SPC Network

Response to TRC Public Consultation Document

"Update to Competition Safeguards Instructions"

Prepared for Zain Jordan

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About SPC Network

SPC Network was founded in 2003 and has worked for over 50 clients worldwide. We undertake Strategic Policy Development in platform and networked industries, by combining the knowledge of our consultants with specific and valuable skills to ensure rigorous analysis and exceptional advice. Our core consultancy team and network of partners have substantial experience in industry and consulting meaning that we understand the practical issues and challenges facing the market. Through advanced academic training, we have developed the key skills and rigorous approach needed to support our clients in the policy debate.

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1 INTRODUCTION

1. Zain has asked SPC Network (www.spcnetwork.uk), a UK based consultancy specialising in economic regulation of electronic communications markets, to review the TRC's Public Consultation Document "Update to the Competition Safeguard Instructions" and to make relevant comments on its behalf. SPC Network has worked with Zain on a number of matters in the past and has thus developed a deep understanding of the Jordanian telecoms market.

2. It has been 18 years since the last Instructions were published and it is therefore necessary to issue revised Instructions to incorporate recent developments in competition economics and market conditions. However, in our view the 2006 Competition Safeguards Instructions were well drafted, and any changes should be kept to a minimum and only made where necessary.

3. Safeguarding competition from anticompetitive behaviour of a dominant firm is essential to protect consumers and to ensure markets function in the best interest of consumers and the economy in general. These Instructions are helpful in that they clearly set out how the TRC will investigate anticompetitive behaviour in a transparent manner.

4. Nevertheless, we do have a number of comments we wish to make in the interests of improving the Instructions. Whilst we have answered the specific questions posed by the TRC, we also make some further constructive comments that we hope will improve the Instructions.

2 GENERAL COMMENTS

Hierarchy of Documents

5. We propose that the Instructions contain a sentence stating that in the event of a conflict between the Competition Law and the Instructions then the Competition law takes precedence. This will provide the legal certainty that Licensees need regarding the relative status of the law and the Instructions.

Use of Subheadings

6. The Instructions apparently cover *ex post* competition investigations under the Competition Law, mergers between Licensees in the telecommunications markets and *ex ante* market reviews of the telecommunications markets. There is, of course, some similarity in the economic analysis used in market investigations and market reviews, and mergers between licensees may affect competition.

7. However, we think it would be clearer if the different sections in the Instructions were more clearly signposted so that it is clear which Articles belong to which process. We therefore propose that Articles are set out under sub-headings as listed below:

   - Articles 1 – 4: Introduction.
   - Articles 5 – 20: Competition Law investigations.
   - Articles 21 – 22: Mergers between licensees.
   - Articles 23 – 27: Market reviews.

Definitions

8. The Instructions contain references to a number of economic concepts used in market analysis. We believe that it would be helpful if the TRC gave a definition of these concepts in the Instructions. A non-exhaustive list of terms that it would be helpful to define is presented below.

   - Article 5(c)(4) "chains of substitution" – defined by the European Commission as occurring "where it can be demonstrated that although products A and C are not directly substitutable, product B is a substitute for both product A and product C and therefore

products A and C may be in the same product market since their pricing might be constrained by the substitutability of product B".[1]

- Article 5(e) "geographic markets – See proposed definition set out below in paragraph 31.
- Article 10(b) "discriminate" - generally accepted to mean the failure to treat equivalent cases in an equivalent manner.
- Article 23(a)(3) "regularly" – we suggest every five years.

Market Share

9. We would like to see a small amendment to Article 6 to make it clear that the market share refers to the share in the relevant market as defined in the market definition process. We therefore propose the first sentence of this Article is amended as below (addition underlined):

   Where appropriate after defining the relevant market pursuant to Article (5) of these Instructions, the TRC shall determine the measurement of the relevant Licensee's market share <u>in the relevant market</u> by examining, as an initial matter, that Licensee's share of revenue in the defined market".

Remedies

10. Article 27 is concerned with Remedies but does not set out the remedies that the TRC may impose on dominant licensees We are very concerned that as currently worded this Article could lead to regulatory uncertainty which may deter investment by new and existing firms, as the remedies the TRC might impose on a dominant operator are not stated.

