Consultation on Proposed Guidelines in relation to Market Definitions and Dominance and to Anti-Competitive Behaviour

Nawras response

19 November 2010

1 Executive Summary

1.1 Introduction

Nawras appreciates the opportunity to participate in this important public consultation regarding the TRA's Proposed Guideline in relation to Market Definitions and Dominance and to Anti-Competitive Behaviour (together the **Proposed Guideline**).

Nawras supports the development of robust and workably competitive telecoms markets in Oman and considers that the careful implementation of appropriate ex ante and ex post competition regulation can play an important role in achieving that end. Overall, the Proposed Guidelines provide reasonable guidance to licensees on how the TRA proposes to deal with the main issues that typically arise in the context of *ex ante* regulation and *ex post* competition rules.

However, we also consider that the Proposed Guidelines could benefit from further refinement in certain areas to ensure greater alignment with established overseas practice, to take account of specific issues that impact the telecoms sector in Oman and to avoid capturing otherwise legitimate or competitive behaviour.

Additionally, we would like to humbly request for an opportunity to meet with the TRA and/or its consultants to present our submission and to provide some working examples of the issues we have raised in our submission. If the TRA is amenable to this suggestion, we kindly ask that the TRA suggest a convenient meeting date.

1.2 Proposed Guideline on Market Definition and Dominance

Our key comments on the TRA's Proposed Guideline in relation to Market Definitions and Dominance are as follows:

- ex ante regulation should only be imposed where ex post competition law protections are insufficient
- ex ante regulation should focus only on wholesale markets and all retail tariff approval requirements should be removed
- the baseline period for *ex ante* regulatory decisions should be 3 years, although shorter periods could also be considered in some circumstances – this will create greater regulatory certainty for licensees
- the TRA should provide greater guidance on how it intends to apply the SSNIP test, including how it intends to determine what constitutes pricing at a "competitive level"
- the TRA should utilise complementary tests to the SSNIP test to check whether the application of the SSNIP test correctly approximates a competitive price

- the TRA should seek to utilise the latest EC recommendation on markets to be subject to ex ante regulation as the starting point for its market reviews
- the TRA should avoid defining geographic markets in an overly narrow way (e.g. on a premises-by-premises basis) – such an approach is likely to distort the assessment of competition within the relevant market.
- however, the TRA should consider adjusting the intensity of regulation (i.e. remedies) to take account of competitive differences based on geography (e.g. between Muscat and other geographic areas within Oman)
- the TRA should provide greater guidance on how it intends to apply the three criteria test by using the list of factors adopted by the European Regulators Group
- the TRA should remove the joint dominance criteria – it is unnecessarily complex and is not directly relevant to Oman's telecoms sector, which is characterised by two facilities based operators and a range of resellers.

1.3 Proposed Guideline on Anti-Competitive Behaviour

Our key comments on the Proposed Guideline in relation to Anti-Competitive Behaviour are as follows:

- the TRA should clarify the specific circumstances in which compliance with ex ante regulation will clear a licensee from liability under ex post competition laws
- if the TRA does not consider that it has sufficient expertise or resourcing to undertake a rigorous margin squeeze analysis, it should build up these capabilities over time and the prohibition against margin squeezes should only be applied once such capabilities are sufficiently developed
- the TRA should only utilise the "Equally Efficient Operator" test in its consideration of margin squeeze cases
- the TRA should consider developing comprehensive rules or guidelines that allow licensees to self assess whether their proposed pricing is likely to result in a margin squeeze
- the TRA should use long run incremental cost (**LRIC**) as the appropriate costs standard for assessing a margin squeeze
- the TRA should recognise that bundling and tying is typically pro-competitive and should provide further guidance on the types of activities that are likely to be seen as anti-competitive, as well as the criteria that needs to be satisfied before an abuse of dominant position can be established

- the TRA should develop procedural rules or guidelines that govern how it deals with disputes on ex ante regulation and ex post competition matters.

2 Market Definition and Dominance Guidelines

2.1 Market review period should be longer than 2 years

The performance of market reviews are highly complex and resource intensive activities for both the TRA and the industry. We expect that the TRA will take measures to ensure that it is appropriately resourced to undertake these reviews from both a financial, resourcing and expertise perspective.

The *Market Definition and Dominance Guidelines* state[1]:

> *"At present the TRA considers that a period of two years represents a reasonable forecasting horizon and it intends to use that period as a horizon in its Reports, unless specific circumstances suggest otherwise for specific markets".*

We appreciate that telecommunications service markets are fast moving and competitive conditions within these markets are subject to change over time. However, this does not necessarily mean that regulatory look forward period should be based on a baseline of 2 years.

As market analysis for the purposes of *ex ante* regulation is typically forward looking and markets are defined prospectively, a properly conducted market analysis would typically be able to predict the competitive changes within a market over a longer regulatory period than the proposed 2 years.

As the EC has stated:[2]

> *"Their definitions take account of expected or foreseeable technological or economic developments over a reasonable horizon linked to the timing of the next market review. Moreover, given the possibility to review a market at regular intervals, a NRA would be justified in taking into account past performance and existing market position as well as expectations concerning forthcoming developments".*

As a general rule, we consider that the TRA should adopt a longer period than 2 years, although shorter periods would also be appropriate in some circumstances.

Our main reason for a longer look forward period is the need for *ex ante* regulation to be predictable and capable of allowing both access providers and access seekers

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1 Telecommunications Regulatory Authority, *Market Definition and Dominance Guidelines*, page 7. Referred to as the Market Definition and Dominance Guidelines in subsequent references.

