



Public Consultation

on the

Tariff Approval and Notification Regime

and on the

Guidelines for Addressing Abuse of Dominance
in the Telecommunications Sector

Issued by CITC in Riyadh,

2/7/1431H (14/6/2010G)

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1. Introduction

The Telecommunications Bylaw (the “Bylaw”) and the Rules of Procedures set out the general regulatory and process framework for the filing and approval of new tariffs or tariff amendments based on the tariff-related provisions in Article 3 of the Telecommunications Act (the “Act”). The Act also establishes a series of competition-related provisions that are complemented by Chapter 4 of the Bylaw, including Article 31 that relates to abuse of a dominant position.

On 10 June 2009 the CITC issued for public consultation the final version of the proposed Regulatory Framework for Designation of Markets and Dominance in the Telecommunications Sector (the “Dominance Framework”). Based on the Dominance Framework and taking into account recent competitive developments in the Kingdom, the CITC prepared an associated Market Definition, Designation and Dominance Report (the “Market Report”). The Market Report establishes those telecommunications markets and any corresponding designated dominant service providers (“DSPs”) on which *ex ante* remedies should be imposed.

The CITC has prepared the following two documents, applicable to both wholesale and retail services, taking into consideration the above.

- **Tariff Approval and Notification Regime.** The “Tariff Regime” is designed to lighten the overall regulatory burden associated with *ex ante* tariff approval and notification processes and to provide clarity, transparency and responsiveness to market conditions. The Tariff Regime achieves these objectives by establishing different levels of *ex ante* regulatory scrutiny based on the type of service, the type of tariff proposal, and whether the service is provided by a DSP. The Tariff Regime would replace the CITC’s existing current tariff approval and notification procedures.
- **Guidelines for Addressing Abuse of Dominance in the Telecommunications Sector.** The “Guidelines” are designed to provide greater clarity and transparency by providing an indication of the approach the CITC is likely to adopt in applying *ex post* competition controls related to abuse of a dominant position, including in relation to tariffs. The CITC hopes that this will aid in stakeholder’s understanding of the distinction between abuses of a dominant position and vigorous competition, thus avoiding frivolous or insufficiently documented allegations of abuse of a dominant position. The Guidelines also have the aim of clarifying the interplay between *ex ante* and *ex post* telecommunications regulation in the Kingdom.

2. Public Consultation Process

2.1 Objective and Aim of the Consultation

CITC invites all service providers, as well as all other interested private individuals, and organizations in the public and private sectors, to register and participate in this consultation process (together, the “Respondents”).

The objective of this consultation process is to provide Respondents with the opportunity to provide comments to CITC on the draft Tariff Regime and the draft Guidelines, copies of which are included in Annex A and Annex B, respectively. The aim of this public consultation process is to assist CITC to finalize and publish these documents.

Section 3 includes a summary of CITC’s benchmarking and analysis undertaken in preparation of the draft Tariff Regime and the draft Guidelines.

2.2 Comments on Consultation Document

Respondents are invited to submit their comments in writing to CITC. All comments must be received by CITC no later than 14/8/1431 H, corresponding to 26/7/2010 G. All Respondents who submit comments on this Public Consultation Document by such date will be deemed to have registered with CITC for purposes of the Rules of Procedure.

Comments filed in relation to this Public Consultation Document may be submitted to one or more of the following addresses:

E-mail to: **Trr@citic.gov.sa;**

Delivery (hard and soft copy) by hand or by courier to:

Office of the Deputy Governor for Policy and Licensing affairs
Communication and Information Technology Commission (CITC)
King Fahd Road, P.O. Box 75606
Riyadh 11588
Kingdom of Saudi Arabia

CITC welcomes and invites comments to any matter included in the draft Tariff Regime and draft Guidelines. CITC particularly invites comments and responses to the specific numbered “Questions” set out in Annex C (the “Consultation Questions”). The CITC also strongly encourages Respondents to present their comments on other aspects of the two documents in a manner that is consistent with the Consultation Response Forms presented in Annex C.

