

# POSITION PAPER

## Price and Non-Price Discrimination

Position Paper No. 2 of 2007

10 September 2007

LAU/0907/161

A Position Paper issued by the Telecommunications Regulatory Authority concerning price and non-price discrimination

**Purpose: To outline the TRA's position on the concepts of discrimination and provide guidance as to the application of these concepts by dominant operators in their transactions with their own retail arm and other retail operators**



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## Price and Non-Price Discrimination

### 1. Introduction

- 1.1 This Position Paper (“**Paper**”) is intended to be a guideline for existing and potential telecommunication operators active in the telecommunications sector on how the TRA will consider the concepts of equivalence and non-discrimination in the wholesale market. This Paper is also concerned with outlining the importance of applying these concepts by dominant operators when dealing with their own retail arm and other retail players.
- 1.2 The Telecommunications Regulatory Authority (“**TRA**”) was formed pursuant to Legislative Decree No. 48 of 2002 promulgating the Telecommunications Law (the “**Telecommunications Law**”). TRA’s responsibilities include promoting effective and fair competition and protecting the interests of users of telecommunications services.
- 1.3 Through its regulatory framework, TRA aims to foster an environment of competition where economic efficiencies are achieved and benefits to consumers are maximised. The first step towards this is to ensure that entry barriers are reduced to allow new telecommunication operators to enter the market. Given the fact that the telecommunication industry is a network industry, it is accepted that entry into the market by new operators necessarily entails at least some access to established networks as well as interconnection between public telecommunications operators.
- 1.4 Access and interconnection are critical factors determining a new telecommunications operator’s ability to commence operations and provide its services. Therefore, in order to achieve the goal of creating a competitive market, it is imperative that newly established or potential entrants to the retail telecommunication market not only have the ability to build out their own network and infrastructure but are equally able to access the wholesale telecommunications facilities and networks necessarily required to enter the retail market on terms and conditions that are non-discriminatory compared to those provided to a dominant operator’s retail arm by the dominant operator’s wholesale arm.
- 1.5 Public telecommunications operators in the Kingdom of Bahrain must negotiate in good faith with other telecommunication operators operating in the Kingdom of Bahrain for interconnection to the public operators’ telecommunications networks.<sup>1</sup> Telecommunications operators with a dominant position in any telecommunications market in the Kingdom of Bahrain must also offer interconnection and access

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<sup>1</sup> This is a requirement under section 57 of the Telecommunications Law. The Telecommunications Law is available on the TRA’s website, [www.tra.org.bh](http://www.tra.org.bh). Please note that only the Arabic text is authoritative

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to their telecommunications networks and telecommunications facilities on fair and reasonable terms.<sup>2</sup>

- 1.6 Dominant operators are also prohibited from abusing a dominant position.<sup>3</sup>
- 1.7 Where appropriate, TRA will take enforcement action against breaches of the Telecommunications Law and Regulations, such as where a dominant operator abuses its dominant position by acting in a discriminatory manner to foreclose a relevant market. However, TRA will also attempt to educate the market as to the proper application of the concepts of equivalence and non-discrimination by dominant operators in upstream markets, to their procedures and provision of services in downstream markets, i.e. how they treat their own retail arm, affiliates or subsidiaries and other retail players.
- 1.8 This Paper is a TRA position paper only. This Paper is not intended to provide an exhaustive list of practices which TRA will consider to be discriminatory. It is not binding upon TRA. It should not be considered as legal advice.

### **2. Definition of Equivalence and Discrimination**

- 2.1 Describing matters as “equivalent” is a way of saying that two things are equal in value, amount, function, meaning, etc. or have the same or a similar effect.<sup>4</sup> Discrimination for competition law purposes on the other hand is the application of dissimilar conditions to equivalent transactions with other trading parties.<sup>5</sup>

### **3. Dominant Operators and the Application of the Concept of Equivalence**

- 3.1 In recently liberalised telecommunications markets, the former monopolies have an extremely strong position in infrastructure markets and in markets downstream of that infrastructure. Therefore, following the application of the appropriate procedure, it is usually the case that the former monopoly is found to have a dominant position in the market for access to telecommunications networks and telecommunication facilities.<sup>6</sup> Section 65(b)(1) of the

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<sup>2</sup> Specific requirements are found in section 57 of the Telecommunications Law and the Access Regulation