11. Therefore, we would like to see the TRC set out the remedies it may use defined in these Instructions, or an explicit reference made to the remedies set out in the TRC's White Paper on the Market Review Process from 2009, where the remedies are explained in Section 5. Such a reference will ensure that all Licensees are aware of what remedies the TRC may impose in advance.

[1] European Commission (2018) *'Guidelines on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and services'* Para 43.

Specific Comments Not Addressed in Questions

12. Article 4(a)(1) - This clause could be clarified by the following amendment (addition underlined)

    “its ex-post assessments of potential anticompetitive behaviour by any Licensees found to be dominant in a relevant market as determined under these Instructions".

13. This addition would ensure that anticompetitive behaviour can only be conducted by a dominant firm in a relevant market and would, therefore, stop complaints by one firm against another firm that is not dominant in a relevant market.

14. Article 14(a) - Typing error: in line 8, “charge” should read “charges”.

15. Article 23(b)(2) – Typing error. “Tree” should be “Three”

16. Article 24 – In line with best practice, candidate markets should be the most upstream markets feasible.

17. Article 24(a) – any variation from the previously defined markets should be thoroughly explained by the TRC and subject to consultation if necessary.

3 RESPONSE TO QUESTIONS

Question 1

Does** the industry agree with the updates to the market definition process as set out in Article (5) of the draft updated Instructions? In particular, the TRC proposes to remove any references to pre-defined product or geographic markets, and instead undertake a market definition exercise on a case-by-case basis, based on evidence around demand-side and supply-side substitutability, and other relevant considerations. If not, please state why this is not the case, with reasons, and propose **alternative definitions.

Predefined Markets

18. There appears to be some cross-over between the market definition process set out in Article 5 and that referred to in Article 24. However, this cross-over could lead to some confusion as there are some contradictory points.

19. In Article 5(a) the Instructions state that markets will be defined on a "case-by-case basis" and removes the four pre-defined product markets included in the 2006 Instructions. However, Article 24(a) states that the TRC will start the process of identifying candidate markets for *ex ante* market reviews "from any markets defined in a previous review, or any international benchmarks, where relevant". Article 5(b) goes on to say that "*following the identification of the candidate markets, the TRC will look to define the relevant product and geographic markets. The TRC will follow the principles set out in Article 5 of these Instructions*".

20. This wording could lead to some confusion as the candidate markets will be based on the previous review, but the revised Article 5 removes the predefined markets.

21. There is a clear distinction between the roles of investigations under competition law and *ex ante* market reviews. The former are designed to protect competition from the actions of dominant undertakings and the latter to promote competition in markets that have not historically been competitive. A competition law investigation generally examines actions by allegedly dominant firms at a point in time and may not be carried out again. However, market reviews are carried out on a regular basis to review how well competition is developing in the market.

22. For this reason, it is important that there is consistency in the market definitions used for *ex ante* market reviews over time. Any substantial variations in the market definitions used in consecutive market reviews could lead to inconsistent regulation, which will affect the ability of companies in the market to make consistent investment and operation plans. Substantial variations in market definitions will lead to uncertainties that could affect Licensees' ability to compete.

23. Further, it is increasingly the case that best practice for competition law investigations is that the analysis starts with the potential anticompetitive behaviour and works from that starting point backwards towards the market definition. This requires the competition authority to develop its "theory of harm"[2] and then show the market or markets to which it applies. This is contrast to an *ex ante* market review in which no specific anticompetitive behaviour is alleged, but where a firm may be dominant in a specific market and remedies need to be applied to prevent it abusing that position.

24. We are therefore of the opinion that for market reviews, there needs to be consistency of market definition so that any regulation that is imposed following the market review applies to the same markets over time with only minimal variation. Without such consistency, all operators' ability to compete and invest will be put at risk.

25. We therefore propose that the Instructions make an explicit statement that the market review process differs between that used for competition law investigations, where markets can be defined on a case-by-case basis, and *ex ante* market reviews where the same definition of candidate markets will be used over time.