2 European Commission, *Explanatory Note: Accompanying document to the Commission Recommendation on Relevant Product and Service Markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications network and* services, 2nd edition, 13 November 2007.

to understand with certainty the price and non-price terms of access that will apply over the regulatory period. A 2 year period is unlikely to deliver such certainty.

Even in faster moving areas like broadband local access markets, decisions of overseas regulators such as Ofcom, are typically for longer periods than two years.

We consider that 3 years represents a more appropriate look forward period for regulatory decision making. That is not to say that a shorter period will not be appropriate in some instances, but from our perspective, a slightly longer regulatory period as a general rule is more desirable, as it provides both licensees with a greater degree of certainty about the shape of regulation over a foreseeable period.

Without such certainty, it would be difficult for an access seeker to be able to participate in the relevant market to implement business plans that contemplate the existence of particular forms of wholesale regulation.

This is particularly the case if the form of regulation requires a degree of investment in facilities based infrastructure to allow that access seeker to acquire the relevant wholesale product from the access provider (e.g. wholesale bitstream or duct sharing). In such a situation, an access seeker is less likely to be incentivised to invest if the 'pay back' period cannot be realised due to a risk that the TRA will remove or change the form of regulation in the next regulatory period.

We consider that a 3 year look forward period is likely to give licensees a greater level of predictability on the form of regulation that will apply to a market.

Recommendation:

Nawras recommends that the TRA adopt a baseline look forward period of 3 years for ex ante regulatory decisions, although shorter periods should also be used, where appropriate.

2.2 Further guidance on application of SSNIP test

The TRA states that it will apply the SSNIP test when undertaking its assessment of service markets:[3]

> *"The TRA may consider any factor that, in its opinion, reasonably affects market definition, including consideration of the smallest group of services and the smallest geographic area in relation to which a service provider can impose and profitably maintain a small but significant non-transitory increase in price (known as a SSNIP) above the competitive level."*

While the SSNIP test is a common way of defining the boundaries of relevant markets, this test can be complex and time consuming to apply in practice.

[3] Market Definition and Dominance Guidelines, page 9.

We would ask that the TRA provide further guidance on how it intends to apply the SSNIP test.

As the TRA has correctly observed, the SSNIP tests asks whether a hypothetical monopolist could profitably implement a small but significant non-transitory increase in price above the competitive level. To this end, we consider that it would be beneficial for the TRA to specify how it will determine the competitive level of the prices that will be used as part of the application of the SSNIP test.

It would be necessary for any SSNIP test to be applied in a manner that reasonably approximates the relevant competitive price. A failure to do so could result in an overly wide market definition that understates the existence of competition problems within the relevant market, which is commonly referred to as the "cellophane fallacy".

As one commentator has stated:[4]

> *"The SSNIP test requires examining whether a hypothetical monopolist could profitably and permanently raise prices above their "competitive level." However, if a firm is dominant, its prices are already likely to be at supra-competitive levels. The implication of this is that the estimated elasticity of demand and gross margin will be greater than if prices corresponded to a competitive market. The elasticity of demand will therefore be overestimated because, at high prices, consumers regard even inferior substitutes as attractive, whereas, if prices were at the lower, competitive level, they would not. As a result the application of the SSNIP test in abuse of dominance cases may lead to excessively broad market definitions that will tend to mask the existence of dominant positions."*

A number of solutions have been proposed abroad to address the problem of the cellophane fallacy, and we would recommend that these be adopted by the TRA.

A common option is to estimate the competitive price level prior to engaging in a substitutability analysis. In such a case, the competitive price could be derived from cost information. In a perfectly competitive market, economic theory says that setting price equal to marginal cost is a necessary requirement if resources are to be allocated efficiently. However, as telecoms markets are characterized by very high fixed costs, long run incremental cost (**LRIC**) plus a mark-up reflects a more appropriate proxy for the "competitive price."

Given that there may be practical difficulties associated with estimating the competitive price level, the TRA may wish to consider alternative options to assist its analysis, including[5]:

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[4] R O'Donoghue and A Padilla, *The Law and Economics of Article 82*, USA, 2006, page 81. Referred to as O'Donoghue, The Law and Economics of Article 82 in subsequent references.

[5] Ibid, pages 82-84. See also Commission Notice on the definition of the relevant market for the purposes of Community competition law, OJ 1997 C/372/5; Office of Fair Trading, "Market Definition", OFT 403, December 2004.

- using a combination of qualitative and quantitative analysis – this solution adopts a qualitative based approach based on the analysis of product characteristics and intended use, but takes account of the logic and principles of the SSNIP test

- using other comparable markets as a cross check – this involves looking at market conditions in similar markets that are more competitive than the one under investigation. If the price level in the comparable market(s) is not significantly lower than in the market under consideration it is unlikely that the cellophane fallacy plays a major role

- examining the competitive reactions of the allegedly dominant firm – this approach measures whether the allegedly dominant firm monitors and reacts to the price changes and new product introductions of its competitors. If it does, then those products are likely to be close substitutes for its own products

- the small but significant non-transitory decrease in price test (**SSNDP**) – an alternative way to delineate the boundaries of the relevant market is to consider the impact on the volume sold by a hypothetical monopolist of a 5-10% reduction in the prevailing price (opposite to SSNIP test). If the prevailing price was supra competitive, the price reduction would lead to a relatively small increase in sales (otherwise, the price would not have been lifted to its prevailing level in the first place).

We submit that the TRA may wish to consider incorporating the above within the Market Definition and Dominance Guidelines to provide licensees with greater guidance as to how the TRA intends to perform the SSNIP test as part of the market definition process.

