SPC Network

Reply Comments to TRC Public Consultation Document

Update to Competition Safeguard 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 market, to reply to the comments made by other Licensees on the TRC's revised Competition Safeguard Instructions (The Instructions).

2. The comments made are generally of a high standard and, in our view, some should be considered seriously by the TRC as they will improve the process of competition investigations and market reviews. That said, there are some proposals from other stakeholders with which we disagree and believe would weaken competition protection if adopted by the TRC.

3. In this report we address the following topics:

   - General comments made by other Licensees
   - Answers to specific questions asked by the TRC.
   - Comments on specific Articles made by Batelco/Umniah and by Orange.

4. The responses made by Batelco and Umniah are so similar that we have treated them as a single response. Whist we respect JorMal's postion in the market, its submission reads more like a complaint against mobile operators than a response to the consultation and so we have not replied to their comments.

5. We are, of course, willing to engage in further discussion with the TRC should this be needed.

2 GENERAL COMMENTS BY OTHER LICENSEES

2.1 Frequency of Market Reviews

6. Section 2 of Orange's response sets out the case for a new set of reviews of electronic communications markets, largely on the basis that market conditions have changed since the last set of reviews were completed in 2020.

7. Whilst the case made by Orange is not directly relevant to the consultation on Competition Safeguards, we agree with them that a new set of market reviews is needed. Next year it will be five years since the completion of the market reviews that resulted in the current set of regulations and we consider five years to be an appropriate length of time between reviews, regardless of whether market conditions have changed or not.

8. Under the European Electronic Communications Code (EECC), European National Regulatory Authorities (NRAs) are required to undertake market reviews on a five yearly cycle. This period is considered appropriate by the European Union to provide "stability and predictability of regulatory measures". Interim reviews may be conducted if market conditions deem them necessary.[1]

9. Orange makes the case that market conditions and have changed since 2020 and that the previous analysis of dominance was flawed. We make no comment on the substance of their argument, which is an empirical matter and needs to be addressed through an objective market analysis. However, we do agree with the need for a new review of fixed broadband, as set out in Section 2.2.3 of their response. We also agree with their proposal for a 'regulatory period of five years' and for the TRC to consider requests from market players more frequently when market conditions justify an earlier review.

10. We also agree with Orange that the draft Instructions should not be used retrospectively and applied to any operator found dominant under the 2020 market reviews and should only be applied following a new set of market reviews.

2.2 Role of the 2009 White Paper

11. Orange comments on the final paragraph of the Introduction section of the consultation document on the draft Instructions, where the TRC states: "*The final updated Instructions will be published following the public consultation process, following which the White Paper will be superseded by the Instructions."* The footnote to this sentence states:

[1] EECC Recital para. 177

"*However, the White Paper will remain available as a non-binding reference document for ex ante market reviews*".[2]

12. Orange objects to this proposal, arguing that Articles 23-27 of the draft Instructions "do not offer sufficient detail to provide market players with clarity on how the TRC will act" and this will create "substantial regulatory uncertainty that will undoubtedly affect future investment by market players".

13. We are in full in agreement with Orange on this point. In our own response, we proposed that the finalised Instructions should state that in the event of a discrepancy between the law and the Instructions, the law takes precedence. We would like to add to that proposal that the Instructions should also state that the TRC should take utmost account of the White Paper when conducting a market review, in the same way that European Member States are required to utmost account of "*guidelines, opinions, recommendations, common positions, best practices and methodologies adopted by BEREC*".[3] The reasons for any deviation from the White Paper should be fully explained and justified by the TRC.

[2] TRC (2024) '*Public Consultation Document: Update to Competition Safeguard Instructions'* page 2
[3] EECC Article 10

3 COMMENTS ON SPECIFIC 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.

14. In our response we stated that we thought it would be helpful for the TRC to provide sub-headings within the Instructions to show which Articles refer to competition law investigations conducted *ex post*, mergers and *ex ante* market reviews. The responses to this question demonstrate the need for such signposting as respondents appear to be understandably confused about whether this question applies to competition investigations, market reviews or both. We therefore repeat our call for the Instructions to include sub-heading for each Section to ensure market players know whether an article is related to *ex post* investigations, mergers or *ex ante* reviews.

15. We repeat our view here that we support the use of case-by-case product market definitions for *ex post* investigations under competition law, which are likely to be one-off investigations into specific alleged anticompetitive activities. However, we do not support the use of case-by-case market definitions for *ex ante* market reviews where regulatory consistency is required between market reviews.

16. Further, any market definition exercise for an *ex post* market investigation must be objective and must be based on a rigorous analysis of the boundaries of a market, using the same techniques as that those used in a market review. It is important that the TRC does not follow what might be considered a marketer's perception of a market (where the company under investigation targets specific customer groups) but sticks to the economic analysis used by competition and regulatory authorities, (where the key issue is demand and supply side substitutability).

