PUBLIC CONSULTATION ON MARKET REVIEWS AND EX-ANTE REGULATION

AUGUST 2015
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INTRODUCTION

The Communications and Media Commission has engaged a firm of consultants, WRAP International, to assist it with a review of the regulatory framework for the electronic communications sector in Iraq, and this review has highlighted the need for policy for market reviews and ex-ante regulation. The consultants have produced draft of this policy based on international best practice, and CMC wishes to obtain the views of interested individuals and organisations on this policy before it is approved and implemented.

CMC now invites the public, operators and other interested organisations to provide it with their answers to the consultation questions or other comments on the draft policy for market reviews and ex-ante regulation. Any answers or comments should be made in writing addressed to:

IRAQ - Baghdad
almasbeh - hay Babel
District #: 929,Street #: 32, Building #: 18

or electronically to;

consultation@cmc.iq

by 11/11/2015

Submissions are needed in soft copy only and may be in English or Arabic; dual-language submissions will be extremely helpful.

In the interests of transparency, CMC expects to publish submissions. Stakeholders should indicate clearly any part of their submission that they would not wish to be included in a published version, explaining why this part should be treated as confidential.
Article 1
This policy regulates the terms and procedure for definition and analysis of relevant markets for telecommunication services, the assessment criteria for the existence of effective competition and for designating operators with significant market power on the relevant markets and the regulatory obligations, which can be imposed on the operators with significant market power.

Article 2
The Communications and Media Commission (CMC) shall define regularly, at least once in three years, relevant markets for telecommunication services subject to ex-ante regulation, assess the level of competition on the relevant markets and, where it concludes that the market is not effectively competitive, it shall designate operators with significant market power on the relevant market and impose ex ante regulatory obligations on the operators with significant market power.

Article 3
When defining and analyzing the relevant markets, as well as when designating operators with significant market power and imposing ex ante regulatory obligations on them, the Commission shall exercise its powers in accordance with Order 65 and the licenses of authorized telecommunication service providers.

Article 4
Operators providing telecommunication services shall submit to the Commission documents and information needed to carry out the definition and analysis of the relevant markets as requested by the Commission and in the format and by the deadline specified by the Commission.

Article 5
Operators providing telecommunication services cannot refuse to submit to CMC the information referring to it as confidential information however CMC will maintain confidentiality where this has reasonably been requested.

Question 1: Do you agree that CMC should at least once in three years repeat the market review process as described above and impose regulatory obligations on any operator found to have significant market power in the relevant markets? If not, please provide reasons for your response.
**Market Definition**

**Article 6**
The relevant markets for telecommunication services are retail or wholesale markets. There are two dimensions to the definition of the relevant market: the relevant products to be included within the market and the geographic extent of the market.

**Article 7**
The products to be included within the market are all telecommunication services which can be perceived as substitutable. There are two main criteria to consider:

1. demand-side substitutability;
2. supply-side substitutability.

**Article 8**
Demand-side substitutability exists when, in case of a small but significant non-transitory increase in price (usually 5%-10%) of a telecommunication service, consumers are prepared to switch their demand to other telecommunication services capable of substituting the service in question on the basis of their characteristics, functionality and prices to such a degree as to make this price increase unprofitable (SSNIP or hypothetical monopolist test).

**Article 9**
Supply-side substitutability exists when, in case of a small but significant non-transitory increase in price (usually 5%-10%) of a telecommunication service, operators which are currently not engaged in offering services on the relevant market decide to enter the market in the short term, within up to one year, without incurring significant additional costs, to such a degree as to make this price increase unprofitable (SSNIP or hypothetical monopolist test).

**Article 10**
Existence of chain substitutability shall also be investigated when defining the relevant market. Chain substitutability occurs between two services, which are not directly substitutable, when each one of them is substitutable with a third service. In such a case these two services shall be included in the relevant product market although they are not directly interchangeable.

**Question 2:** Do you agree that the product dimension of the relevant markets should be defined based on the principles of demand-side and supply-side substitutability or chain substitutability? If not, please provide reasons for your response.
Article 11
Geographic extent of the market is defined based on following three criteria:
1. territorial coverage of telecommunication networks;
2. similar or sufficiently homogeneous conditions of competition which can be distinguished from neighbouring areas in which the prevailing conditions of competition are appreciably different;
3. common pricing in geographic areas (i.e. areas in which a firm offers its services at a geographically uniform price).