As a starting point to its market reviews, we would recommend that the TRA should seek to utilise the latest EC recommendation on markets to be subject to ex ante regulation[6] (**EC Recommendation**). By adopting the EC Recommendation, the TRA will provide licensees with a degree of advanced certainty of the markets to be analysed and the services within those markets that may be subject to ex ante regulation.

It is also important to note that, under the EC regulatory framework, national regulatory authorities are also able to regulate markets that differ from those identified in the EC Recommendation where this is justified by national circumstances taking account of the three criteria test. Accordingly, the use of the EC Recommendation would also permit the TRA to potentially regulate other markets within Oman, where it is reasonable to do so.

Recommendation:

Nawras recommends that:

- the TRA provide greater guidance on how it will apply the SSNIP test in practice
- the TRA explicitly specify how it will determine the competitive level of the prices that will be used as part of the application of the SSNIP test
- the TRA adopt complementary tests to the SSNIP test to assist in accurately approximating what constitutes pricing at a competitive level, including:
  - using a combination of qualitative and quantitative analysis
  - using date from comparable markets as a cross check
  - looking at competitive market behaviour from the dominant firm
  - using the SSNDP test.
- the TRA should seek to utilise the latest EC recommendation on markets to be subject to ex ante regulation as the starting point for its market reviews.

2.3 Geographic markets

We broadly agree with the TRA's proposed approach to defining geographic markets – the geographic market for any service is the geographic area in which competitive conditions are essentially similar[7].

We also consider, however, that it would be worthwhile if the TRA provided further guidance on its approach to defining geographic markets. In particular, it would be worthwhile if the TRA clarified how it will determine whether competitive conditions are essentially similar based on geography to justify a single market definition.

We note that the EC adopts a common sense approach to geographic market definition in this regard and we would recommend that the TRA adopt a similar approach. The EC has stated:[8]

> *"According to established case law, the relevant geographic market comprises an area in which the undertakings concerned are involved in the*

[7] Market Definition and Dominance Guidelines, page 10.

[8] European Commission, Guidelines on market analysis and the assessment of significant market power under the community regulatory framework for electronic communications networks and services, 2006, paragraph 56.

supply and demand of the relevant products or services, in which area the conditions of competition are similar or sufficiently homogeneous and which can be distinguished from neighbouring areas in which the prevailing conditions of competition are appreciably different. The definition of geographic market does not require the conditions of competition between traders or providers of services to be perfectly homogenous. It is sufficient that they are similar or sufficiently homogenous, and accordingly, only those areas in which the conditions of competition are 'heterogeneous' may not be considered to constitute a uniform market."

The implementation of such an approach would avoid the identification of very narrow geographic markets (e.g. on a premises-by-premises, or route-by-route basis), which are otherwise likely to distort any assessment of competition within those markets.

However, with that said, we note that there should be considerable scope for the TRA to potentially adjust the application of remedies to take account of competitive variations based on geography (e.g. between Muscat and other areas within Oman).

The EC has stated[9]:

"However, investment in alternative infrastructure is often uneven across the territory of a Member State, and in many countries there are now competing infrastructures in parts of the country, typically in urban areas. Where this is the case, an NRA could in principle find sub-national geographic markets.

...

In the absence of sub-national markets, the existence of geographically differentiated constraints on a SMP operator who operates nationally, such as different levels of infrastructure competition in different parts of the territory, could be taken into account in the context of remedies."

For example, in Australia, while the Australian Competition and Consumer Commission (**ACCC**) has imposed *ex ante* regulation in respect of the supply of domestic transmission capacity services (i.e. leased lines), the ACCC has progressively removed wholesale supply obligations on certain routes where there is evidence of facilities based competition from two alternative suppliers of such services (in addition to the incumbent)[10]. Therefore, while the ACCC effectively continues to define markets on a nationwide basis, it has sought to apply the applicable remedies within that market on a more targeted basis that takes account of competitive overbuild based on geography.

[9] Explanatory Note, Commission Recommendation on Relevant Product and Service Markets within the electronic communications sector susceptible to ex ante regulation (2007) pp 12-13.

[10] ACCC, Final Report on reviewing the declaration of the domestic transmission capacity service, March 2009.

It would be appropriate for the TRA to adopt a similar approach in respect of some markets in Oman, where there is sufficient variation in competitive conditions between different geographies (e.g. between Muscat and other geographic areas). Such an approach would ensure that remedies are applied in a proportionate and targeted manner.

Recommendation:

Nawras recommends that:

- the TRA provide further guidance on its approach to defining geographic markets
- the TRA should avoid overly narrow market definitions (e.g. building-by-building market definitions) that take account of minor or non-significant competitive variations between geographic areas
- the TRA should consider adjusting the intensity of regulation (i.e. remedies) to take account of competitive differences based on geography (e.g. between Muscat and other geographic areas within Oman).

2.4 Proposed factors for the application of the TRA's three criteria test

The TRA has incorporated the EC three criteria test within the Market Definition and Dominance Guidelines for the purpose of determining whether a market is susceptible to ex ante regulation.

The TRA has correctly stated that if any one of the criteria is no longer satisfied, it may be necessary to review the continued need for ex ante regulation in that market[11]. It would be useful, however, for the TRA to clarify that the three criteria test is cumulative and ex ante regulation will not be imposed unless all of the three criteria are simultaneously satisfied.

It would also be useful if the TRA provided further guidance on the factors that it will take into account to determine whether the three criteria test has been satisfied as part of market review. In this regard, we consider that the TRA could be guided by the European Regulators Group (**ERG**) (now the Body of European Regulators for Electronic Communications), which has recently published guidelines for application of the three criteria test[12].

