



# Merger Review Process

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# Table of Contents

1	Introduction.....	3
2	Definitions.....	4
3	Role of the CITC.....	5
4	Transactions subject to Review .....	6
5	Review Procedures .....	7
5.1	Informal advice .....	7
5.2	Application.....	7
5.3	Review phases .....	7
5.4	Remedies .....	9
5.5	Conclusion of Decision-making.....	10
5.6	Treatment of confidential information.....	10
6	Assessment Framework.....	13
6.1	Principles of the assessment .....	13
6.2	Market definition .....	13
6.3	Competition analysis .....	14
6.4	Barriers to entry.....	16
6.5	Efficiencies .....	17
6.6	Benefits to the Public .....	17
7	Filing Requirements .....	18
7.1	Form of notification / information to be submitted at the start of the review (first phase) 18	
7.2	Additional Filing Requirements in case there is a change of control or other competition concern .....	18
	Annex A: Application .....	19

# 1 Introduction

- 1.1 These Guidelines supplement the relevant articles of Communications and Information Technology Commission (CITC) statutes relating to the review of mergers.
- 1.2 These Guidelines may in due course be amended, updated, supplemented, replaced or revoked.
- 1.3 These Guidelines should not be seen as a substitute for the Act, the Bylaws other regulations issued or overseen by the CITC or any other relevant legal statutes.
- 1.4 Whilst the CITC will have regard to these Guidelines in reviewing mergers in the ICT sector, the CITC may apply them flexibly and may depart from the approach described in the Guidelines where there is an appropriate and reasonable justification for doing so.

## 2 Definitions

2.1 The words and expressions defined in CITC Statutes shall have the same meaning when used in this document. The following words and expressions shall have the meaning assigned to them below, unless the context requires otherwise.

2.1.1 **“Conglomerate transaction”** means a transaction leading to a change in control in which the transacting parties are engaged in business activities in which the products or services are a) within separate markets or b) within the same market but complementary to one another.

2.1.2 **“Coordinated Effects”** means effects that increase the likelihood or ability of Service Providers in the market to coordinate their pricing or other commercial conduct.

2.1.3 **“Horizontal transaction”**: means a transaction leading to a change in control in which the transacting parties are engaged in business activities in the same relevant market.

2.1.4 **“Joint venture”**: means a transaction in which a third party is founded by two transacting parties jointly, sharing resources, equity, revenues, expenses, and management to pursue a common goal. Each transacting party usually retains its own corporate identity

2.1.6 **“Notifying Party”** means a party that has submitted an application to the CITC for approval of a Reviewable Transaction pursuant to Article 25 of the Act.

2.1.7 **“Remedy”** means any requirement imposed by the CITC to address a concern relating to a merger.

2.1.8 **“Reviewable Transaction”** means a transaction that

- (i) any Service Provider undertaking any merger with another domestic or foreign Service Provider;
- (ii) any Service Provider or any person purchasing 5% or more of the stocks or shares of a Service Provider<sup>1</sup> licensed to work in the Kingdom; or
- (iii) any Service Provider or any person purchasing a percentage that creates a dominant position in a specific telecommunications market or leading to a change in control.

2.1.9 **“Unilateral effects”** means effects that increase the likelihood or ability of a Service Provider to act unilaterally of customers or competitors.

2.1.10 **“Vertical transaction”**: means a transaction leading to change in control in which the one of the transacting parties is engaged in business activities in a market which is upstream or downstream of the other transaction party.