Subject to Section 2.3 below, CITC intends to publish on the CITC website copies of all comments submitted by Respondents. CITC encourages Respondents to support all comments with relevant data, analysis, benchmarking studies, and information based on the national situation or on the experience of other countries to support their comments. CITC may give greater weight to comments supported by appropriate evidence. Respondents are not required to comment on both the draft Tariff Regime and the draft Guidelines nor in all sections of these documents. CITC will consider all comments received but is under no obligation to adopt the comments of any Respondent.

2.3 Treatment of Confidentiality Claims

The following methodology (as supplemented by the applicable provisions of the Rules of Procedure) will apply to the publication of submissions and any claim of confidentiality by Respondents in relation to a document submitted to CITC in relation to this Public Consultation:

- (1) Where a document is submitted by a Respondent to CITC in relation to this Public Consultation, CITC shall place a copy of the document on the CITC website at <http://www.citc.gov.sa> unless the Respondent asserts a claim of confidentiality as regards part(s) or the entire document at the time of such submission.
- (2) A Respondent asserting such a claim of confidentiality in connection with a document shall at the same time submit to CITC a redacted version of the document to be placed on the public record in which the confidential information in the document has been removed.
- (3) Each claim of confidentiality made in connection with a document submitted to CITC or requested by CITC shall be accompanied by written reasons for such confidentiality claim. Where a single document contains multiple confidentiality claims, the written reasons must be given separately for each part of a document for which confidentiality is claimed. Where it is asserted that specific direct harm would be caused to the Respondent claiming confidentiality, sufficient details shall be provided as to the nature and extent of such harm. CITC will deal with such claims in accordance with its Statutes. If no justification is provided as to why the information should be designated as confidential information, then CITC will assume that it is non-confidential and may decide to place the information on the public record on the CITC website. Any such claim of confidentiality may itself be placed on the public record on the CITC website.
- (4) Where a Respondent submits either paper or .PDF versions of their comments, Respondents must also submit documents in an electronic format that may be edited (such as MS Word or MS Excel). For redacted versions of submissions, The Respondent should edit them in a manner that facilitates a determination of the

places where and the extent to which information has been omitted (for example, by means of use of square brackets and/or hash marks - ##).

3. Regulatory and Benchmarking Analysis

This Chapter includes a summary of CITC's benchmarking and analysis undertaken in preparation of the draft Tariff Regime and the draft Guidelines.

3.1 *Ex Ante* and *Ex Post* Regulation

One of the fundamental features of modern legal frameworks in the telecommunications sector is the dynamic interplay between *ex ante* and *ex post* regulation. Initially, before significant competitive entry, National Regulatory Authorities ("NRAs") typically rely on *ex ante* remedies. As telecommunications markets become more competitive, NRAs generally reduce their application of *ex ante* regulation and rely more on market outcomes and the active application of *ex post* regulation. By eliminating or lightening *ex ante* remedies in competitive markets, NRAs reduce the associated regulatory burden on DSPs and other service providers and the administrative burden on the NRA.

The NRA however often retains the authority to administer *ex post* remedies even in markets where it has chosen to eliminate *ex ante* remedies. Through the active application of *ex post* remedies, the NRA ensures the maintenance of fair competition by investigating and prosecuting allegations of anti-competitive practices after they have occurred.

Based on the draft results of the Market Report, the CITC is of the view that the Kingdom is currently in the transition phase toward full market competition. In this context, the CITC believes that it is appropriate that it should review and update the application of *ex ante* tariff regulation through the publication of the draft Tariff Regime and to more fully develop its *ex post* regulatory regime through the publication of the draft Guidelines.

Given the dynamic inter-play between *ex ante* and *ex post* regulation described above, the CITC considers it important that these two aspects be considered and reviewed in a comprehensive and concurrent manner.

3.2. Tariff Regime

Pursuant to Article 51 of the Bylaw, the CITC "may issue a decision to adopt any approach to tariff regulation ... including, but not limited to price cap regulation". In preparing the draft Tariff Regime, the CITC undertook a detailed and comprehensive review and analysis of international *ex ante* tariff regulation generally and *ex ante* price caps and tariff approval, review and notification processes specifically.