In terms of assessing high and non transitory barriers to entry, the ERG identifies the following indicators as useful for assessing the magnitude of entry barriers[13]:

- the existence of sunk costs

[11] Market Definition and Dominance Guidelines, page 11.

[12] European Regulators Group, *ERG Report on guidance on the application of the three criteria test*, ERG (08) 21, June 2008.

[13] Ibid, page 3.

- control of infrastructure not easily duplicated
- technological advantages or superiority
- easy or privileged access to capital or financial resources
- economies of scale, economies of scope
- vertical integration
- barriers to develop distribution and sales network
- products or services diversification.

The ERG specifies the following criteria as possible indicators to assess whether a market tends toward effective competition[14]:

- market shares
- price trends and pricing behaviour
- control of infrastructure not easily duplicated
- product / services diversification (e.g. bundled products or services)
- barriers to expansion
- potential competition

Finally, in assessing whether competition law is sufficient to address market failures in electronic communications markets, the ERG recommends assessing the following factors[15]:

- the degree of generalization of non-competitive behaviour
- the degree of difficulty to address non-competitive behaviour
- non-competitive behaviour brings about irreparable damage in related or connected markets
- the need of regulatory intervention to ensure the development of effective competition in the long run.

We would recommend that the TRA provide greater guidance to licensees on how it intends to apply the three test criteria, by having regard to the guidance identified above.

[14] Ibid, pages 3-4.
[15] Ibid, page 4.

Recommendation:

Nawras recommends that:

- the TRA provide further guidance on its application of the three criteria test
- the TRA should reference the list of factors used by the ERG in respect of stage of the three criteria test, and use these factors when applying the three criteria test.

2.5 Application of remedies should be targeted at wholesale level

The TRA has stated:[16]

> *"there will seldom be justification for the ex ante regulation for dominance of downstream retail telecommunications service markets if wholesale markets in the same value chain are either sustainably competitive or effectively regulated. Nevertheless, if wholesale market regulation is untried, there may be a case for a temporary extension of downstream ex ante regulation for dominance until the wholesale market remedy or remedies have been proven to be effective".*

And further:[17]

> *"The TRA will apply remedies first to dominance in wholesale markets and only then will it consider whether it is necessary to also apply remedies to dominance in related retail markets, bearing in mind that the wholesale market remedies may preclude the need for retail market remedies".*

Nawras strongly prefers the use of ex post competition law measures in the first instance. It is only when such measures are insufficient that *ex ante* regulation should be imposed at a wholesale level. We do not support regulation at the retail level.

In particular, we consider that there are currently a range of competitive telecommunications services in Oman that remain subject to retail regulation that should no longer be regulated in this manner.

As part of the implementation of the TRA's proposed *ex ante* regulatory framework, we consider that the TRA should assess whether existing retail regulation should continue to apply in their current form. In particular, we would welcome the TRA removing all retail tariff approval obligations.

16 Market Definition and Dominance Guidelines, page 13.

17 Ibid, page 17.

We consider that there is likely to be significant scope for the TRA to move away from the current retail tariff approval regime, which applies to all Class 1 licensees regardless of whether a market is competitive or whether a licensee has SMP in that market.

We have previously provided the TRA with a comprehensive submission of our views on the retail tariff regime. In line with those views, we consider that the implementation of the proposed *ex ante* regulatory framework should result in the removal of retail tariff filing obligations on Class-I and Class-II licensees (at least in its current form) – in particular:

- while Oman is a small market relative to foreign markets, it is characterised by reasonable levels of competition from Class-I licensees, as well as services based licensees – this is demonstrated in the Arab Advisors Group Report on Competition Levels in Arab Cellular Markets.[18]

- there is effective regulation at the wholesale level for mobile services, which is sufficient to negate any competition issues that potentially may arise in the mobile segment (this includes regulatory approval of relevant agreements including pricing)

- mobile licences prohibit anti-competitive conduct, which would be complemented by the TRA's ex post competition law measures.

Our proposals in this regard are consistent with the TRA's proposed guidelines and international best practice. The EC highlights the need to remove *ex ante* regulation where competition is effective[19]:

> *"Regulatory controls on retail services should only be imposed where national regulatory authorities consider that relevant wholesale measures ...would fail to achieve the objective of ensuring effective competition and the fulfilment of public interest objectives. By intervening at the wholesale level, including with remedies which may affect retail markets, Member States can ensure that as much of the value chain is open to normal competition processes as possible, thereby delivering the best outcomes for end-users."*

And further:[20]

> *"Should a national regulatory authority demonstrate that wholesale interventions have been unsuccessful, the relevant retail market may be*

[18] Arab Advisors Group Report on Competition Levels in Arab Cellular Markets, June 2010.

[19] European Commission Recommendation of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, Articles 4 and 15; see also European Regulators' Group (ERG), *Common Position on the approach to appropriate remedies in the new regulatory framework*, ERG (06) 30rev1, page 49.

[20] Ibid Paragraph 15.

susceptible to ex ante regulation provided that the three criteria set out above are met".

We consider that the imposition of such regulation on Nawras in various retail markets is likely to be disproportionate and contrary to the principle of proportionate and targeted regulation. We also note that such a practice is inconsistent with international regulatory practice, including the practices of other regulates in the region, such as the TRA in Bahrain.