17. Taking the example of a "youth" segment, one operator may have been more successful in targeting such a segment by producing a more relevant product/service mix. However, that does not mean it is a separate market for the purposes of competition law or regulation, as other companies have the assets, (e.g. spectrum licenses) in place to compete in that market as well.

18. Batelco/Umniah argue for geographic market definitions to be set at a micro level taking account of arrangements with individual property developers and so forth. We think it would be incorrect for the TRC not to accept such a proposal as it runs the risk of many,

potentially hundreds, of individual geographic markets that would be unwieldy for the TRC to manage as it may have to apply different remedies in each of the many geographic markets, should any operator be found dominant.

19. Paragraphs 48 – 51 of the European Commission's SMP Guidelines[4] set out the established process by which NRAs should define geographic markets. Although Jordan is not a member of the EU, these Guidelines are generally regarded as an appropriate methodology even for non-Member States. These paragraphs are summarised below

- A 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 homogeneous, and which can be distinguished from neighbouring areas in which the prevailing conditions of competition are significantly different.
- NRAs should ensure that the geographic units: (a) are of an appropriate size, i.e. small enough to avoid significant variations of competitive conditions within each unit but big enough to avoid a resource-intensive and burdensome micro-analysis that could lead to market fragmentation, (b) are able to reflect the network structure of all relevant operators, and (c) have clear and stable boundaries over time.
- If regional differences are found that are not sufficient to warrant different geographic markets or SMP findings, NRAs may pursue geographically differentiated remedies.
- In the electronic communications sector, the geographical scope of the relevant market has traditionally been determined based on to two main criteria: (i) the area covered by a network; and (ii) the existence of legal and other regulatory instruments.

20. The final paragraph above is particularly relevant as it notes that geographic markets have tended to be determined on the area covered by a network. This means that where two or more networks cover the same area but one has been more successful than its rivals in one part of the area, this part does not constitute a separate geographic market.

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

[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*"

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.

21. There is general agreement with the Impact Factors, and we also agree.

22. However, there is also general concern that the 40% market share threshold for finding a Licensee dominant is too low. Orange also disagrees with the definition of dominance and points out that the definition used by the TRC is not consistent with the law. [5]

23. We agree on both points and note that in the 2006 Instructions, the markets share at which a firm is presumed dominant was set at 50%, in line with international best practice. In our view, this should remain the threshold for finding a licensee dominant.

24. If, however, the TRC feels it is unable to keep the 50% threshold then we restate our proposal in our response to the consultation that the TRC should take especial note of the Impact Factors when assessing dominance, as any one of them could counteract market share as an indicator of dominance. Further, the TRC should make it clear in the Instructions that it will do so.

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.

25. There is a wide variety of views expressed by Licensees in relation to the question of joint dominance. Batelco/Umniah are concerned about the effect on competition if Licensees are fearful of responding to rivals' actions in case the TRC finds joint dominance; FiberTech thinks the Jordanian market structure could facilitate joint dominance, but points out it is difficult to prove; and Orange also points out it is difficult to prove on an *ex ante* basis. Our own response is broadly consistent with the other Licensees.

26. On this basis we suggest that the TRC withdraws joint dominance from draft Instructions and consults more specifically on this question to ensure that it gets it right. It is also important that the TRC is clear whether joint dominance applies to market investigations, market reviews or both.

[5] Orange (2024) '*Response to the TRC consultation: Update to Competition Safeguard Instructions'* Section 5.6.

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.

27. We note the answers of other Licensees and have no objections to the points raised.

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.

28. Our major concern with the answers to this question is Orange's proposal with regards to Article 11 and the recoupment of profits following a period of predatory pricing. Orange regards a strong likelihood of recoupment of lost profits by the dominant operator is a "necessary condition" of predatory pricing.

29. For the reasons set out in our response to the consultation (paragraphs 60 – 65), we disagree with Orange on this matter.

30. The action of a dominant operator setting its price below its own cost with the intention or effect of preventing market entry or driving a rival out of the market should be seen as anticompetitive in its own right and not depend on recoupment of lost profits. A failure to recoup lost profits may be due to some unforeseen market condition that should not protect the dominant firm from being found to have behaved in an anticompetitive manner in the first place.

31. Further, requiring the proof of recoupment raises the barrier to proving predatory pricing, which makes it easier for a dominant operator to behave in such a manner. The TRC would have to identify the period over which predatory pricing took place, the lost profits over that period and show that those lost profits were recouped over a specific time period once the dominant firm raised prices above the predatory level. This raises the level of proof required, even though the act of predatory pricing is itself anticompetitive regardless of what follows.

32. As we pointed out in our response, European case law rejects the need for a finding of recoupment of profits for the reasons set out above.