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<sup>1</sup> Article 25(2) of the Act refers to acquisitions of shares in an "operator". However, as noted above, the term "Service Provider" is used throughout this document in the interests of consistency

### **3 Role of the CITC**

- 3.1 Pursuant to Article 29 of the Bylaws, the CITC is required to perform the following functions and duties of relevance to its role in reviewing mergers and acquisitions in telecommunications markets in the Kingdom:
  - (i) to promote efficient and sustainable competition for the benefit of users;
  - (ii) to monitor and review practices that would restrict competition; and
  - (iii) to review and decide upon proposed mergers of Service Providers.
- 3.2 In pursuance of these functions and duties, the Act and the Bylaws contain a regime for approval by the CITC of mergers between Service Providers and certain acquisitions of shares in Service Providers. This regime is described in detail in the remainder of these Guidelines.
- 3.3 The Council of Competition Protection and the CITC may have concurrent jurisdiction over some mergers and acquisitions, in which case a separate notification to each agency will be required.
- 3.4 Furthermore, the Capital Market Authority has responsibility for regulating capital markets in the Kingdom and, in particular, overseeing offers to purchase shares in publicly listed companies. The CITC will consult with the Capital Market Authority in the context of reviewing a Reviewable Transaction involving a publicly listed Service Provider, where the CITC considers this to be appropriate.

## 4 Transactions subject to Review

4.1 The Reviewable Transactions set out under the Act as follows:

- (i) any Service Provider undertaking any merger with another domestic or foreign Service Provider;
- (ii) any Service Provider or any person purchasing 5% or more of the stocks or shares of a Service Provider licensed to work in the Kingdom; or
- (iii) any Service Provider or any person purchasing a percentage that creates a dominant position in a specific telecommunications market or leading to a change in control.

4.2 For clarity, paragraph 4.1(iii) applies to any subsequent transactions.

4.3 With respect to paragraph 4.1(iii), the CITC will consider a Service Provider as dominant in accordance with applicable regulations.

4.4 With respect to paragraph 4.1(iii), the CITC will generally presume that Company A (the acquiring party) acquires or obtains control over or a significant interest in Company B (the target) where, following the proposed Reviewable Transaction, Company A would:

- (i) hold 30% or more of the shares in Company B, or
- (ii) have the ability through an agreement, arrangement or otherwise to direct or block major strategic decisions of Company B. Major strategic decisions would include approving the Service Provider's budget or business plan and the appointment of senior management.

4.5 This presumption may be overturned if the CITC considers there are reasonable grounds for doing so, which may be founded on evidence provided by a Notifying Party.

4.6 Depending on the facts of a particular case, the CITC may also conclude that Company A acquires or obtains control over or a significant interest in Company B if Company A would hold *less* than 30% of the shares in Company B, following the proposed Reviewable Transaction. In making an assessment of what will (or will not) constitute control or influence, the CITC may consider a range of indicators including,:

- (i) the level of shareholding which Company A would hold in Company B;
- (ii) the existence of any special voting or veto rights attached to that shareholding;
- (iii) the pattern of distribution of other shareholdings in Company B and, in particular, whether Company A would be the largest shareholder;
- (iv) whether Company A would also have the right to appoint its representatives to the Board of Company B; and
- (v) any other agreements or financial arrangements which make Company B dependent on Company A.

## 5 Review Procedures

### 5.1 Informal advice

- 5.1.1 The CITC would encourage parties to contact it at an early stage to discuss any application for approval of a Reviewable Transaction which they are planning to submit.
- 5.1.2 The CITC is willing to provide informal advice in advance of any such application. The advice would be provided on a confidential basis.
- 5.1.3 As this advice is provided outside of the CITC statutory requirements, it will be of a non-binding nature and will not be subject to any formal time limits.
- 5.1.4 There are no formal informational requirements for seeking such informal advice; however, the parties seeking such advice should consider the kinds of information required for approval as set out in article (7) and be aware that the quality of informal advice provided by the CITC may depend on the amount and nature of the information provided.

### 5.2 Application

- 5.2.1 The CITC's approval is required before a Reviewable Transaction may be implemented.
- 5.2.2 A Notifying Party shall inform the CITC within 5 working days of any initial agreement reached with regard to a Reviewable Transaction.
- 5.2.3 Notwithstanding this obligation, the CITC will accept an application for approval of a Reviewable Transaction prior to the execution of a legally binding agreement, provided that the Notifying Parties can demonstrate to the CITC a good faith intention to enter into an agreement (for example, on the basis of a memorandum of understanding, letter of intent or agreement in principle signed by the parties to the Reviewable Transaction or, in the case of a public bid, that they have announced an intention to make a bid).
- 5.2.4 Failing to fulfil the requirements above may result in a financial or other penalty in accordance with CITC statutes.
- 5.2.5 Where a particular Reviewable Transaction falls to be notified under both Article 25(1) and (2), a single application to the CITC for approval will suffice.