CITC Decision 43/1425 of 07/04/1425H established a price caps plan for STC. Based on a CITC review of the efficacy of same, and taking into account the international benchmarking, the CITC has concluded that many of the necessary pre-conditions for effective price cap regulation do not apply at the moment in the Kingdom.

First, the CITC does not consider that, at this time, there is adequate cost information to implement a well-functioning price cap plan. Second, one of the key attributes of price cap plans is the flexibility and freedom of the service provider to increase (and decrease) the prices of different services included under the cap, without seeking further approval. However, given the procedural difficulty of obtaining approval of price increases for basic fixed services in the Kingdom, even if a DSP is compliant with its price cap plan, the anticipated efficiency benefits of the plan would not result.

Based on the above, the CITC has concluded that it should not adopt the price caps approach to tariff regulation. In this context, the CITC intends to terminate the currently non-operational price caps plan applicable to STC. This is without prejudice to the CITC considering the issue of a specific price cap plan proposed to the CITC by a DSP at some time in the future.

With respect to tariff approval and notification processes, the benchmarking results show that NRAs have adopted regimes that include two or more different processes to approve or monitor prices. Each of the different processes depends on the nature of the services and of the proposed price change. With respect to the former, one of the most important criteria is whether or not the services are included in markets that have been designated as being subject to dominance. With respect to the latter, a key criterion was whether the proposal was a price increase or price decrease.

While the specifics vary from country to country, the general thrust of the benchmarking results is that NRAs require different levels and types of data for each of the processes. By way of illustration, for instance, at one extreme, NRAs require relatively more data, including costing information, for the approval of price increases for services in markets that are designated as being subject to dominance. At the other extreme, NRAs require little or no data for price decreases for services in markets that are designated as competitive.

Conceptually, the approval and monitoring of prices has multiple objectives, including helping to ensure that the tariffs remain “fair and reasonable” for consumers and that they not be anti-competitive. The benchmarking results indicate that NRAs have developed a number of *ex ante* mechanisms to prevent anti-competitive tariff-related practices.

Based on the above, the CITC has concluded that it should adopt the tariff approval and notification process approach to tariff regulation. In this context, **in** the draft Tariff Regime, the CITC has defined three different processes to approve and monitor prices. Each of these processes establishes different levels of *ex ante* regulatory scrutiny based on the

type of service, the type of tariff proposal and whether or not the service is provided by a DSP.

The Tariff Regime introduces a series of Tests which are designed to allow more expeditious review of the majority of tariff applications of services provided by a DSP. Specifically, for retail services where the service provider meets the relevant Test, it may file the tariff under the Tariff Notification process, rather than under the Retail Tariff Approval process. The period of evaluation by the CITC under the former is considerably shorter than under the latter. For services provided by a non-DSP, the lighter Tariff Notification process is also applicable and the informational requirements are considerably less than under the existing procedures. Further, as the name suggests, under the Tariff Notification process, a proposed application may only be rejected based on procedural and compliance considerations and not on the merits of the application. This is in contrast with the Retail Tariff Approval process, wherein the application may be rejected on the merits of same. Given this, the CITC expects that the overall regulatory burden associated with *ex ante* tariff regulation will decline in comparison to the current approach for most service providers.

In addition, the overall coherence and rigour of tariff review will be increased because CITC determinations will be based on more relevant information and evaluation criteria.

The three processes, which are fully described in the draft Tariff Regime, are the following :

1. The **Retail Tariff Approval** process applies to retail services provided by a DSP which involve price increases or do not pass certain Tests to safeguard against anti-competitive pricing.
2. The **Wholesale Tariff Approval** process applies to wholesale services provided by a DSP.
3. The **Tariff Notification** process applies to retail services provided by a DSP, which pass certain Tests to safeguard against anti-competitive pricing, or to any service, whether retail or wholesale, provided by a non-DSP.

The proposed Tests and the abuses that they are designed to prevent are as follows and fully described in the draft Tariff Regime:

The **Promotions Test**, designed to prevent anti-competitive promotions; and

The **Cost-Related Tests**:

- The **Price Floor Test** designed to prevent predatory pricing.
- The **Imputation Test** designed to prevent margin squeeze.