33. In summary, treating recoupment of lost profits as a "necessary condition" for predatory pricing will weaken Article 11 and make it easier for a dominant firm to implement predatory pricing without fear of being found to have done so and have sanctions applied.

34. Orange also proposes that Article 15 (Excessively Long Term Contracts) should be applicable to all Licensees and not just any found to be dominant. We also disagree with this proposal.

35. ELTCs are an abuse of dominance and only a dominant operator can abuse its dominance. It therefore follows that, in a market investigation, only a dominant firm can be subject to a sanction for imposing an ELTC.

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?

36. We note the answers of other Licensees and have no objections to the points raised.

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.

37. We note the answers of other Licensees and have no objections to the points raised. However, we think that Orange's suggestions with regard to including mechanisms for merging parties to offer undertakings and for the TRC to specify remedies are helpful.

4 COMMENTS ON SPECIFIC CLAUSES

38. The tables below set out comments on specific clauses made by Batelco/Umniah and Orange and our responses to those comments.

Table 1: Batelco/Umniah Comments

Article	Batelco/Umniah	Our response
Article 4: Scope	Suggests the TRC should keep 2006 Provision regarding cases brought by the TRC or another Licensee alleging anticompetitive behaviour.	We do not consider this is necessary as it is already covered by provisions on *ex post* assessments in Draft Instructions.
Article 5: Market Definition	5a) Case-by-case analysis should be conducted when specific circumstances arise. 5b) When the HMT is conducted using a qualitative analysis, the TRC should provide guidelines. 5c4) Then TRC should clarify how chains of substitution are evaluated and whether burden of proof lies with Licensee or TRC. 5c5) TRC should set out specific criteria for analysing indirect price constraints. 5d) The TRC should outline how often market definitions are reviewed.	We are not convinced that this is needed as the requirement seems to be covered in the new sub-clause. We agree. We accept reality that qualitative analysis is often a necessity, but qualitative analysis must be done in a rigorous and objective manner. We agree the process for evaluation should be included, but what constitutes a chain of substitution is included in the White Paper. Where an *ex post* competition analysis assessment is being conducted, our view is that the burden of proof lies with the TRC. Agree this would be helpful. Again see White Paper p.24. We agree the market review process should be conducted every five years, but it is our understanding that this Article refers to competition assessments.

	5e-g) TRC should set criteria for when sub national markets are justified. 5 – all) Should allow for customer segmentation, e.g. business/residential, pre/post paid.	We agree but are not sure if this is necessary given that it well known that geographic markets are based on heterogeneous competitive conditions. We agree in principle, but without prejudice to actual findings of customer segmentation. We would also not want to see micro-geographic markets as this is unwieldy for both the TRC and Licensees. Any market definition must be based on well-established economic principles reflecting demand and supply side substitutability of products and not on a marketer's perception of segmentation.
Article 8: Market Share	Batelco/Umniah objects to "where appropriate .." at the start of the Article and wants the TRC to set out guidelines for determining what is "appropriate". Batelco/Umniah want market share to be measured on a dynamic basis, i.e. changes over time.	We agree that the phrase can add ambiguity. However, the TRC must also have the freedom to determine if market share is appropriate in assessing dominance and so any guidelines should not be overly prescriptive. We agree.
Art 7(a)	7a-b-1) Batelco/Umniah suggests changing the Article to allow for effective competition even if Licensee has more than 40% market share. 7a-c-5) Essential facilities should be defined.	We agree. In fact, we would say this is essential given the low market share threshold applied to dominance. We do not object to this proposal, but TRC must not be too prescriptive as new essential facilities may enter market.

	7b) TRC should promote competition through *ex ante* measures and then revert to competition law.	We agree, but do not see anything in Instructions that prevents that.
Article 8: Anticompetitive conduct	Batleco/Umniah seek clarification on when Article 8 will be used.	Batelco/Umniah's comment demonstrates our concern with potential confusion about the application of these Articles to *ex post* competition assessments and *ex ante* market reviews. We have a different understanding of this Article and believe it applies to *ex post* assessments only.
Article 9 Competition Analysis Process	Batleco/Umniah seek clarification on when Article 9 will be used. 9-3) Batelco/Umniah seek clarification of role of competition law/Directorate and TRC.	We agree. We agree.
Art 21 Acquisition	Article 21-d-8) Batelco/Umniah seek clarification on R&D. Art 21-e) Batelco/Umniah suggest using simpler analysis in most cases and leaving more advanced methodologies for more complex case.	No objections No objections.