### 5.3 Review phases

#### 5.3.1 Phases of the review and time limits for each phase

- 5.3.1.1 Upon receipt of an application form, as set out in the Annex (A), for approval of a Reviewable Transaction, the CITC will conduct its initial review (the "**first phase**" review). Within 90 days of receipt of a complete application, the CITC shall:
  - (i) issue a decision in accordance with Article 35(2)(a) to (c) of the Bylaws; or
  - (ii) issue a notice in accordance with Article 35(2)(d) of the Bylaws initiating an investigation of the proposed Reviewable Transaction (the "**second phase**" investigation).

5.3.1.2 Following the conclusion of a second phase investigation, the CITC shall issue a decision in accordance with Article 35(4) of the Bylaws.

5.3.1.3 If the CITC decides to initiate a second phase investigation, it will generally endeavour to conclude that investigation by issuing a decision within an additional 90 day period. These time periods are subject, in both cases, to the Notifying Parties providing all requisite information in a timely manner.

### **5.3.2 Major milestones in the process**

5.3.2.1 The CITC's first phase review of a Reviewable Transaction will typically include the following major milestones:

- (i) application for approval;
- (ii) feedback to the Notifying Parties on any issues identified through the use of a private informal meeting;
- (iii) consideration of possible remedies; and
- (iv) decision.

5.3.2.2 In the event the CITC initiates a second phase investigation, the same milestones will typically be included during that second phase, but it will include third party consultation.

5.3.2.3 If the CITC uses other milestones it will endeavour, where applicable, to inform the Notifying Parties of its intention in advance, and outline its reasons for doing so.

### **5.3.3 Circumstances in which the time limits may be extended**

5.3.3.1 Subject to the overriding statutory time limits, the CITC may extend its review beyond its process target periods of 90 days (for the first phase review) and other 90 days for the second phase investigation, where:

- (i) Notifying party has failed to provide (or to provide in full) the requisite information within the time limit fixed, the CITC may issue a notice to the Notifying Parties staying the review with effect from the date of the notice.
- (ii) The time limits referred to in paragraph (5.3.1) will be suspended for the period between the date of the notice referred to above and the date on which the CITC receives the requested information in a complete and correct form.
- (iii) Following receipt of the information, the CITC will issue a further notice to the Notifying Parties confirming the number of days during which the review was stayed.
- (iv) a transaction raises novel or complex issues;
- (v) the CITC proposes to accept remedies; or
- (vi) the Council of Competition Protection is conducting a concurrent review of the same transaction and has extended its review period.

### **5.3.4 Process and timing for providing feedback to the parties on potential issues**

- 5.3.4.1 In order to provide feedback during the review process, the CITC will typically invite the Notifying Parties to a private informal meeting during the first phase of its review. Attendance at the meeting is voluntary for the Notifying Parties.
- 5.3.4.2 The purpose of the meeting is to ensure that the CITC has all the necessary information to make its report on the Reviewable Transaction to the Board. It may also be used as an opportunity to put third parties' concerns to the Notifying Parties and to hear their response. The CITC is unlikely to propose an informal private meeting if it considers that the Reviewable Transaction does not raise competition concerns.
- 5.3.4.3 In the event the CITC decides to open a second phase investigation, it is likely to invite the Notifying Parties to a further informal private meeting.
- 5.3.4.4 The CITC may also decide to invite third parties and/or relevant government representatives reviewing the Reviewable Transaction to any informal private meeting.
- 5.3.4.5 The Notifying Parties will be entitled to make oral representations at these informal private meetings and/or written representations by way of follow up, within a timeframe which will be specified by the CITC at the time of scheduling the meeting. The CITC will take any such representations into account in making its report on the Reviewable Transaction to the Board.

