FiberTech responses to Public Consultation Document Update to the Competition Safeguard Instructions

Q1: Enhanced Review of the Proposed Updates to the Market Definition Process in Article (5)

FiberTech believes that moving away from pre-defined product and geographic markets toward a case-by-case approach raises significant concerns. FiberTech supports maintaining pre-defined markets due to the benefits of regulatory consistency, predictability, and fairness. Below, we outline our alternative views, supported by international best practices, to highlight why the pre-defined approach remains a stronger and more appropriate methodology for Jordan's broadband market.

The removal of pre-defined markets in favor of a case-by-case approach can introduce significant uncertainty, particularly those already facing challenges to expand their services to certain geographical areas.

Regulators like BEREC have emphasized the importance of maintaining consistent regulatory frameworks to avoid market instability. Pre-defined markets, such as those identified in the EU Recommendation on Relevant Markets, provide clarity and allow operators to plan their business strategies around well-defined market boundaries.

Conducting a case-by-case analysis for every market definition may result in longer regulatory decision-making processes. This could cause delays in addressing pressing competitive issues, especially in fast-evolving sectors like broadband services.

Ofcom, the UK regulator, has highlighted the importance of maintaining clear, predefined markets to streamline regulatory processes. It has found that using pre-defined market boundaries accelerates competition assessments and helps regulators react swiftly to anti-competitive behavior.

Pre-defined market boundaries ensure consistency and predictability for both operators and regulators. This allows Non-SMP operators to have clear expectations about market regulations, fostering an environment where all players can compete fairly.

Regulator in Germany maintains a consistent market definition process that includes pre-defined product and geographic markets, which supports smaller operators in competing fairly with larger, dominant players like Deutsche Telekom. This predictability ensures stability and fairness across the market.

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Given the presence of dominant operators in Jordan, a pre-defined market approach ensures that there are clear regulatory safeguards in place to prevent dominant operators from leveraging their market power to stifle competition. Without pre-defined markets, dominant operators may exploit regulatory gaps during the time-consuming case-by-case assessments.

France's telecom regulator, utilizes pre-defined markets to ensure dominant operators are held accountable for maintaining fair competition. This includes specific rules for wholesale broadband to ensure smaller players can access critical infrastructure.

Conclusion

FiberTech urges the TRC to reconsider transitioning to a case-by-case market definition. This approach would ensure the necessary stability, fairness, and predictability essential for fostering competitive dynamics in Jordan's telecom market, while also allowing for adjustments in light of future technological advancements. If the TRC chooses to implement a case-by-case framework, it should be limited to SMP operators and applied exclusively on an ex-post basis. This focus is vital, as these operators possess significant market power, and assessing them individually can effectively address competitive concerns and enhance market health. Furthermore, applying this method ex-post allows for a more accurate evaluation of market behavior and outcomes, ultimately supporting a more balanced competitive landscape.

Q2: Review of the Definition and Categorization of Impact Factors in Article 7(a), with Emphasis on the Jordanian Telecom Market

In response to the specific question about the definition and proposed categorization of Impact Factors used to assess whether a licensee holds a position of single or joint dominance, FiberTech would like to offer the following considerations, drawing on both local market conditions and international best practices.

FiberTech's position is that while the 40% market share threshold proposed in Article 6 is an important indicator, it should not serve as a sole determinant of dominance. The regulatory approach must consider other market realities, like market share, market power, vertical integration, and the unique geographical and operational limitations faced by certain operators.

For instance, FiberTech operates in limited geographical areas, which severely limits our ability to influence the market at a national level. Conversely, other designated operators are operating across Jordan and enjoys advantages in economies of scale and scope.

The European Commission's Guidelines on Market Analysis suggest that market share alone is insufficient to determine dominance. Regulators should also consider other competitive dynamics, such as barriers to entry, buyer power, vertical integration and other major factors .

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In the UK, Ofcom's approach to dominance goes beyond simple market share and includes factors like network reach, infrastructure control, and customer churn to determine whether an operator truly has the ability to act independently of competitors

The proposed Impact Factors in Article 7(a) provide a more holistic approach to understanding market power. In FiberTech's view, factors such as barriers to entry, infrastructure control, vertical integration and economies of scale should carry significant weight when assessing dominance.

In Australia, the Australian Competition and Consumer Commission (ACCC) recognizes that operators may have high regional market shares but do not exert control nationally due to barriers to expansion

Similarly, in India, the TRAI applies a nuanced approach that takes into consideration regional market dynamics and local regulatory challenges when determining market power.

Ex-Post vs. Ex-Ante Market Reviews :

FiberTech agrees with the distinction between ex-post competition investigations and ex-ante market reviews, as the two require different frameworks.

Ex-ante market reviews should focus on preventing the development of dominance, taking into account future market developments, expansion opportunities, and technological advancements. In contrast, ex-post investigations require a backward-looking assessment of anti-competitive behaviors.