<sup>3</sup> This is a requirement under section 65 of the Telecommunications Law and the telecommunications licenses

<sup>4</sup> Compact Oxford English Dictionary of Current English, Third Edition (2005)

<sup>5</sup> From Article 82(2)(c) of the Treaty establishing the European Community, as amended

<sup>6</sup> Point 65-67, European Commission, *Commission Notice on the application of the competition rules to access agreements in the telecommunications sector - Framework, relevant markets and principles*; Official Journal C 265, 22.08.1998, pages 2-28

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Telecommunications Law establishes the general prohibition of abuse by licensed operators, either independently or with others, of a dominant position in the market or in a substantial part of it which materially prevents or limits competition in the market.

- 3.2 The principle of discrimination and the converse principle of equivalence are considered here in terms of a dominant operator's abusive discrimination between downstream operators and its own retail arm, affiliate or subsidiary. This behaviour is also known as "vertical leveraging", which has been defined as "...any dominant firm's practice that denies proper access to an essential input it produces to some users of this input, with the intent of extending monopoly power from one segment of the market (the bottleneck segment) to the other (the potentially competitive segment)".<sup>7</sup>

This can take two forms:

- (a) price discrimination
- (b) non-price discrimination

- 3.3 The Telecommunications Law has incorporated several safeguards to prevent discriminatory and abusive anti-competitive conduct. As mentioned above discriminatory terms and tariffs are explicitly prohibited for access and interconnection services by section 57 of the Telecommunications Law and section 6.1 of Regulation No. 1 of 2005 (the "Access Regulation").

- 3.4 The general prohibitions found in section 65 of the Telecommunications Law act as a wide net by which a range of abusive practices may be caught. Additionally, the Access Regulation provides an effective safeguard against refusing access to telecommunications facilities. Article 2.1 of the Access Regulation gives TRA the authority to impose by way of an Access Order one or more of the wide-ranging Access Obligations identified in Article 3 of the Access Regulation on a licensed operator declared to hold a dominant position in a relevant market. Combining the practical effects of these legal instruments will most likely aid the application of the equivalence principle and provide sufficient safeguards against price discrimination and refusal to supply.

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<sup>7</sup> Rey/Tirole, A Primer on Foreclosure 1997, p. 1, quoted in Revised European Regulators' Group ("ERG") Common Position on the approach to Appropriate remedies in the ECNS regulatory framework Final Version May 2006 ERG (06) 33; the ERG also explained that "(l)everaging, in general, can be described as any behaviour by which an undertaking with SMP\* on one market transfers its market power to another, potentially competitive market. As leveraging is an attempt to drive rivals out of the potentially competitive market, to limit their sales or profits, or to prevent them from entering the market, it can also be regarded as a form of foreclosure.". ERG also distinguished three types of leveraging strategies: "An outright refusal to deal/denial of access; Leveraging by means of non-price variables; Leveraging by means of pricing (p.29)"

\* "SMP" is an acronym for "Significant Market Power", the definition of an "Operator with Significant Market Power" can be found in section 1 of the Telecommunications Law.

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### 4. Price Discrimination<sup>8</sup>

- 4.1 When a dominant operator offers different prices<sup>9</sup> for downstream operators to those offered to its own retail arm or affiliate, this may be found to be an abuse of a dominant position<sup>10</sup> unless the price discrimination can be objectively justified.
- 4.2 Price discrimination is somewhat controlled through the ex ante review and approval/order process of the Reference Interconnection Offer (RIO) and Reference Access Offer (RAO) under Section 57 of the Telecommunications Law.

### 5. Non-Price Discrimination

- 5.1 A dominant operator may also discriminate against operators in downstream markets by other means not related to pricing. The anti-competitive practice of refusal to supply and the concept of essential facilities become increasingly important in this regard.
- 5.2 Dominant operators may abuse their dominant position and carry out practices which have been referred to as “quasi-refusals to supply”.<sup>11</sup> This may, inter alia, take the form of restrictions or delays in connection to the public switched network or leased circuit provision, in installation, maintenance and repair, in effecting interconnection of systems or in providing information concerning network planning, signalling protocols, technical standards and all other information necessary for the appropriate interconnection and interoperation with the reserved service and which may affect the interworking of competitive services or terminal equipment offerings.<sup>12</sup> In practice, this conduct amounts to defiance of the principle of equivalence,

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<sup>8</sup> The main focus of this Paper is on Non-Price Discrimination.