- The Predatory Bundle Test designed to prevent predatory bundling.
- The Exclusionary Bundle Test designed to prevent exclusionary bundling.

Pursuant to the Bylaw, DSPs may be required to submit costing information as part of the tariff approval processes – the Tariff Regime establishes a transition mechanism for the application of these provisions. In particular, the following is proposed:

- The costing information required for this Tariff Regime is to be drawn from a CITC-approved cost study, including a CITC-approved costing methodology (together, the “Approved Costs”).
- Where the Approved Costs are not yet available, and as an interim measure for up to 1 year from the coming into effect of this Tariff Regime (the Interim Period”), the CITC has determined that service providers may submit an interim set of readily-available alternative costs (the “Cost Proxies”).

The use of Cost Proxies will expedite review of proposed tariffs during the Interim Period while at the same time ensuring that tariffs are evaluated against measures approximating the efficient costs of providing the relevant service.

3.3 Guidelines

The CITC undertook a detailed and comprehensive analysis of abuse of a dominant position provisions contained in Article 31 of the Bylaw (which supplements Article 26 of the Act) in light of the results of its benchmarking and current market conditions in the Kingdom. The benchmarking results show that NRAs have developed a series of *ex post* mechanisms related to identifying and sanctioning abuse of a dominant position in order to promote healthy competition in the telecommunications sector. One of the key mechanisms is the issuance of telecommunications-specific guidelines related to abuse of a dominant position. By publishing such guidelines, NRAs help stakeholders understand the important distinction between abuses of a dominant position and vigorous competition. They also increase transparency and market certainty by indicating the procedures to be followed to initiate a claim of abuse of a dominant position and how the NRA is likely to address such claims.

Consistent with the results of such benchmarking, the draft Guidelines address a number of issues, including the following:

- The CITC’s approach to the inter-play of *ex post* and *ex ante* regulation and, in particular, the application of Article 31 provisions (as discussed in the Guidelines) to DSPs that are also subject to *ex ante* regulation, including those *ex ante* remedies set out in the Tariff Regime;

- An overview of the CITC's approach to market definition and the assessment of dominance in the context of an *ex post* market analysis (with specific reference to the manner in which this approach differs from the *ex ante* approach set out in the Dominance Framework and the reasons for these differences);
- An in-depth treatment of the CITC's approach to the assessment of each of the types of abuse of dominant position (both price-related and non-price related) that are set out in Article 31. This treatment includes a definition of the abusive practice, the criteria that the CITC will use to determine whether the abuse has occurred and a non-exhaustive list of the types of evidence that will be relevant to the CITC's analysis;
- A summary of the CITC's procedural approach to treating an application by an aggrieved service provider regarding a claim of abuse of a dominant position, including its approach to assessing the validity of such claims, enforcing remedies and imposing sanctions; and
- An approach to addressing the concurrent jurisdiction of the CITC and the Council for Competition Protection as regards an allegation of abuse of a dominant position in the telecommunications sector.

Annex A: Draft Tariff Regime

Annex B: Draft Guidelines

Annex C: Questions for Public Consultation

Tariff Regime

1. Will the application of the Tariff Regime serve to meet the objectives defined in section 3.2 above, including shortening the evaluation period and reducing the regulatory burden for most tariffs application for most service providers? If not, can you make specific recommendations regarding how the draft Tariff Regime could be improved in this regard?

2. Does the Tariff regime cover all critical aspects of tariff regulation, as regards both dominant and non-dominant service providers?

3. Is it clear when, under what circumstances and why each of the three Tariff Processes would apply? If not, can you make specific recommendations regarding how the draft Tariff Regime could be improved in this regard?

4. Do you consider that the proposed timeline for disposition of a tariff application under each of the three processes is reasonable? If not, please provide suggested alternative timelines.

5. Is the purpose of each Test clear, and is it clear how the CITC intends to apply each one of the Tests? If not, can you make specific recommendations regarding how the draft Tariff Regime could be improved in this regard?

6. Are the suggested cost methodologies for Approved Costs and interim Cost Proxies appropriate and effective in their role and do you have any specific suggestions as to alternatives or any comments as to how they could be improved?