The Hypothetical Monopolist Test

26. The TRC states, in Article 5(c)(5), that the Hypothetical Monopolist Test (HMT) does not require a quantitative assessment and may be carried using qualitative assessments. We agree this is the case and note that many regulators and competition authorities are strongly

[2] A theory of harm is the conceptual framework or explanation that outlines how a particular behaviour, agreement, or market practice is likely to negatively affect competition and harm consumers or the overall market. It is essentially the reasoning used by competition authorities, such as the European Commission or national competition regulators, to demonstrate how a specific conduct may lead to anti-competitive outcomes, such as higher prices, reduced innovation, or lower quality.

informed by qualitative assessments. However, we wish to make two points in response to the TRC's statement.

27. First, before resorting to qualitative techniques, the TRC should explore all possible options for quantitative analysis and whether they have, or can acquire, the necessary data. The TRC will no doubt be aware of econometric methodologies such Critical Loss Analysis that are successfully used when relevant data can be acquired and should also explore the possibility of acquiring such data.[3]

28. Second, qualitative techniques should be just as rigorous and objective as any quantitative techniques. In undertaking a qualitative technique, the TRC should follow a rigorous process explaining its methodology and how it reaches its findings in a non-biased manner.

29. A qualitative HMT needs to assess how consumers are likely to behave in the event of a Small but Significant Non-transitory Increase in Price (SSNIP) by a hypothetical monopolist. This would require demonstrating that the potential substitute product is functionally similar to the focal product and that the price difference is within the 5 - 10% difference envisaged by the HMT. Thus, if the focal product were, for example, fixed broadband access and the TRC were testing whether mobile broadband access was an effective substitute and so in the same relevant market, it would need to show that fixed and mobile broadband access had similar product characteristics and similar prices. Product characteristics may include speeds available, reliability, latency and so forth.

30. We agree with Article 5(d) that the HMT should be forward-looking so that new services that may be in the market in future can be included. In particular, we agree with the final sentence of that Article that potential substitutes may enter the focal product market from a separate market. An example here would be public voice call apps, such as WhatsApp, that can be used as a substitute for traditional voice calls over fixed or mobile phones.

[3] **Critical Loss Analysis estimates** the maximum percentage loss of sales that a firm could sustain before a price increase becomes unprofitable. If the actual loss of sales exceeds the critical loss, the price increase would not be profitable.

Geographic Markets

31. We suggest that a definition of a geographic market is included in the Instructions such as the definition adopted by the European Commission in its 2018 SMP Guidelines, which we have inserted below.

    "the relevant geographic market comprises an area in which the undertakings concerned are involved in the supply and demand of the relevant products or services, in which the conditions of competition are sufficiently homogeneous, and which can be distinguished from neighbouring areas in which the prevailing conditions of competition are significantly different. Areas in which the conditions of competition are heterogeneous do not constitute a uniform market."[4]

32. Experience in other countries that have adopted geographic markets strongly suggests that sub-national geographic markets are more relevant in fixed than mobile networks. For example, in the Wholesale Local Access (WLA) market for fibre, the UK regulator, Ofcom, has found three geographic markets based on the level of competition: Area 1 where there is competition between BT Openreach and two or more wholesale fixed network operators; Area 2 where there is potential for competition to BT Openreach; and Area 3 where competition between network operators is unlikely. These geographic markets are based on the footprint of the various networks. Ofcom, has determined that the conditions of competition in an area where BT Openreach faces competition from two other networks are sufficiently different to an area where it faces no competition that these areas form distinct geographic markets.

33. Similar geographic market definitions are used in other European countries, for example Denmark, Finland, the Netherlands and Poland.

34. We are not aware of any country of a similar size to Jordan where geographic markets have been found to exist in the mobile markets. This is because Licenses to provide mobile networks tend to be national and so all Licensees cover the same geographic areas (with perhaps some difference at the margins). This means that the conditions of competition tend to be same nationwide and so there is a single geographic market covering the whole

[4] European Commission (2018) *'Guidelines on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and services'* Para 48.

country. This definition would not preclude one Licensee being more successful in some areas than others, but such success is likely to be a result of competition rather than conditions of competition.