In addition to the above, there are also other salient reasons why retail regulation should be withdrawn, including the negative impact that such forms of regulation can actually have on competition. As the Canadian Telecommunications Policy Review Panel has observed[21]:

> *"The requirement for ex ante approval of tariff imposes certain regulatory costs on service providers. First the tariff approval process and the requirement for supporting documentation are administratively burdensome and costly to produce. Second, ex ante approval of tariffs can introduce lengthy delays from the time a service provider makes a decision to introduce a service to the time when it can offer it to customers. At times in the past, such delays have extended for months or occasionally even years. However, the CRTC recently has introduced streamlined processes that can in some cases reduce the time to approve a tariff to a matter of ten days or so.*
>
> *Nonetheless, in a rapidly evolving market, a delay of ten days, combined with the greater amount of time required to assemble the information necessary to comply with CRTC filing requirements, can impede a service provider's ability to respond to customer requests or to marketplace developments. This is especially true in a competitive 'bid' situation, where a counter-offer may have to be immediate to be of value. In these instances, any regulatory requirement to prepare tariff applications and to receive prior tariff approval can hinder competition and potentially deprive customers of lower prices."*

Similarly, Ofcom has allowed retail price controls that were applicable to BT to lapse and has noted that[22]:

> *"retail price regulation can have an impact on the wider market (e.g. possibly restricting tariff innovation)."*

Nawras has previously provided the TRA with evidence to suggest that the operation of the retail tariff approval regime in Oman has been sub-optimal. We consider the implementation of the new regulatory framework proposed by the TRA presents an opportunity to deal with these shortcomings in a holistic and integrated manner. In light of the above, we are strongly supportive of the TRA's proposal to focus

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21 *Canadian Telecommunications Policy Review Panel*, Final Report, 2006, section 3.26.

22 Ofcom, *Retail Price Controls,* Explanatory Statement, 19 July 2006, paragraph 1.4.

regulation at the wholesale level and to only use retail regulation as a last resort. However, we would also encourage the TRA to use the move to a new *ex ante* regulatory framework as an opportunity to review and refine the existing state of retail tariff regulation on non-dominant undertakings, such as Nawras. The adoption of such an approach would not undermine competition within telecommunications markets, as it would be open to the TRA to use its ex post competition law powers (and ex ante regulation at the wholesale level) to deal with any perceived competition issues.

Recommendation:

Nawras recommends that:

- ex ante regulation should only be imposed when ex post competition law measures are insufficient to regulate dominant undertakings within a market
- any ex ante regulation imposed by the TRA should only be imposed at a wholesale level in a proportionate manner
- the TRA remove the current retail tariff approval regime and primarily rely on ex post measures (and ex ante regulation at the wholesale level) to deal with any perceived competition law issues.

2.6 Criteria for joint dominance

Nawras has previously expressed concerns in relation to the inclusion of joint dominance criteria within the TRA regulatory framework.

We have not repeated those comments here in their entirety due to issues of length but continue to remain of the view that joint dominance is an unnecessary concept in the context of an ex ante regulatory framework.

As Nawras has previously suggested, the TRA should consider removing joint dominance from its legislative and regulatory framework entirely or, alternatively, the criteria for single dominance could effectively be applied without the need for a separate set of joint dominance criteria.

We set out below some of the key points raised in our previous submission around the inappropriateness of joint dominance:

- joint dominance is one of the most complex and controversial concepts in EC competition law
- the concept is confused at a first principles level – it is unclear whether a jointly dominant position exists by virtue of an oligopolistic market structure or because of structural links between entities

- the joint dominance criteria used by the EC and proposed by the TRA in its Market Definition and Dominance Guidelines utilises a "checklist" of criteria for establishing joint dominance – economists have alluded to the dangers of reducing the test for joint dominance to a box ticking exercise
- it is not clear how such a test would be applied in the context of ex ante regulatory assessments – most, if not all, regulatory assessments in overseas jurisdictions are based on the application of a single dominance criteria, as there is typically only one dominant entity within each market that is subject to ex ante regulation
- it will not be necessary for the TRA to designate joint dominance in any telecommunications markets in Oman, as the same outcome could be achieved through the application of the single dominance criteria.

In light of the above, we do not consider that the joint dominance criteria should be included within the Market Definition and Dominance Guidelines.

Recommendation:

Nawras recommends that the TRA remove the joint dominance provisions from the Market Definition and Dominance Guidelines.

3 Principles and Guidelines on Anti-Competitive Behaviour

3.1 Relationship between ex ante regulation and ex post competition rules

The Guidelines on Anti-Competitive Behaviour discuss the interrelationship between *ex ante* regulation and *ex post* competition rules. They correctly state that the two can run concurrently and are not mutually exclusive.

The Guidelines also state[23]:

> *"Compliance with ex ante price controls may be an outright defence against a subsequent ex post claim of abuse of a dominant position but only if the service provider is required by an ex ante control to behave in the exact manner in which it has done so, and has not exercised any degree of discretion as to how the ex ante control was implemented."*

While the above statement is technically correct and reflects the recent decision of the European Court of Justice (**ECJ**) in the Deutsche Telekom (**DT**) case[24], we consider that it would be useful for the TRA to provide a higher level of practical

[23] Telecommunications Regulatory Authority, Principles and Guidelines on Anti-Competitive Behaviour, 23 October 2010, page 7. Referred to as the Guidelines on Anti-Competitive Behaviour in subsequent references.

[24] European Court of Justice Judgment C-280/08 P *Deutsche Telecom v Commission*.

guidance to identify the circumstances in which compliance with ex ante price controls would relieve a licensee against a margin squeeze or predatory pricing allegation.

In the interests of creating certainty in relation to the application of competition laws in Oman, we ask that the TRA clarify the specific circumstances in which compliance with ex ante rules will clear a licensee from the potential risk of liability under ex post competition law.

In particular, we note that the ECJ's decision highlights that decisions of national regulatory authorities only provide dominant undertakings with immunity from competition law in very limited circumstances.