Question 3: Do you agree that the geographic dimension of the relevant markets should be defined based on the territorial coverage, similar conditions of competition and common pricing in geographic areas? If not, please provide reasons for your response.

Article 12
The Commission may identify markets which may be susceptible to ex ante regulation having regard to three cumulative criteria:
1. the presence of high and non-transitory barriers to entry, which may be of a structural, legal or regulatory nature;
2. a market structure which does not tend towards effective competition within the relevant time horizon (the application of this criterion involves examining the state of competition behind the barriers to entry); and
3. the insufficiency of competition law alone to adequately address the market failure(s) concerned.

Article 13
Structural barriers to market entry are those which can result from the sunk costs, economies of scale and scope or the characteristics of demand, and create conditions in which the operators with significant market power and the new entrants do not enjoy equal competitive position whereby the market entry of the new entrants is impeded or prevented.

Article 14
Legal or regulatory barriers to market entry are those which are not based on economic conditions but result from legislative, administrative or other state measures that constrain to a certain extent the market entry of potential competitors or their future behavior.

Question 4: Do you agree that markets susceptible to ex ante regulation should be identified based on the three criteria test as described above? If not, please provide reasons for your response.
Designation of Operators with Significant Market Power

Article 15
An operator shall be deemed to have a significant market power if, either individually or jointly with others, it enjoys a position equivalent to dominance, that is a position of economic strength allowing it to behave to an appreciable extent independently of competitors, customers and end users.

Article 16
Two or more operators shall be deemed to have joint dominance in a relevant market when, regardless of the existence or absence of economic or structural links between them, they can be perceived as a collective entity and can act independently of their competitors, trading partners and consumers, and:
1. there is no effective competition between the operators in question
2. they adopt a uniform conduct and/or coordinated conduct and/or common policy in the relevant market.

Article 17
When designating an operator as having a significant market power, the Commission shall first take account of the market share of the operator in question.

Article 18
When carrying out the analysis, the Commission shall determine the market share of each of the operators operating in the relevant market. The market share of each of the operators shall be calculated on the basis of one or more of the following indicators:
1. net revenues from the provision of telecommunication services;
2. traffic volume;
3. number of subscribers and/or end users;
4. capacity;
5. other.
A leading indicator for determining the market share of the operators in the relevant market shall be the net revenues from the provision of telecommunication services included in the relevant market.

Article 19
Operators with market share in the relevant market of less than 25% shall not be designated as having a significant market power, except when an analysis of the characteristics of the relevant market applying other criteria provides evidence to the contrary.

Article 20
Operators with market share in the relevant market of more than 50% shall be generally designated as having a significant market power, except when an analysis of the characteristics of the relevant market applying other criteria provides evidence to the contrary.
Article 21
The Commission shall take account of the dynamics in the market shares of the operators in the relevant market over a specified past period and/or of potential possibilities for changes in the market shares within the relevant time horizon.

Article 22
If the analysis establishes that an operator has high market share without significant fluctuations over the period in question, the operator may be presumed to have a significant market power on the relevant market.

Article 23
If the analysis establishes a lasting trend of significant decrease in the market shares of the operators with large market shares, combined with increase in the market shares of the operators with smaller market shares, it can be presumed that effective competition exists on the relevant market.

Article 24
The existence of high market share in emerging markets or fast-growing markets may not be accepted by the Commission as evidence of a significant market power in the relevant market.

**Question 5:** Do you agree that market share should be used as the basic criteria for designating operators with significant market power and that this criteria should be applied as described above? If not, please provide reasons for your response.

Article 25
To establish the existence of an operator with significant market power, the Commission shall also take into account (in addition to the market share of the operator) all or some of the following criteria: Barriers to entry, Control of infrastructure not easily duplicated, Economies of scale and scope, Vertical integration, Lack of countervailing buyer power.