### **5.3.5 Role of third parties**

- 5.3.5.1 The CITC will invite third party comments on a notified Reviewable Transaction, in phase two, by issuing a notice commencing a review in according to CITC statutes.
- 5.3.5.2 Notifying Parties should refer to the Rules of Procedure, which set out specific requirements for documents filed in a review, and other provisions in relation to filing documents with the CITC.

## **5.4 Remedies**

- 5.4.1 Pursuant to the Bylaws, the CITC may approve a Reviewable Transaction with such conditions as are reasonably related to promoting the development of open and competitive telecommunications markets in the Kingdom, and maximising the benefit for telecommunications users.<sup>2</sup>
- 5.4.2 These conditions may include
- (i) structural remedies (such as the divestiture of an asset), which are generally once-off measures that aim to restore the competitive structure of the market, or
  - (ii) behavioural remedies, which are generally on-going commitments that aim to modify or restrain the behaviour of the merged entity.

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<sup>2</sup> Articles 35(2) and 35(4) of the Bylaws.

5.4.3 Notifying Parties may propose conditions to address any competition concerns. The CITC may accept any conditions proposed (with or without modification) and/or may impose conditions of its own.

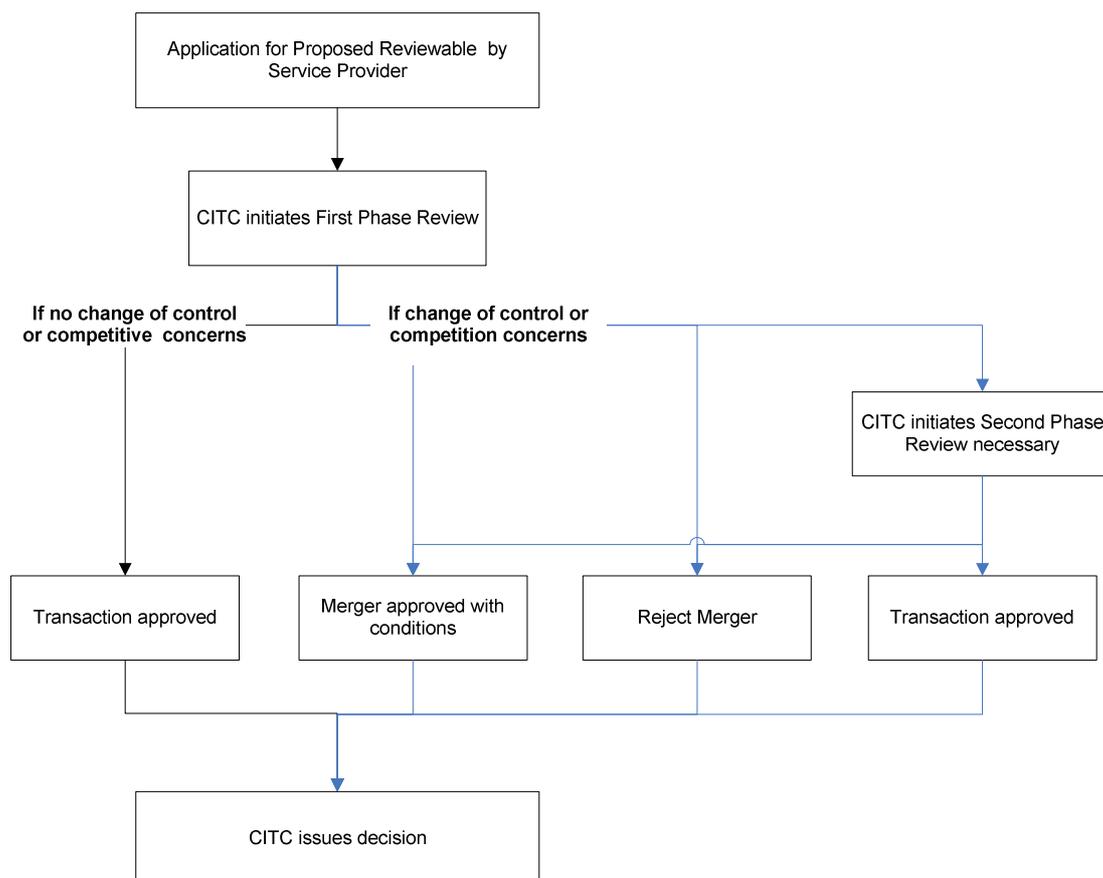
5.4.4 Where Notifying Parties wish to propose conditions, the CITC would expect to receive these proposals no later than 10 days following the informal private meeting(s) referred to in paragraph (5.3.4) above. However, conditions may be proposed by the Notifying Parties as early in the process as they wish, and can be included with their initial application to the CITC for approval.