In the DT case, the ECJ found that even though wholesale prices for local loop access services were set by Germany's National Regulatory Authority, the General Court was entitled to hold that the margin squeeze at issue was a practice attributable to DT, as DT had sufficient scope to adjust its retail prices to end-users notwithstanding that these prices were subject to some retail regulation. The Court considered that DT should have gone to the regulator for approval to increase its retail tariffs in order to prevent the margin squeeze occurring.

It would be worthwhile for the TRA to clarify the types of ex ante obligations that the TRA considers:

- would require the regulated firm to behave in an exact manner
- would result in the regulated firm having discretion to determine its pricing practices.

In addition, we would also wish to understand the liability position in circumstances where a regulated firm has a discretion to determine its pricing practices and seeks to change its pricing by obtaining appropriate permissions from the TRA, and where the TRA either:

- approves such a request, resulting in the licensee implementing the price change that results in a margin squeeze allegation; or
- alternatively, fails to respond to the regulated firm's request within a reasonable time and the licensee decides to implement a price change (assuming it has the flexibility to do so based on the applicable remedies for that market).

Recommendation:

Nawras recommends that, for the purpose of determining whether compliance with ex ante price controls may be an outright defence against a subsequent ex post claim of abuse of a dominant position, the TRA should clarify the circumstances in which a regulated firm would be considered to have discretion in determining its pricing practices.

3.2 TRA should use a single test for measuring a margin squeeze

As a general comment, the investigation of margin squeeze allegations (and the performance of imputation testing for margin squeezes more generally) is a highly complex activity that typically requires the regulator to be appropriately resourced with highly experienced economic teams.

Given the implications for competition in various markets, our expectation is that if the TRA intends to apply the margin squeeze prohibition it will do so in a very rigorous and careful way that utilises an appropriate degree of internal and external expertise. To the extent that the TRA does not consider that it has sufficient expertise or resourcing at this point in time to undertake such rigorous analysis, we consider that the TRA should aim to build up these capabilities over time and that the prohibition against margin squeezes should only be applied once such capability is sufficiently established.

The TRA currently proposes two alternative tests in the Guidelines on Anti-Competitive Behaviour for assessing whether a margin squeeze has occurred[25]:

- an "Equally Efficient Operator" test – a price squeeze exits if the downstream arm of a vertically integrated player that is dominant in the supply of an upstream input could not trade profitably on the basis of the price of the upstream input. This test uses the retail costs of the access provider; or
- the "Reasonably Efficient Operator (REO)" test – a price squeeze exists if a reasonably efficient competitor could not trade profitably on the basis of the upstream and downstream prices charged by a dominant competitor. This test uses the retail costs of a reasonably efficient operator.

While both of the above tests are recognised in EC commentary on margin squeezes, it is important to note that the reasonably efficient operator test has never been used in the telecoms context within the EC.

The dominant firm's cost test has been applied in virtually all instances under Article 82 of the EC Treaty and equivalent national laws in EU countries[26], most recently in the *Deutsche Telekom* decision. The Court of First Instance in that case stated[27]:

> *"...the abusive nature of a dominant undertaking's pricing practices is determined in principle on the basis of its own charges and costs, rather than on the basis of the situation of actual or potential competitors."* (our emphasis)

25 Guidelines on Anti-Competitive Behaviour, page 34.

26 O'Donoghue The Law and Economics of Article 82, page 313.

27 *Deutsche Telekom AG v Commission of the European Communities*, Case T-271/03.

The ECJ upheld the CFI's decision - it considered whether the difference between DT's retail and wholesale prices was either negative or insufficient to cover the product specific costs to DT of providing its own retail services[28]. This should be the only test that is applied by the TRA.

The REO test is unlikely to be workable in practice. While the REO test has previously been put forward by the EC, subsequent statements by the EC have confirmed that the correct test is one that uses the dominant entity's own costs and profitability as the benchmark[29]:

> *"The suspicion of a price squeeze arises where the spread between the access and retail prices of the incumbent's corresponding access services is not wide enough to reflect the incumbent's own downstream costs. In such a situation, alternative carriers normally complain that their margins are being squeezed because this spread is too narrow to enable them to compete with the incumbent.*
>
> ...
>
> *Provided access and retail services are strictly comparable, a situation of a price squeeze occurs where the incumbent's prices of access combined with its downstream costs are higher than its corresponding retail price."*
> (emphasis added)

Some further points which highlight the inappropriateness of the REO test include[30]:

- the REO test is not capable of ex ante application by a dominant firm (i.e. at the time when it formulates its pricing policy). The lawfulness of the dominant firm's prices should not depend on its rivals' costs, which it cannot know, or those of a hypothetical entrant (which are difficult to measure) – liability for breaches of competition law must depend on the application of a precise test that the dominant firm can readily apply.
- a test based on the dominant firm's costs takes into account any relevant advantages or disadvantages arising from its vertical integration. Using the dominant company's downstream profits automatically takes into account its competitive advantages, including any advantages due to vertical integration, and any therefore disadvantages which its rivals may face.

The TRA should consider developing comprehensive guidelines that allow licensees with SMP to perform a self assessment as part of their wholesale and retail pricing considerations to determine whether such pricing is likely to be viewed by the TRA as resulting in a margin squeeze.

Such a practice is consistent with overseas practice. For example, we understand that in France, ARCEP has adopted the practice of agreeing with industry a model

[28] European Court of Justice Judgment C-280/08 P *Deutsche Telecom v Commission.*
[29] European Commission, "*Pricing Issues in Relation to Unbundled Access to the Local Loop*" (2001) ONPCOM, pp1-17.
[30] O'Donoghue The Law and Economics of Article 82, pages 314-317.

to be used to determine whether particular pricing constitutes a margin squeeze which is updated periodically.