Article 26
Barriers to entry occur where an operator has access to or is guaranteed privileged use of important assets or resources which are not accessible in the same way to potential competitors that want to provide the services in the relevant market. Absolute barriers to entry include for example patents and other exclusive rights, legal or other regulatory requirements.

Article 27
Control of infrastructure not easily duplicated occurs where an operator owns or controls a telecommunication network or part of it, for the building of which potential competitors would have to make sizable investments over a long period of time or make investments which cannot be recovered when exiting the market (sunk costs). The control of such infrastructure by an operator can be a significant barrier to the entry of potential competitors in the relevant market.
Article 28
Economies of scale occur where an increase in the volume of the services provided by an operator results in lower average unit costs for the operator. In the telecommunication sector economies of scale exist, because the provision of telecommunication services is accompanied by high fixed costs. The existence of economies of scale can be a barrier to the entry of new competitors in the market and can also create advantages against existing competitors.

Article 29
Economies of scope occur where the combined provision of different services by an operator results in lower average unit costs for the operator. In the telecommunication sector economies of scope exist, when an operator uses the capacity of a telecommunication network to provide more than one service. The existence of economies of scope can be a barrier to the entry of new competitors in the market and can also create advantages against existing competitors.

Article 30
Vertical integration occurs where an operator, including other operators connected to it, acts as a service provider on the wholesale market, at the same time supplying services to end users on the retail market and competing on the retail market with the users of the services it supplies on the wholesale market. The existence of vertical integration can be a barrier to the entry of new competitors in the wholesale and retail markets and can also create advantages against existing competitors. It can create a possibility for market power leverage from wholesale into retail market or vice-versa.

Article 31
Countervailing buyer power occurs where an operator has customers with strong negotiating positions who have significant impact on the competition and limit the operator’s ability to behave independently of its customers. Such buyer power exists, when the customers in question buy a large share of the services supplied by the operator, make a significant portion of the operator’s revenues, are well informed of alternative operators supplying similar services and can migrate easily and without incurring significant costs to services supplied by other operators and/or even begin to self-supply the services needed. If it is established that an operator does not have customers who meet the characteristics above, it can be assumed that operator’s customers lack or have low countervailing buyer power.

**Question 6:** Do you agree that in addition to market share CMC should use also following criteria for designating operators with significant market power: Barriers to entry, Control of infrastructure not easily duplicated, Economies of scale and scope, Vertical integration, Lack of countervailing buyer power? If not, please provide reasons for your response.
Imposing Regulatory Obligations

Article 32
When the market review concludes that the relevant market is effectively competitive, the Commission must not impose any regulatory obligations. When previously imposed regulatory obligations exist, the Commission shall adopt a decision withdrawing these obligations in the relevant market.

Article 33
When the market review concludes that the relevant market is not effectively competitive, the Commission shall define operators with significant market power and impose certain regulatory obligations on them. Regulatory obligations imposed in accordance with this article must be based on the nature of the identified market problem and must be proportionate and justified.

Question 7: Do you agree that CMC should impose regulatory obligations only if the market is not effectively competitive and that the obligations must be proportionate and justified? If not, please provide reasons for your response.

Article 34
The regulatory obligations may include obligations for access to and use of specific network facilities, obligation not to unreasonably bundle, obligation of non-discrimination, obligation of transparency, obligation of price control, obligation of cost accounting, obligation of accounting separation as described below. The Commission may impose also other regulatory obligations when it deems necessary.

Article 35
When the Commission imposes the obligations for access to and use of specific network facilities it may require from the operator with significant market power the following:
- to give third parties access to specified network elements and/or equipment;
- to negotiate in good faith with operators requesting access;
- not to withdraw access to facilities already granted;
- to provide specified services on a wholesale basis for resale by third parties;
- to grant open access to technical interfaces, protocols or other key technologies that are indispensable for the interoperability of services;
- to provide co-location or other forms of shared use of telecommunication infrastructure and associated facilities;
- to provide special services necessary for ensuring interaction of services for the end-users, including the facilities for intelligent networks services or roaming services in mobile networks;
- to provide access to operational support systems or similar software systems necessary to ensure fair competition in the provision of services;
- to interconnect networks or network facilities.