5.4.5 The CITC will typically market test any conditions it is intending to attach to a clearance decision, either through an invitation for public comment or by sending the proposals to competitors, suppliers and/or customers in order to obtain their views.

## 5.5 Conclusion of Decision-making

5.5.1 The Notifying Parties will be directly informed of the CITC's decision, which will also be published, in full or abridged form.

5.5.2 The flow chart below provides an illustration of the process by which a decision is taken in the review of a Reviewable Transaction.



## 5.6 Treatment of confidential information

5.6.1 The following methodology will apply to the publication of filing and any claims of confidentiality by a Notifying Party or third party in relation to a document submitted to CITC related to the merger review process:

- (i) Where a document is submitted by a Notifying Party or third party to CITC in relation to the merger review process, CITC shall place a copy of the document on the CITC website at <http://www.citc.gov.sa> unless the Notifying Party or third party asserts a claim of confidentiality, as regards part(s) of or the entire document, at the time of such submission.
- (ii) A notifying party or third party asserting such a claim of confidentiality in connection with a document shall at the same time submit to CITC either a redacted version of the document to be placed on the public record in which the confidential information in the document has been removed or, where the entire document is deemed by the Notifying Party or third party to be confidential, reasons for objecting to the submission of a redacted version thereof. Where a Notifying Party or third party submits either paper or .PDF versions of its comments, it must also submit documents in an electronic format that may be edited (such as MS Word or MS Excel). For redacted versions of submissions, Notifying Party or third party should edit them in a manner that facilitates a determination of the places where and the extent to which information has been omitted (for example, by means of use of square brackets and/or hash marks - ##).
- (iii) Each claim of confidentiality made in connection with a document submitted to CITC or requested by CITC shall be accompanied by written reasons for such confidentiality claim. Any such claim of confidentiality shall itself be placed on the public record on the CITC website.
- (iv) CITC will only consider claims of confidentiality that meet the definition of "Confidential Information" set forth at section 11.1 of the Rules of Procedures. If a claim of confidentiality is made in relation to information that does not meet the definition of "Confidential Information" set forth in the Rules of Procedure, then CITC may, subject to subparagraph (ix) below, decide to place the information on the public record on the CITC website.
- (v) Where, pursuant to subparagraph (iii) above, it is asserted that specific direct harm would be caused to the Notifying Party or third party claiming confidentiality, sufficient details shall be provided as to the nature and extent of such harm. If no justification is provided as to why the information should be designated as confidential information, then CITC will assume that it is non-confidential and may, subject to subparagraph (ix) below, decide to place the information on the public record on the CITC website.
- (vi) Any Notifying Party or third party wishing the public disclosure of information in respect of which there has been a claim for confidentiality may submit to CITC within 5 days of the publication of the confidentiality claim:
  - a. a request for such disclosure setting out the reasons therefore, including the public interest in the disclosure of all information relevant to CITC's regulatory responsibilities; and
  - b. any material in support of the reasons for public disclosure.
- (vii) A copy of a request from a Notifying party or third party for the public disclosure of information in respect of which there has been a claim for confidentiality shall be provided to the Notifying Party or third party claiming confidentiality and that Notifying Party or third party may, unless CITC otherwise determines, submit a reply to CITC within 5 days after the date of service of the request and shall,

where a reply is submitted, provide a copy thereof to the party requesting public disclosure.