In Germany, the Federal Network Agency (BNetzA) employs ex-ante reviews to assess whether regulatory interventions are needed to prevent dominance before it happens, while ex-post reviews are used to address issues once they arise.

FiberTech proposes that TRC consider the following alternative approach when assessing dominance:

Weight of Barriers to Entry and Expansion: Place greater weight on factors such as barriers to expansion and municipal regulations. This would align with global practices in countries like Spain, where local operators are assessed based on their ability to expand regionally

FiberTech supports the TRC's intention to develop a more nuanced and holistic framework for assessing market dominance. However, it is critical that factors such as geographic limitations, municipality barriers, and actual market dynamics are considered in determining whether a licensee holds SMP.

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By aligning Jordan's telecom regulatory framework with international best practices as seen in the EU, UK, and Australia, the TRC can promote a more competitive market that enables non-SMP operators like FiberTech to grow while preventing excessive regulatory burdens.

Q3: The Provisions on Joint Dominance in Article 7(b) Relevant to the Jordan Telecom Market:

FiberTech generally agrees with the principles outlined. However, we would like to provide insights on specific areas that warrant further refinement or clarification, with reference to international best practices to ensure regulatory clarity and proportionality.

The TRC's emphasis on elements like structural links, market concentration, and collective market behavior is similar to best practices in organizations like the European Union. These elements are essential for determining whether businesses dominate a market jointly or not. The country's telecom industry is extremely consolidated, with major market shares held by SMP operators in the domains of fixed-line, broadband, and mobile services. To make sure that these major firms don't band together or erect obstacles in the way of smaller competitors entering the market, joint dominance evaluations are essential. However, it is crucial that any determination of joint dominance is based on strong evidence of active coordination, especially in ex-post investigations.

The criteria listed in Article 7(b) (such as price coordination, refusal to supply, or market segmentation) should be evaluated with a high evidentiary threshold, particularly for ex-post sanctions. Joint dominance findings must consider the complexity of parallel conduct that may arise in competitive and transparent markets without being the result of collusion

Through evaluating possible market coordination or collusion, the TRC can step in early to stop anti-competitive actions. This is essential to prevent the bigger, more powerful companies from marginalizing the smaller telecom carriers.
Joint dominance provisions would assist stop these operators from coordinating their strategies (e.g., price, network access) to exclude competitors or new entrants in Jordan, where a limited number of providers control mobile broadband and fixed-line services.

Although TRC offers a framework for evaluating joint dominance, Non-SMP operators can find it difficult to comprehend the precise proof required to demonstrate anti-competitive coordination between two or more dominating operators. This may be difficult, especially for smaller businesses with less resources.
The TRC ought to release comprehensive recommendations for Non-SMP operators that specify the kinds of proof that may be used to prove cooperation or coordination amongst major

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companies. This might contain information on market share, price trends, or infrastructure access behavior.

The identification of high barriers to entry and the absence of countervailing buyer power as conditions facilitating joint dominance are well-founded. FiberTech believes that these factors should be carefully assessed in the context of the Jordanian market. In particular, the municipalities impose high costs on network deployment outside of Amman create significant barriers for FiberTech to expand its operations, further restricting our ability to influence market outcomes nationally.

Additionally, buyer power in the wholesale market is not uniform across regions. While FiberTech competes in a limited geography, national players have the ability to leverage economies of scale and buyer relationships across a wider range of regions.

The OECD recommends that joint dominance assessments should consider the role of buyer power, particularly in markets where large wholesale purchasers (such as mobile operators) can negotiate favorable terms with dominant operators

In Australia, the ACCC uses a detailed analysis of buyer-supplier relationships to assess market power and determine whether countervailing buyer power is sufficient to prevent coordinated behavior

We acknowledge the inclusion of symmetry and transparency as factors that can contribute to joint dominance. However, FiberTech believes that these factors should be analyzed with contextual flexibility, particularly in the Jordanian telecommunications market, where geographical differences play a significant role.

For example, FiberTech's operations are limited to certain geographical area, whereas Orange has a national presence. Thus, our cost structures, network capacity, and competitive environment are vastly different. Symmetry in financial performance or operational strategies should not be presumed simply because two operators offer similar wholesale services in a single region.

In Spain, the National Commission of Markets and Competition (CNMC) assesses joint dominance in light of structural asymmetries between operators, particularly when one operator holds a significant advantage in network reach or market scope

Similarly, BEREC (Body of European Regulators for Electronic Communications) highlights that asymmetries in infrastructure, network reach, and market penetration are critical when assessing joint dominance in markets with both regional and national players

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FiberTech suggests the following refinements to the TRC's framework for assessing joint dominance

When Joint dominance is assumed, the TRC should set precise criteria. A combined market share criterion, such as 40% or more, may be established, for example, to guarantee that major firms with the capacity to greatly impact the market continue to receive the majority of attention.
Without unfairly singling out smaller competitors, a combined market share requirement for mobile providers in Jordan might assist the TRC in promptly determining whether their combined market strength warrants more examination.