35. We understand that the TRC must always keep an open mind as to whether geographic markets exist for both competition law investigations and *ex ante* market reviews. We also think that the TRC is right to emphasise the "structural difference in competitive conditions" (Article 5(g)(2)) and the "coverage of the parties' fixed or mobile telecommunications differences" (Article 5(g)(3)) as it is these conditions of competition that determine the existence or otherwise of geographic markets.

Question 2

Does the industry agree with the definition and proposed categorisation of the Impact Factors that the TRC proposes to consider when assessing whether a Licensee holds a position of single or joint dominance in the relevant market(s) as set out in Article 7(a)? In addition, does the industry agree with the distinction in the approach to dominance designation in the context of ex-post competition investigations, compared to ex-ante market reviews? If not, please state why this is not the case, with reasons, and propose an alternative approach.

Definition of Dominance

36. We recognise that the definition of a Licensee with single dominance reflects that used in the Competition Law. However, we consider that this definition is rather weak as all Licensees will have some degree of influence over the market and no Licensee, not even a monopolist, will be able to control the market.

37. We would prefer to see the definition of dominance changed to reflect that used in the European Union where a dominant firm is defined as one that enjoys *"a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and consumers"*.[5]

38. Failing a change in the wording, we would like to see the Instructions amended to state that TRC shall interpret the definition in Article 7a(a) along the same lines as that used in the EU.

[5] European Commission (2018) *'Guidelines on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and services'* Para 52.

Market Share at which Dominance is Presumed

39. The market share used in the Jordanian Competition Law to presume dominance (40%) is low by international standards. Case law in the EU, the UK and the USA all point to a market share of 50% in the relevant market as the level at which dominance may be presumed[6].

40. In our view, therefore, to counterbalance the low market share at which dominance is presumed and to align with international best practice, the TRC should take especial note of the additional Impact Factors listed in Article 7a(c). These Impact Factors are likely to provide a more rounded picture of any firm's market position than a simple market share threshold, especially when that threshold is quite low.

Impact Factors

41. The proposed wording of Article 7a(c)(3) is confused by the second part of the sentence. We propose deleting the words "due to other buying relationships that the Licensee may have in the relevant market(s)".

42. We suggest amending Article 7a(c)(5) as below to bring the definition of the Impact Factor in line with best practice (addition underlined/deletion struck through):

    "Its control of essential facilities and infrastructure that is not ~~economically duplicable~~ easily duplicated."

43. In the same clause, we note that the TRC defines spectrum as a scarce resource. Whilst spectrum is limited and cannot be duplicated, the amount of spectrum that is released is under the control of the TRC. Therefore, spectrum licences are not economic barriers to entry, such as the cost of building an alternative fixed network, but legal barriers to entry that can be removed by the TRC itself.

44. At the extreme, if the TRC determined that more competition was desirable in the mobile market, it could issue new spectrum in relevant bandwidths reserved for a new entrant thus removing access to spectrum as a barrier to entry.

[6] See for example European Commission (2018) *'Guidelines on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and services'* Para 55.

45. The wording of Article 7a(c)(12) suggests that expansion is only possible in a market if part of the market remains unserved, and so penetration levels are below their potential. Whilst this is true, it suggests a somewhat static view of the market and ignores the potential for new substitute products entering the market and taking market share from existing suppliers. There are many examples of such substitute expanding in a market, for example messaging and calling apps taking over from SMS and voice calls and the smartphone taking over from the feature phone.

46. In our view possible entry and expansion by new substitute products should be included in the Impact Factors to ensure there is a more dynamic and forward-looking assessment of dominance.

47. We propose making changes to Article 7a(d) to emphasise that any remedies imposed are in the relevant market only. Our suggested changes are below (additions underlined).

    "Any designations of dominance pursuant to this Article shall be used both to: (1) impose ex ante regulatory obligations applicable to dominant Licensees <u>in the relevant market</u>, and (2) evaluate alleged anti-competitive misconduct by Licensees <u>in the relevant market</u> on an ex post basis."