- (viii) Where CITC of its own motion requests that information for which confidentiality has been claimed be placed on the public record, the Notifying Party or third party claiming confidentiality shall have 5 days to submit a reply, unless CITC otherwise determines.
- (ix) Where CITC is of the opinion that, based on all the material before it, no specific direct harm would be likely to result from disclosure, or where any such specific direct harm is shown but the benefits of disclosure outweigh any harm to the person who submitted the information, CITC may issue a decision to order that the information be placed on the public record.
- (x) Where CITC is of the opinion that, based on all the material before it, the specific direct harm likely to result from public disclosure justifies a claim for confidentiality for all or parts of the document, CITC may
  - a. order that the confidential information not be placed on the public record;
  - b. order disclosure of a redacted version of the document; or
  - c. order that some or all parts of the document be verbally disclosed to the other parties at a closed hearing.

## 6 Assessment Framework

### 6.1 Principles of the assessment

- 6.1.1 The CITC's approach to assessing a Proposed Reviewable Transaction is primarily a competition-based; the CITC shall also examine the Proposed Reviewable Transaction's compliance with other relevant statutory requirements and the important factors that had impact on ICT sector.
- 6.1.2 The assessment of the likely effects of a Reviewable Transaction on competition is an important step in evaluating whether, or in what form, the transaction should be allowed to proceed. This competitive assessment will generally necessitate the CITC conducting a careful and detailed examination of the evidence gathered from the parties and other market sources to decide whether the Reviewable Transaction is likely to lead to a substantial lessening of competition in any of the markets that the transaction affects.
- 6.1.3. A substantial lessening of competition arises when merging parties are able to exercise a materially greater degree of market power in a substantial part of a relevant telecommunications market for two years or more than if the Reviewable Transaction did not proceed in whole or part.
- 6.1.4 The CITC will generally undertake this competitive assessment on a forward-looking basis, comparing the development of the market with the Reviewable Transaction (the "factual"), against the way the market would develop without the Reviewable Transaction (the "counterfactual"). In theory there are a number of possible counterfactuals to a particular course of action, and the CITC will weigh the available evidence at the time of the Reviewable Transaction to determine the most reasonable counterfactual on which to build its analysis.<sup>3</sup>
- 6.1.5 Where competition concerns are found, the CITC may choose to balance these against other considerations, such as whether the Reviewable Transaction generates significant efficiencies or other benefits to the public. In its balancing assessment the CITC will weigh the risks and costs of any potential harm to competition against the likely benefits of the Reviewable Transaction.

### 6.2 Market definition

- 6.2.1 The appropriate definition of the "relevant market" is the first step in the competitive assessment— defining the market is used as a tool to assess the degree of the merging parties' market power, which is at the heart of evaluating whether the proposed Reviewable Transaction would likely lead to a substantial lessening of competition.<sup>4</sup>
- 6.2.2 The CITC has issued one or more other discussions of the methodology for defining a market which are indicative of how it will conduct such an exercise in assessing a Proposed Reviewable Transaction.

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<sup>3</sup> Section 35.5(a) of the Bylaws

<sup>4</sup> In some cases, whether a merger substantially lessens competition will not turn on the precise definition of the market – it may be clear that the merger would harm competition irrespective of whether a narrow or a wide definition of the market is taken. In these cases, the CITC may leave open the precise definition of the market, and move straight on to assessing the likely effects on competition.

## 6.3 Competition analysis

### 6.3.1 Market concentration

- 6.3.1.1 Having defined the relevant market definition, the CITC will generally consider the level of concentration in the relevant market as an indicator of the competitive pressure in that market. Other things equal, the more concentrated a market, the weaker the competitive constraints on the merged Service Provider are likely to be.
- 6.3.1.2 Market shares are one simple measure of concentration. Other commonly used measures of market concentration are the Herfindahl Hirschman Index (HHI) and the four firm concentration ratio (CR4). The HHI is the sum of the squares of the market shares of all firms in the market. The CR4 aggregates the market share of the four largest firms

### 6.3.2 Possible competitive harm

- 6.3.2.1 Measures of market concentration are suggestive of changes in market power, but do not reveal how the competitive constraints within an industry are affected by a Reviewable Transaction. A Reviewable Transaction may give rise to either unilateral or coordinated effects. Consequently in analysing possible anti-competitive effects, it is necessary to ascertain whether the market characteristics would favour either of these outcomes.