Market factors that might allay worries about dominance, such as technical advancement, new competitors, and changes in consumer behavior, should be considered by the TRC while evaluating joint dominance.
For instance, the introduction of new market dynamics and the growth of IoT services may alter the competitive environment in Jordan as a result of the deployment of 5G. The TRC's strategy for joint domination needs to be adaptable enough to take note of these changes and modify as necessary.

For ex-post investigations, the TRC should require robust evidence of active coordination or collusion, as opposed to relying solely on market outcomes or parallel conduct. This would align with international standards that seek to avoid penalizing natural market behavior that could arise from independent strategic decisions.

Joint dominance assessments should account for regional market dynamics. Operators like FiberTech, which face barriers to expansion due to municipal regulations, should not be grouped with operators that have nationwide reach and resources.

The TRC should incorporate flexibility when analyzing symmetry between operators, recognizing that differences in network size, investment levels, and operational scope can lead to asymmetrical market positions, even within the same service category.

Q5: the Substantive Assessments of Anti-Competitive Behavior in Articles (11) to (20) with Relevance to Jordan Telecom Market

FiberTech generally agrees with the TRC's initiative to enhance the assessment of anti-competitive behaviors, as outlined in the articles mentioned. The proposed framework demonstrates a comprehensive understanding of the potential abuses of market power and provides a structured approach to address them.

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Key Points of Agreement

1. **Predatory Pricing (Article 11)**
   - **Support for Comprehensive Assessment**: The emphasis on assessing predatory pricing through a detailed analysis of cost benchmarks, time periods, and market behavior aligns with international standards.
   - **International Best Practice**: The **European Commission** utilizes a similar methodology to evaluate predatory pricing, ensuring that both cost structures and market context are taken into account.
2. **Anti-Competitive Cross-Subsidization (Article 12)**
   - **Recognition of Competitive Dynamics**: FiberTech agrees that identifying anti-competitive cross-subsidization requires a careful examination of the cost structures across different markets. FiberTech has observed instances where some operators are bundling broadband services with other products like TV content for instance, creating a form of cross-subsidization that places smaller operators at a competitive disadvantage. While bundling may not always be anti-competitive, when done by a dominant market player, it may subsidize below-cost pricing in a highly competitive broadband market using profits from the less competitive TV segment.

   The European Commission has taken strong actions against bundling practices that result in cross-subsidization across markets where there is dominance in one service but not in another. This prevents competitors from matching the low prices of the bundled services, which could foreclose competition in the broadband market

   - Support for Two-Step Analysis: The two-step approach proposed by the TRC for evaluating price discrimination is robust. It recognizes that pricing differences must be assessed in light of market conditions and consumer welfare.
   - International Comparison: The Australian Competition and Consumer Commission (ACCC) adopts a similar framework to evaluate pricing practices, ensuring that the analysis considers the impact on competition and consumer choice.
3. **Margin Squeeze (Article 14)**
   - **Importance of Imputation Test**: FiberTech supports the use of the imputation test to evaluate margin squeeze cases, as it provides a clear methodology for assessing whether a dominant operator is harming competition.

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- **EU Guidance**: The **European Commission** also employs imputation tests in assessing potential margin squeezes, which ensures that both upstream and downstream market dynamics are considered

4. **Excessive Pricing and Long-Term Contracts (Articles 16 and 15)**

    - **Need for Clear Criteria**: The definitions provided for excessive pricing and excessively long-term contracts are necessary to protect market dynamics. FiberTech believes that establishing clear criteria is essential for effective enforcement. The TRC's focus on excessive pricing should include analysis of volume discount schemes offered by dominant operators. These schemes provide significant discounts for larger wholesale buyers, which discriminates against smaller operators that cannot meet the volume thresholds
    - In Spain, the CNMC considers excessive pricing as a significant concern, establishing clear thresholds and guidelines for intervention.
    - The competition authority in Germany has issued rulings on volume-based pricing that create barriers for smaller market players, leading to effective exclusion from the market. FiberTech urges the TRC to adopt similar considerations, ensuring that volume discounts are not being used as a tool for excessive pricing and market exclusion

FiberTech propose the amendments below to enhance the clarity and effectiveness of the assessment process:

1. Clear Guidelines for Evidence Submission: The TRC should outline specific types of evidence required for complaints regarding predatory pricing and other abuses. This will ensure that investigations are grounded in reliable data and reduce the likelihood of frivolous complaints.
2. Transparency in Assessment Procedures: The TRC should publish guidelines detailing the procedural steps it will take during investigations. This transparency will help operators understand the assessment criteria and foster trust in the regulatory process.
3. Regular Review of Assessment Criteria: The TRC should commit to reviewing the criteria and processes established in Articles 11 to 20 periodically. This will allow for adjustments based on market developments and evolving competitive dynamics.

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