48. We fully support the incorporation of forward-looking considerations in Article 7a(e) and also agree that the specifics of the case are relevant. We also suggest that the TRC takes note of the way in which forward looking considerations are taken account of in the UK's merger assessment guidelines. Here the Competition and Markets Authority (CMA) considers whether a market development will be "timely, likely and sufficient" to counter any dominance.[7]

49. There is no hard and fast definition of "timely, likely and sufficient" and so this must be assessed on a case-by-case basis. Nevertheless, in our view this approach ensures that any forward-looking assessment of dominance does have a framework for objective analysis.

[7] CMA (2021). Merger Assessment Guidelines. Para 8.31

Question 3

Does the industry agree with the provisions regarding the identification of joint dominance, including the considerations that the TRC will take into account in its assessment, as set out in Article 7(b)? If not, please state why this is not the case, with reasons, and propose an alternative approach.

50. Joint dominance is a concept that has emerged from competition law. In the European Union there are two seminal cases (*Compagnie Martime Belge* (2008) and *Airtours/First Choice* 1999) that have set much of the economics of assessing joint dominance.

51. Key to both of these cases is the observed behaviour of the jointly dominant firms. In *Airtours/First Choice* the European Commission, which was the competent authority investigating the case, found a three-step procedure for finding joint dominance:

    - Each firm has the ability to monitor that other suppliers are adopting a common policy.
    - All jointly dominant firms have the Incentive not to depart from common policy
    - The foreseeable reaction of competitors and consumers would not jeopardise results of common policy.

52. However, despite some successful cases, joint dominance has proved extremely hard to prove and, even where found by the competition authority, it has often been overturned in the courts. This is particularly true of findings of joint dominance under *ex ante* market reviews in the telecoms sector. Most recently, the Dutch Authority for Consumers and Markets (ACM) found KPN and Vodafone Ziggo to have joint dominance in the wholesale broadband markets in 2018. The decision was appealed to the court by Vodafone Ziggo and that appeal was upheld.

53. The ACM claimed that the two firms were symmetrical in the services they supply and the way they produce them. Vodafone Ziggo successfully demonstrated that they did not provide a wholesale service in competition with KPN and that it would be expensive for them to set one up. The court agreed and therefore threw out the ACM's findings.

54. Other joint dominance findings in *ex ante* regulation, in Spain and Ireland were also rejected by the courts.

55. So, whilst we have no objection to an Article in the Instructions concerning joint dominance, we are highly sceptical that it will ever be used as it is extremely hard to prove.

56. We have one specific comment to make regarding Article 7b(c) where the TRC sets out two ways in which joint dominance can be exercised. In particular we are concerned with sub-paragraph 2 which refers to "an explicit agreement between two or more Licensees to act in combination…".

57. The definition provided in this paragraph is more akin to a cartel than the tacit collusion that is normally the result of joint dominance. Cartel-like behaviour is already prohibited under Article 5 of the Competition Law as amended in 2023 and in our view this prohibition is sufficient.

Question 4

Does the industry agree with the overall, proposed complaint and assessment process (and the key process steps within it) set out in Article (9) of the draft updated Instructions? Additionally, does the industry agree with the proposed timelines set out by the TRC as part of the guidance on the complaint and assessment process? If not, please state why this is not the case, with reasons, and propose specific amendments to the overall process or timelines.

58. We have no objection to the process. However, we are concerned that no timeline is given in the Article for either phase of the investigation to be completed. We propose that the timeline should be consistent with Article 22: i.e. 30 days for the Phase 1 and a further 30 days for Phase 2.

59. We also suggest that the TRC should recognise that other parties do not have the investigative powers of the TRC so cannot expect the high level of evidence to be presented apparently required under Article 9(a)(1)(b). Instead, we propose that the TRC should only require other operators to provide sufficient *prima facie* evidence that shows the behaviour of the allegedly dominant firm is consistent with conduct that has the intention or effect of reducing competition. It would then be for the TRC to use its investigatory powers to seek more detailed evidence from relevant parties.

Question 5

Does the industry agree with the proposed amendments to the substantive assessments that the TRC will look to undertake when assessing each of the anti-competitive behaviours outlined in Articles (11) to (20)? If not, please state why this is not the case, with reasons, and propose alternative substantive approaches.