The Commission may also specify additional requirements where it deems necessary.
Article 36
When considering whether to impose the obligations for access to and use of specific network facilities and in particular when assessing whether such obligations would be proportionate, the Commission shall take account of the following factors:

- the technical and economic viability of using or installing competing facilities;
- the feasibility of providing the access proposed, in relation to the capacity available;
- the initial investment by the facility owner, bearing in mind the risks involved in making the investment;
- the need to safeguard competition in the long term.

**Question 8:** Do you agree with the obligations for access to and use of specific network facilities and with the factors which should be considered when imposing these obligations as described above? If not, please provide reasons for your response.

Article 37
When the Commission imposes the obligation not to unreasonably bundle it requires from the operator with significant market power to provide unbundled services. This means that both retail customers (end users) and wholesale customers (other operators) must not be forced to use and pay for additional network facilities and services which they do not require.

**Question 9:** Do you agree that CMC may impose the obligation not to unreasonably bundle as described above? If not, please provide reasons for your response.

Article 38
When the Commission imposes the obligation of non-discrimination it requires from the operator with significant market power to provide services and information to all other operators under the same conditions and of the same quality as it provides for its own retail services or to its subsidiaries or partners. The Commission may require that the services and information are provided under the Equivalence of Inputs or Equivalence of Outputs standards.

Article 39
Equivalence of Inputs means that the operator with significant market power shall provide all services and information to all other operators and to itself in the same timescales and on the same terms and conditions (including price and service levels) by means of the same systems and processes.
Article 40
Equivalence of Outputs means that the operator with significant market power shall provide all services and information to all other operators in a manner which is comparable or identical to those it provides to itself in terms of functionality and price, but potentially using different systems and processes.

Question 10: Do you agree that CMC may impose the obligation of non-discrimination as described above? If not, please provide reasons for your response.

Article 41
When the Commission imposes the obligation of transparency it requires from the operator with significant market power that certain information is made publicly accessible, such as:
- accounting information;
- technical specifications;
- network characteristics;
- terms and conditions for supply and use of services;
- prices of services.

Article 42
As part of the obligation of transparency the Commission may request from the operator with significant market power to publish a reference offer.

Question 11: Do you agree that CMC may impose the obligation of transparency including the publication of a reference offer? If not, please provide reasons for your response.

Article 43
When the Commission imposes the obligation of price control it may define the principles of the pricing to be applied on the operator with significant market power, such as:
- cost orientation of prices;
- price caps;
- setting of prices according to prices on comparable markets.

Article 44
When an operator has an obligation regarding the cost orientation of its prices, the burden of proof that prices are derived from costs including a reasonable rate of return on investment shall lie with the operator concerned.
Article 45
An operator with significant market power, on whom has been imposed the obligation of price control, must submit the proposed prices of services and their justification to the Commission at least 30 days before the publication of such prices, and the Commission may, before or after the publication of the prices, require prices to be adjusted when it establishes that the prices are contrary to the pricing principles set by the Commission.

**Question 12:** Do you agree that CMC may impose the obligation of price control as described above? If not, please provide reasons for your response.

Article 46
When the Commission imposes the obligation of cost accounting on the operator with significant market power it requires that necessary and appropriate cost accounting systems are implemented by the operator, whereby the Commission may specify the format and accounting methodology to be used. The compliance of the operator’s cost accounting system and its results with the methodology shall be verified by an independent auditor once a year.

Article 47
For the purpose of calculating the cost of efficient provision of services, the Commission may use cost accounting methods independent of those used by the operator.

**Question 13:** Do you agree that CMC may impose the obligation of cost accounting on the operator with significant market power and define the methodology which should be used by the operator? If not, please provide reasons for your response.

Article 48
When the Commission imposes the obligation of accounting separation on the operator with significant market power it requires that the operator separates the costs and revenues of the overall integrated company between various activities as if these activities were carried out by legally independent companies. In particular, accounting separation makes internal transfer prices visible and enables to detect (or verify the absence of) certain anti-competitive behavior by a vertically integrated operator such as unfair cross-subsidy and undue discrimination between internal provision (internal transfer prices) and external provision (wholesale prices).

**Question 14:** Do you agree that CMC may impose the obligation of accounting separation on the operator with significant market power? If not, please provide reasons for your response.