Such an approach would allow regulated firms to perform a risk assessment to determine with a degree of certainty the extent to which proposed pricing would potentially result in a margin squeeze. The application of such a test by regulated firm would not necessarily exonerate a licensee with SMP from a breach of the prohibition against margin squeezes but would allow that licensee:

- to better manage that competition law liability risk associated with its pricing policies
- to potentially reduce the likelihood of margin squeeze allegations
- where pricing conduct by that licensee is subject to a margin squeeze allegation, to enable the TRA to more effectively undertake an investigation of that pricing conduct and to provide other licensees with greater transparency.

Recommendation:

Nawras recommends that:

- to the extent that the TRA does not consider that it has sufficient expertise or resourcing to undertake a rigorous margin squeeze analysis, the TRA should aim to build up these capabilities over time and the prohibition against margin squeezes should only be applied once such capability is sufficiently established
- the TRA should only utilise the "Equally Efficient Operator" test in its consideration of margin squeeze cases and provide further clarification about how it will apply such a test
- the TRA should consider developing comprehensive rules or guidelines that allow licensees to self assess whether their proposed pricing is likely to result in a margin squeeze.

3.3 Costs standards for margin squeeze

The TRA has proposed the use of both avoidable and incremental cost as the appropriate cost measure for assessing margin squeeze allegations, whichever is the lower of the two. The Guidelines then go on to state[31]:

> *"There are however a number of complexities that arise in relation to the assessment of costs to use for the test, i.e. whether the cost should include short run or long run; historic or forward looking on a Discounted*

[31] Guidelines on Anti-competitive Behaviour, p36.

Cash Flow basis or Net Present Value; Fully Allocated Cost (FAC) or Long Run Incremental Cost (LRIC).”

The TRA should consider amending the costs standards section of the Guidelines to align with EC approach to the relevant costs in margin squeeze cases.

In the EC context the most commonly applied cost benchmark is long run incremental cost (**LRIC**), which includes all the product specific variable costs and fixed costs of the relevant activity, but excluding any joint or common costs. Notably, in the telecommunications sector, relevant legislation either stipulates the use of LRIC or regulators have regularly applied LRIC to take account of the low variable network costs.

The EC has specifically invoked the use of LRIC in the telecommunications sector[32]:

> *“Secondly, it is presumed that pricing below LAIC is predatory in cases concerning sectors which recently have been liberalised or which are undergoing liberalisation, such as the telecom sector. It is considered important that the liberalisation efforts in these sectors are not undermined by predatory behaviour by the incumbent dominant companies, which may try to protect and maintain their monopoly positions that resulted from their previous legal monopoly or access to state funds. These sectors concern network industries, with very high fixed costs and very low variable costs, where it is considered that the use of an average variable cost or average avoidable cost benchmark would not reflect the specific economic realities of these industries.”*

The TRA should adopt LRIC as the relevant cost methodology in margin squeeze cases.

Recommendation:

Nawras recommends that the TRA should adopt LRIC as the relevant cost methodology in margin squeeze cases.

3.4 Bundling and Tying

We consider that this section of the Guidelines on Anti-Competitive Behaviour could benefit from the inclusion of more comprehensive guidance from the EC framework.

First, we consider that the TRA should clarify that many forms of bundling or typing in the telecommunications sector are likely to be pro-competitive and should, as a general rule, be treated as such.

[32] European Commission, *DC Discussion Paper on the application of Article 82 of the EC Treaty to exclusionary abuses*, December 2005, paragraph 126.

In most instances, bundling is a commercially appropriate practice from a licensee perspective, as it provides a way of rewarding loyal customers and growing ARPU from those customers over time. For example, in overseas markets, it is typical for facilities based operators to bundle offering together across fixed and mobile platforms to offer better value to customers (e.g. double and triple play).

A general prohibition against bundling would be contrary to the interests of consumers, as they deprive customers of the convenience of purchasing products together and force them to acquire the selected products individually, usually at higher prices. Accordingly, we consider that licensees should generally be free to bundle their product offerings and we ask that the TRA clarify that in many instances bundling and tying is likely to be pro-competitive and beneficial for consumers.

While bundling of retail products is likely to be pro-competitive in most cases, it may also be the case that some forms of bundling, including those in a wholesale supply scenario, could be seen as potentially anti-competitive. For example, we would favour an approach where access to fixed line wholesale products is provided on an unbundled basis to the extent possible (e.g. wholesale bitstream access), where it is economically and technically feasible to do so.

To this end, we consider that it would be useful if the TRA provided further details about examples of tying and bundling conduct and whether those examples would be viewed as problematic by the TRA from a competition law perspective.

For example, in the EC context, three variants of tying and bundling conduct are recognized[33].

- tying occurs when the purchase of product A (the tying product) is conditional upon the purchase of product B (the tied product) and where only the tied product can be purchased separately
- pure bundling refers to a situation where products A and B can only be acquired as a bundled package
- mixed bundling is where products A and B can be purchased separately but purchasing them together is cheaper.

For bundling and tying conduct to constitute an abuse of a dominant position, four conditions typically have to be satisfied[34]:

- dominance in the tying market – for bundling to be abusive, the service provider concerned needs to be dominant in the tying market.
- distinct products – two products or services are distinct if from a customer's perspective the products are or would be purchased separately.

[33] O'Donoghue, The Law and Economics of Article 82, pages 477-478.

[34] European Commission, *DG Competition discussion paper on the application of article 82 of the treaty to exclusionary abuses*, 2005, page 55.

- the tying practice must be likely to cause market distorting foreclosure effects.
- there is no efficiency or objective justification for the practice.