60. Although the final sentence of Article 11(a) is unchanged from the 2006 Instructions, the requirement to prove the expectation of recouping losses raises the bar for a successful finding of predatory pricing. We believe that the TRC should follow the example of the European Union and not require that proof of recoupment is necessary for demonstrating predatory pricing.

61. A predatory price sacrifices profits in the short run with the expectation of higher profits in the long run by driving competitors out of the market as they cannot match the predatory price set by the dominant Licensee. Indeed, jurisprudence in the USA assumes that not having the intention to recoup the investment would be an irrational policy by the firm. Thus, if recoupment cannot be proved, the dominant firm is presumed not to have the intention of harming competition.

62. In Europe, however, the competition authorities take a different approach and do not require actual or intended recoupment to be demonstrated.

63. European case law considers that the longer term profits expected from predatory pricing may not be achieved for reasons outside the control of the dominant firm, such as a change in market demand. Requiring recoupment could, therefore, allow the predator to get away with an anticompetitive action just because it failed to meet its aim due to other circumstances. Further, setting a predatory price may drive out competitors and so harm competition which is anticompetitive in and of itself whether lost profits are recouped or not.

64. It is our view that it should not be necessary for the TRC to prove recoupment and that therefore the phrase “and with the expectation of recouping such losses through subsequent higher prices” should be deleted from Article 11(a).

65. Article 11(b)(3) refers to the TRC identifying the relevant cost benchmark on a case-by-case basis. We agree with this statement but urge the TRC to always be open to new and

developing economic thinking on predatory pricing. A simple benchmark of a predatory price being below variable (or incremental) costs is a reasonable starting point, but the TRC should also consider how dominant firms may play signalling games and/or use algorithms to set prices in a manner designed to exclude rivals.

66. Article 12 prohibits anticompetitive cross-subsidisation. Whilst we accept that a dominant firm should not be allowed to leverage its dominance in one market into another where it does not have dominance, the TRC must also be aware that even a dominant firm may invest in new products that in the early stages of their product lifecycles may require cross-subsidies. The TRC therefore needs to be careful to distinguish between anticompetitive cross-subsidies and legitimate investments and should allow a fair allocation of common costs between products and markets.

67. Article 13(a) – (f) are concerned with price discrimination and we have no comments on these clauses.

68. Article 13(g) is concerned with non-price discrimination, and we are concerned that the Instructions only have one clause on this form of anticompetitive behaviour, which has been found to be a significant problem in other countries that required radical solutions. For example, in Italy, New Zealand and the UK, the problem of non-price discrimination was sufficiently severe that the regulator forced the vertical separation of the fixed line incumbent operator. We, therefore, believe that more can and should be said about non-price discrimination as there is no reason why this competition problem would be any the less in Jordan than elsewhere.

69. To minimise the changes required to the Instructions, we suggest that Article 13 is simply renamed as “Abuses of Dominant Position – Anti-competitive Price and Non-Price Discrimination” and clauses a – f slightly amended to reflect that they cover both forms of discrimination as set out in the table below. Clause g can be deleted. In our view these changes will make it clear how the TRC will investigate complaints of both price and non-price discrimination.