Table 2: Orange Comments

Article	Orange	Our response
Article 5: Market Definition	Clause b) Orange supports change that drops starting from pre-defined retail markets	Whilst conducting market definition of competition cases on a case-by-case basis is appropriate, wholesale markets should still be linked to retail markets especially where licensees under investigation are vertically integrated. Wholesale demand is derived from retail demand so necessary to assess competition conditions in retail markets and how whether retail competition would still exist without regulation in the wholesale market.
	Clause d) Orange rejects use of political/admin boundaries for sub-national markets.	Agreed. Sub-national markets are related to different conditions of competition and not related to administrative areas.
	Clause e) Orange rejects new wording and proposes resorting to old wording.	No objection to either wording. The important point is that sub-national markets are related to competitive conditions. They tend to be national for mobile (national licenses) but may be sub-national for fixed dependent on extent of overlapping network build.
	Clause g) Orange supports, but reiterates its strong objection to downgrading the existing White Paper. Orange claims that NRAs elsewhere have largely defined WLA market as national in scope.	We disagree with their claim regarding national Wholesale Local Access (WLA) markets. There are several European examples of sub-national markets based on competitive conditions. These include: Bulgaria, Denmark, Finland, Hungary, Ireland, Italy, Netherlands, Poland, Romania and the United Kingdom. In these countries geographic markets are usually

		defined as competitive or not based on the number of operators present in an area and the market share of largest operator and/or the market share of individual rivals.
	Points to TRC errors in application of Modified Greenfield Approach in Article 23.	Commented on later.
Article 7(a)	Orange objects to the change in the definition of dominance to "influence or control key market outcomes" for three reasons: i) Not in line with competition law definition of "influence and control" and Clause b1 of Art 7a. ii) Inconsistent with TRC 2009 Guidance that uses the EU definition. iii) Does not use language that illustrates market power to a layperson. Orange also objects to use of 40% market share as the threshold for dominance. Orange proposes that the threshold should be set at 50%.	We agree. Consistency needed as is a clear definition. However, the definition in the Instructions must comply with the law. Would propose that TRC states that it will interpret law as consistent with EU definition. We also agree, and support Orange's proposal. If the TRC does not revert to 50% then it should make clear in the Instructions that it will take especial note of the Impact Factors that may counter market share as an indicator of dominance.
7(b) JD	Orange suggests the definition of Joint Dominance should be changed to be consistent with law: i.e. "and" not "or".	Agree.

	Orange is unclear as to whether all five of the TRC conditions must be met. It suggests that the three conditions used by EU must be met. Others are optional. Agrees that TRC should be able to find Joint Dominance *ex ante* and not rely on evidence of tacit collusion.	We agree. We have no objection but warn that it has been very difficult to make an *ex ante* finding of JD stick in other countries. We maintain our overall view set out in response to comments on Question 3 that the TRC should remove the Article on Joint Dominance from the Instruction and consult on this provision in more detail to ensure the Article is workable.
Article 9 Competition Analysis Process	Orange agrees with the TRC but wants to more clarification on what the TRC will do in a Phase 1 investigation.	We have no objection and agree it would be helpful to know.
Article 11 Predatory Pricing	Orange agrees with the definition of Predatory Pricing but wants more specific guidance on what the TRC sees as Predatory Pricing. Orange considers recoupment is a necessary condition for Predatory Pricing.	We have no objection but want the TRC to be open to new theories of Predatory Pricing. We strongly disagree for the reasons set out in our response to comments on Question 5.
Article 12 Cross Subsidisation	Orange considers the Article to be unsatisfactory as not practical.	We partially agree with Orange, especially with points 1 & 3. However, we are always suspicious of a dominant Licensee not wanting regulation. We therefore suggest the TRC carefully considers Orange's motivation for its answer.

Article 14 Margin Squeeze	Orange wants the Margin Squeeze Test Instructions withdrawn.	We disagree. Margin Squeeze is a common tactic for dominant firms and easier to prove that Predatory Pricing. It is therefore important to have a Margin Squeeze Test.
Article 15 Long term contracts	Orange says that the prohibition should apply to all Licensees not just those that are dominant.	We disagree. An excessively long term contract is an abuse of dominance and only a dominant firm can abuse its dominance. Therefore, the prohibition should only apply to the dominant operator.
Article 20 Collusion	Orange says that the Article is "unsatisfactory" and can be dealt with better elsewhere.	We disagree. The Article is very clearly concerned with specific collusive behaviour.
Article 21 Acquisition	Orange says that unclear terms are used in the Clause.	No objections.
Article 22. Acquisition	Orange says that the Article does not allow enterprises to offer undertakings nor does it contain a mechanism for TRC to specify remedies.	We agree these would be helpful.
Article 23 Approach to *ex ante* market reviews.	Orange has three main concerns with this Article: i) Article fails to set out the complementary purposes of *ex post* and *ex ante* and asks TRC to include text suggested by Orange. ii) Modified Greenfield Approach – suggested changes to make process clearer.	We agree and have no objection to the text being included. No objections.

	iii)	Forward looking period of 5 years.	We agree to 5 years so long as that is tied in with a regulatory cycle of the same period.