<sup>9</sup> In some instances charging different prices for similar services with the same cost base can be beneficial. In the retail market, for example, the process of price discrimination where a consumer is offered a discount depending on the number of products they purchase or as a consequence of a characteristic such as being a student are widely practised. Another form of price discrimination in the retail markets is 2-part tariffs, whereby consumers are charged an initial fee and then a usage fee, for example credit cards which charge an annual fee plus a per-transaction fee. Therefore, for the avoidance of doubt TRA does not consider these forms of price discrimination as being relevant to this Paper. However this depends upon the circumstances and facts surrounding the price discrimination; in some cases such practices could still constitute anti-competitive behaviour, e.g., anti-competitive tying and/or bundling or discriminating between user groups with weaker countervailing purchasing power.

<sup>10</sup> Aside from being a breach of section 65 price discrimination is also an infringement of Article 6.1 of the Access Regulation.

<sup>11</sup> Page 1070, Bellamy & Child, *European Community Law of Competition*, 5<sup>th</sup> edition, 2001

<sup>12</sup> Point 98, European Commission, *Commission Guidelines on the application of EEC competition rules in the telecommunications sector*, Official Journal C 233, 06.09.1991, page 2

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which should be applied to the treatment that the dominant operator affords to downstream operators and its own retail arm or affiliate.

5.3 Such conduct has been condemned as an abuse of dominance in Europe. In its guidelines on the application of European Union competition rules in the telecommunications sector, the European Commission identifies three main elements relating to access which could be manipulated by the access provider in order to refuse to provide access. These are timing, technical configuration, and price. With regard to the timing element, the European Commission recognised that dominant telecommunications operators have a duty to deal with requests for access efficiently. The European Commission also identified “undue and inexplicable or unjustified delays in responding to requests for access” as an abuse of a dominant position. The European Commission will particularly seek to compare the response to a request for access with:

- (a) the usual time-frame and condition applicable when the responding party grants access to its facilities to its own subsidiary or operating branch;
- (b) responses to requests for access to similar facilities in other European Union Member States;
- (c) the explanations given for any delay in dealing with requests for access.<sup>13</sup>

5.3 Similar considerations and approaches to those adopted by the European Commission may also be adopted by TRA in its attempt to prevent, eliminate and punish this type of anti-competitive behaviour. Accordingly, in order to ensure that the principle of equivalence is adhered to in the context of dominant operators’ operations, it is essential that sufficient functional separation exists between a dominant operator’s wholesale arm and its retail arm. This is to ensure that the dominant operator’s wholesale arm treats other licensed operators on the same basis as it treats its retail arm and affords the latter no treatment more favourable than any treatment given to other retail operators. Dominant operators should also refrain from abusing such a dominant position through engaging in abusive and discriminatory behaviour relating to non-price variables as outlined above. For this to be done, other licensed operators and the dominant operator’s retail affiliates should be subject to the same processes when requesting any service from the dominant operator’s wholesale arm.

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<sup>13</sup> Point 95, European Commission, *Commission Notice on the application of the competition rules to access agreements in the telecommunications sector - Framework, relevant markets and principles*; Official Journal C 265, 22.08.1998, pages 2-28

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### 6. Conclusion

- 6.1 It is clear from the Telecommunications Law and the Access Regulation that a dominant operator must offer its interconnection and access products on a non-discriminatory basis to all operators, including its own retail arm.
- 6.2 Price Discrimination can be somewhat controlled through the ex-ante RIO and RAO approval process. Non-price discrimination can to some extent also be controlled by including and implementing instruments such as specific access products, related performance targets and service level agreements into RAOs. However TRA considers that there will be a growing emphasis on investigations under Section 65 of the Telecommunications Law as well as general requirements of Section 57 of the Telecommunications Law and Access Regulation.
- 6.3 TRA will be particularly concerned with the following activities:
- (a) undue restrictions or delays in connection to the public network;
  - (b) undue restrictions or delay in connection to leased circuit provision;
  - (c) undue restrictions or delay in installation, maintenance and repair, in effecting access to networks, services and facilities and interconnection;
  - (d) undue restrictions or delay in providing information concerning network planning, signalling protocols, technical standards and all other information necessary for the appropriate interconnection and/or access and/or interoperation with the requested service and/or information which may affect the interworking of competitive services and/or terminal equipment offerings.