It would also be beneficial if the TRA clarified that competition law liability for bundling and typing practices is dependent on the above conditions being satisfied.

Recommendation:

Nawras recommends that:

- the TRA should recognise that many forms of bundling or tying in the telecommunications sector are likely to be pro-competitive
- the TRA provide specific examples of tying and bundling conduct that it considers are likely to be an abuse of dominant position
- the TRA clarify that for bundling and tying conduct to constitute an abuse of a dominant position, the four conditions identified above need to be satisfied.

3.5 Ex post procedural issues

Nawras supports the adoption of an ex post competition law framework along the lines proposed by the TRA.

As noted above, we consider that the substantive framework proposed by the TRA is broadly consistent with international best practice. However, we also strongly consider that the success of such a framework is likely to depend heavily on the manner in which it is implemented.

Accordingly, the rules that govern the acceptance and consideration of complaints, including the timeframes and processes for consultation and decision making, are likely to play a critical role in the success of the proposed competition law framework.

To assist the TRA with the development of these procedures, we have set out our initial thinking below on key procedural aspects of the ex post competition law framework that should be considered by the TRA.

In our view, a key aspect of the procedures that govern competition law matters is the need for processes that set out how licensees can bring complaints about alleged anti-competitive behaviour by other licensees and how the TRA will deal with these complaints.

In particular, we consider that complaints should comply with the following requirements:

- they should clearly identify the relevant alleged anti-competitive behaviour - a general allegation of anti-competitive behaviour will likely be regarded as inadequate
- they should include sufficient factual evidence to back up their allegations, for example, an allegation of predatory pricing or a margin squeeze must be backed up by an analysis of costs and prices
- they should include a statement by an officer of the complainant company that due care has been taken to ensure that the evidence submitted is correct and complete.

Another key aspect of the ex ante and competition law framework is the need for complaints to be investigated and decided in a timely manner. In this regard, we propose the following indicative decision making timelines (subject to the development of an appropriate process for dealing with time extensions):

Type of Investigation	Deadline
Disputes	Six months
Breaches of ex ante conditions	Six months

We consider that the adoption of some of the procedures proposed above would be desirable in creating certainty for licensees going forward in terms of how the TRA proposed to apply the Proposed Guidelines.

Recommendation:

Nawras recommends that:

- the TRA should develop procedural rules or guidelines that govern how it deals with disputes on ex ante regulation and ex post competition matters
- at a minimum, those rules or guidelines should cover the following issues:
  - minimum information requirements and appropriate sign off before a complaint can be lodged with the TRA
  - indicative timelines for decision making of 6 months, as well as pre-defined processes for seeking an extension of this decision making timeline.

4 Conclusion

In concluding we would like to repeat our key comments on both the Proposed Guideline in relation to Market Definitions and Dominance and the Proposed Guideline in relation to Anti-Competitive Behaviour. We set these out below.

Additionally, we would like to humbly request for an opportunity to meet with the TRA and/or its consultants to present our submission and to provide some working examples of the issues we have raised in our submission. If the TRA is amenable to this suggestion, we kindly ask that the TRA suggest a convenient meeting date.

Our key points on the Proposed Guideline in relation to Market Definitions and Dominance are:

- ex ante regulation should only be imposed where ex post competition law protections are insufficient
- ex ante regulation should focus only on wholesale markets and all retail tariff approval requirements should be removed
- the baseline period for *ex ante* regulatory decisions should be 3 years, although shorter periods could also be considered in some circumstances – this will create greater regulatory certainty for licensees
- the TRA should provide greater guidance on how it intends to apply the SSNIP test, including how it intends to determine what constitutes pricing at a "competitive level"
- the TRA should utilise complementary tests to the SSNIP test to check whether the application of the SSNIP test correctly approximates a competitive price
- the TRA should seek to utilise the latest EC recommendation on markets to be subject to ex ante regulation as the starting point for its market reviews
- the TRA should avoid defining geographic markets in an overly narrow way (e.g. on a premises-by-premises basis) – such an approach is likely to distort the assessment of competition within the relevant market.
- however, the TRA should consider adjusting the intensity of regulation (i.e. remedies) to take account of competitive differences based on geography (e.g. between Muscat and other geographic areas within Oman)
- the TRA should provide greater guidance on how it intends to apply the three criteria test by using the list of factors adopted by the European Regulators Group

- the TRA should remove the joint dominance criteria – it is unnecessarily complex and is not directly relevant to Oman's telecoms sector, which is characterised by two facilities based operators and a range of resellers.

Our key comments on the Proposed Guideline in relation to Anti-Competitive Behaviour are:

- the TRA should clarify the specific circumstances in which compliance with ex ante regulation will clear a licensee from liability under ex post competition laws
- if the TRA does not consider that it has sufficient expertise or resourcing to undertake a rigorous margin squeeze analysis, it should build up these capabilities over time and the prohibition against margin squeezes should only be applied once such capabilities are sufficiently developed
- the TRA should only utilise the "Equally Efficient Operator" test in its consideration of margin squeeze cases
- the TRA should consider developing comprehensive rules or guidelines that allow licensees to self assess whether their proposed pricing is likely to result in a margin squeeze
- the TRA should use long run incremental cost (**LRIC**) as the appropriate costs standard for assessing a margin squeeze
- the TRA should recognise that bundling and tying is typically pro-competitive and should provide further guidance on the types of activities that are likely to be seen as anti-competitive, as well as the criteria that needs to be satisfied before an abuse of dominant position can be established
- the TRA should develop procedural rules or guidelines that govern how it deals with disputes on ex ante regulation and ex post competition matters.