Wording in Draft Instructions	Suggested Wording
a) “Anti-competitive price discrimination” is the practice that occurs when a dominant Licensee charges different prices to similarly situated customers for the same product or service, in a manner that substantially reduces competition or otherwise injures wholesale or retail customers.	a) “Anti-competitive discrimination” is the practice that occurs when a dominant Licensee charges different prices to similarly situated customers for the same product or service (“price discrimination”) or different non-price terms, for example information asymmetry, (“non-price discrimination”) in a manner that substantially reduces competition or otherwise injures wholesale or retail customers.
b) In determining whether a particular instance of price discrimination by a Licensee is anti-competitive, the TRC shall apply the following two-step analysis: (1) whether the conditions exist for successful price discrimination, and, if so, (2) whether the discrimination is harmful to customers, whether wholesale or retail, or the market.	b) In determining whether a particular instance of discrimination by a Licensee is anti-competitive, the TRC shall apply the following two-step analysis: (1) whether the conditions exist for successful discrimination, and, if so, (2) whether the discrimination is harmful to customers, whether wholesale or retail, or the market.
c) In analyzing the conditions for successful price discrimination, the TRC shall consider a variety of factors, including, but not limited to (a) the dominance of the alleged violator, (b) whether price differences reflect corresponding differences in quantity, quality, cost or other characteristics, (c) whether the cost of service for different customers varies significantly, (d) whether the alleged violator has sufficient information to determine customer tolerance to pricing differences, and (e) whether the alleged violator is able to prevent arbitrage or resale.	c) In analyzing the conditions for successful price and non-price discrimination, the TRC shall consider a variety of factors, including, but not limited to (a) the dominance of the alleged violator, (b) whether price and/or non-price differences reflect corresponding differences in quantity, quality, cost or other characteristics, (c) whether the cost of service for different customers varies significantly, (d) whether the alleged violator has sufficient information to determine customer tolerance to pricing and non-pricing differences, and (e) whether the alleged violator is able to prevent arbitrage or resale.
d) The TRC will also take into account the potential positive welfare effects of price discrimination such as the expansion of output in the market and lower prices offered to certain customer groups.	d) The TRC will also take into account the potential positive welfare effects of discrimination such as the expansion of output in the market and lower prices offered to certain customer groups.
e) The TRC will assess whether the observed price discrimination is harmful to customers or exclusionary in nature on a case-by-case	e) The TRC will assess whether the observed discrimination is harmful to customers or exclusionary in nature on a case-by-case basis

basis based upon the extent and duration of the practice. f) The TRC may require a Licensee that is the subject of an anti-competitive price discrimination allegation to provide objective justification for the differential prices it has observed, including internal evidence on the cost of supply and demand.	based upon the extent and duration of the practice. f) The TRC may require a Licensee that is the subject of an anti-competitive discrimination allegation to provide objective justification for the differential treatment it has observed, including internal evidence on the cost of supply and demand.

70. The text of the old Article 14(d) that read "with the confidentiality of the information protected in accordance with the terms of its License and the Rulemaking Instructions. Any failure by a Licensee to submit such requested cost information may result in a presumption of abuse of dominance against the Licensee" has been deleted. We believe that this text should be retained to provide the necessary incentives for the alleged perpetrator to provide the information to the TRC. Without these conditions in place, we suspect that a firm practicing a margin squeeze will be unwilling to provide the necessary information and this will harm the TRC's ability to investigate the complaint.

71. In Article 15(a), we propose that the words "or effect" are added after "objective". This will allow the TRC to investigate complaints without having to prove intent if such contracts still have an anticompetitive effect.

72. When investigating a long-term contract, the TRC should not apply an arbitrary term to all contracts that it considers excessive. Rather, the TRC should recognise that for some contracts the Licensee will have made significant investments in infrastructure and a long enough contract term must be allowed to ensure that the Licensee can recoup that investment together with its cost of capital.

73. In some business markets the customer may request a contract term of sufficient duration that the supplier may recover any initial costs over the term of the contract at a rate that keeps annual charges low or prevents the supplier pulling out of the contract after a short period. In these instances, the term would be set as a condition of purchase by the customer and not by the supplier, whether or not that supplier is dominant, and the TRC should recognise that such a contract term is in the best interests of the customer. Such a situation should not be covered by these Instructions as it is not likely to harm competition.

74. Article 16 is new and there is no equivalent in the 2006 Instructions. We have no objection in principle to an Article that prevents a dominant firm from charging excessive prices that harm consumers. However, we do have two comments in the draft Article.

75. First, we believe that Article 16(a) would be more precise if the words "economic value" were replaced with "cost". The precise measure of cost would need to be determined by the TRC as set out in the Article.

76. Secondly, the TRC should recognise that Licensees may make significant investments in new services, for example upgrading their mobile networks to 5G, or in increasing efficiency and lowering the cost of service delivery. To ensure Licensees have the incentives to make such investments, they need to be able to set a price that allows them to make a return on that investment in line with the risk as reflected in their cost of capital. If the upside potential earnings are, in some way, capped by regulation whereas the downside risk is not protected, then firms may not be willing to make the investments.