7. The CITC is proposing an Interim Period for application of Cost Proxies of up to 1 year from the date of issuance of the approved Tariff Regime. Is this period appropriate? If not, can you make specific recommendations as to a more appropriate length for the Interim Period?

8. In developing the Cost Proxies for retail services, the CITC is proposing to use either:

a) wholesale prices as a basis for the Proxy, with a 20% mark-up to reflect retail costs or

b) retail prices effective at the time of the issuance of this Tariff Regime, less 20% to reflect that these retail prices are likely to be above the cost of providing the service.

Are these methods and their proposed percentages appropriate? If not, can you make specific alternative recommendations?

9. The CITC proposes to terminate the current non-operational price cap regime for STC and not to implement a new plan. In the current telecommunications market in the Kingdom, do you consider that a price cap approach is a desirable alternative approach to the tariff approval and notification process approach to tariff regulation included in the draft Tariff Regime? If so, why, and do you have any concrete suggestions as to how it could be effectively implemented?

10. In addition, to the extent that you have any further comments on any other aspects of the draft Tariff Regime, please express them on a section by section basis using the form below.

Guidelines

1. Are the criteria that the CITC will apply to determine whether any given type of abuse of dominance has occurred clear? If not, can you make specific recommendations regarding how the draft Guidelines could be improved in this regard?

2. Are the types of evidence that the CITC deems to be relevant to the determination of whether an abuse of dominance has occurred relevant and sufficiently complete? If not, can you make specific recommendations regarding how the draft Guidelines could be improved in this regard?

3. Is the description of the procedures applicable to the CITC's review of an application regarding a claim of abuse of dominance clear and appropriate? If not, can you make specific recommendations regarding how the draft Guidelines could be improved in this regard?

4. The CCP and the CITC have concurrent jurisdiction as it relates to the assessment and regulation of the abuse of dominant position in the telecommunications sector. Do you consider that the draft Guidelines adequately address how the CITC should interact with the CCP in order to ensure the effective (consistent) exercise of such concurrent jurisdiction in this sector? If not, can you make specific recommendations regarding how the draft Guidelines could be improved in this regard?

5. In keeping with the terms of Article 31 of the Bylaws, the draft Guidelines only provide for remedies in relation to the abuse of dominant position by a DSP. Do you consider that the CITC should regulate the anti-competitive conduct of non-dominant service providers? If so, why and how?

6. In addition, to the extent that you have any further comments on any other aspects of the draft Guidelines, please express them on a section by section basis using the form below.

Consultation Response for Tariff Regime		
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1	Introduction	
1.1	Purpose	
1.2	Objectives	
1.3	Scope	
1.4	Summary of Approach	
1.5	Relation with Ex Post Regulation	
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2.1	Scope	
2.2	Retail Tariff Approval Process	
2.3	Wholesale Tariff Approval Process	
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	Retail business data services at fixed locations	
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	Promotions Test Form	
	Promotions Test Example	
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	Price Floor Test Examples	
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	Imputation Test Form	
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Consultation Response Form for Guidelines		
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1.	Introduction	
1.1	Purpose	
1.2	Objectives	
1.3	Structure of Guidelines	
1.4	Glossary	
2.	Legal Framework	
2.1	Overview	
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2.3	Administrative Context	
3.	Market Definition	
3.1	Introduction	
3.2	Product or Service Market	
3.3	Geographic Market	
3.4	SSNIP Test	
4.	Assessment of Dominance	
4.1	Introduction	
4.2	Factors Considered in Assessment	
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5.	Abuses of a Dominant Position	
5.1	Introduction	
5.2	Failure to Supply Essential Facilities	
5.3	Pre-emption	
5.4	Failure to Comply with Interconnection Obligations	
5.5	Preventing Interoperability	
5.6	Failure to Provide Technical Information	
5.7	Misuse of Competitor Information	
5.8	Margin Squeeze	
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5.10	Predatory and Exclusionary Bundling	
5.11	Anti-competitive Bundling to Competitors	
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6.1	Introduction	
6.2	Application	
6.3	Confidentiality	
6.4	Proceeding	
6.5	Decision	
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6.8	Other Remedies	
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