77. Licensees must therefore be able to set prices at a level that reflects the underlying costs of the service and the benefits that come from innovation and efficiency. This may well mean that the more innovative or more efficient firm will have enjoy higher profits, but these are earned profits resulting from its investment and should be encouraged by the TRC and not regarded as an abuse of dominance. Such pricing is only anticompetitive if the firm setting higher prices is protected by economic conditions that prevent consumers switching to alterative suppliers.

Question 6

Does the industry agree with the detailed guidance presented on the substantive approaches that the TRC will look to adopt in its assessment of proposed transfers of ownership or control, as set out in Article (21) of the draft updated Instructions?

78. We have no objection to the content of Article 21. However, we do think there are a few additional points that need making.

79. First, in Article 21(a), we suggest that the words "intention or" are added before "effect".

80. Second, although we have already noted that the 40% market share at which a company becomes presumptively dominant is too low, we believe that the Article would be

strengthened by a statement requiring the parties to notify the TRC in advance if the threshold in Article 21(c) is likely to be exceeded. Without such an addition it is possible that the TRC will not be aware of Licence acquisitions until after the fact.

81. Third, the TRC should be aware that horizontal mergers may lessen competition by firms creating an ecosystem. This is an emerging area of competition economics driven by the activities of "big tech" companies. In essence it refers to firms becoming dominant in related markets even if they are not dominant in a narrowly defined market. Consumers find themselves using the same firm for a variety of applications such that the market power of the firm supplying the ecosystem is greater than its power in the sum of the parts. This approach to dominance is being applied with the Digital Markets Act in the European Union and by the Digital Markets Unit of the UK Competition and Markets Authority (CMA).

82. An example of such an ecosystem was the proposed merger between Microsoft and Activision which the CMA rejected in 2023, even though Microsoft was not active in the games publication market where Activision operated and Activision was not active in cloud services. The CMA considered that the combination of the two would create an ecosystem that would give the combined operation a dominant position.

83. Finally, emerging competitors can be acquired to exclude them from the market and deter future competition, so called "killer acquisitions". It is at least arguable that Meta'a acquisition of WhatsApp was just such a killer acquisition.

84. Conversely, acquisitions may help strengthen existing firms against realistic future entrants. An example is the Connect Topco/Viasat merger in the UK which was allowed by the CMA as a defensive move against SpaceX entering the satellite market. The CMA concluded that a traditional potential market analysis could have resulted in a substantial lessening of competition (SLC) and so would probably have been disallowed. However, the likely emergence of SpaceX as a future competitor mitigated the expected SLC and so the merger was allowed.

Question 7

Does the industry agree with the information that the TRC proposes to be included as part of a formal notification of a transfer of ownership in Article (22)? Is there any additional information that the TRC should request as part of the initial notification to potentially streamline the TRC's formal investigation? Further, does the industry agree with the proposed

investigation process and associated timelines proposed by the TRC? If not, please state why this is not the case, with reasons, and propose specific amendments to the overall process or timelines.

85. Article 22(b) requires that if a party seeks to acquire an interest in a Licensee of at least 10% it must notify that transaction to the TRC before the transaction is completed. Whilst we agree a threshold should be set, our view is that 10% is somewhat low.

86. The UK's CMA, for example does not require notification of the acquisition of shareholding until the acquiring firm can have a "material influence" over the merged entity. Whilst the effect of the shareholding is more important than any specific threshold, the CMA considers that a shareholding above 25% is likely to allow the shareholder a material influence over policy.[8]

87. The same 25% threshold applies in the Netherlands.

88. Thus, in our view, there is no need for a shareholding below 25% to be notified to the CMA. We therefore think that the CMA should consider whether their 10% threshold is too low and it could be raised to 25%.

89. We agree with the timing for reviews set out in Article 9(d) – (f). It is important that reviews of acquisitions are completed in a timely manner so that important business transactions are not unduly held back by lengthy investigations.

[8] CMA (2021) Mergers: Guidance on the CMA's Jurisprudence and Procedure Paras 4.21 – 4.27