#### *Horizontal transactions - Unilateral effects*

- 6.3.2.2 Horizontal transactions have unilateral effects when they remove or weaken competitive constraints in such a way that the merged entity can raise prices unilaterally (i.e. without consideration for the responses of other market participants, and without the need for coordinated action with the other Service Providers in the market)<sup>5</sup>. Other Service Providers in the market may choose to respond to the price increase by increasing their own prices. The CITC will generally investigate whether the horizontal transaction is likely to create an environment in which there is an increased likelihood of unilateral effects.

#### *Horizontal transactions - Coordinated effects*

- 6.3.2.3 The CITC will also generally investigate whether the horizontal transaction is likely to create an environment in which there is an increased likelihood of coordination. Coordinated effects occur in the context of a horizontal transaction where the dynamics between Service Providers in a market are altered by the transaction such that collusion is more likely, more complete or more sustainable.
- 6.3.2.4 Coordinated effects can occur in addition to unilateral effects – where a post transaction Service Provider finds it profitable to unilaterally raise prices, competing Service Providers may find it more profitable to align their strategy with the post transaction Service Provider rather than compete.

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<sup>5</sup> For example, before the merger of two competitors it may have been unprofitable for either to raise its price unilaterally, as customers would have switched to the other. However, after the merger, those sales that would have been lost to the other competitor are in effect recaptured and so the price rise becomes profitable.

### *Vertical transactions - Coordinated effects*

- 6.3.2.5 Vertical transactions may raise concerns about “coordinated effects” if the market configurations and dynamics they create facilitate collusive outcomes. For example, through input foreclosure, the number of Service Providers in the downstream market may be reduced, creating a more concentrated downstream market conducive to coordination. The transaction may also, for example, improve communication between the downstream conspirators if the vertically-integrated Service Provider’s division in the upstream market is used as a conduit for exchanging sensitive information between the downstream Service Providers.

### *Vertical transactions - Other anticompetitive effects*

- 6.3.2.6 Vertical transactions may also result in other anti-competitive practices, such as margin squeeze<sup>6</sup> or price discrimination<sup>7</sup>, which result from the merged Service Provider accruing or enhancing market power in the upstream market (although these practices can also occur in non-transaction contexts).

### *Conglomerate effects*

- 6.3.2.7 Compared to horizontal or vertical transactions, conglomerate transactions are less likely to raise competition concerns. However, conglomerate transactions can still give rise to market power, particularly where transacting Service Providers produce complementary products. Conglomerate transactions, where market power is enhanced, could result in:
- (i) Strategic leveraging of market power in one product market to another – for example, through commercial tying (refusal to supply), technical tying or mixed bundling; and/or
  - (ii) Cross-subsidisation and predation where the transaction gives rise to financial strength.

### **6.3.3 Other considerations**

- 6.3.3.1 When assessing the competition impact of a Reviewable transaction, there are a number of other considerations the CITC is likely to take into account. These may include, but are not limited to:
- (i) Buying power, e.g., if the customers of the transacting entity are in a strong negotiation position they might limit the entity’s ability to raise prices post transaction; and

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<sup>6</sup> Margin squeeze refers to the practice of a vertically-integrated firm with market power in the upstream market either (i) increasing the price of an important input good or service for rival firms in the downstream market at a level above the retail price it charges in the downstream market, or (ii) decreasing the price it charges in the retail market to a level below the cost charged to rivals in the downstream market for an important input good or service. The practical effect is the same in both cases: the profitability of rivals in the downstream market is squeezed. Anticompetitive foreclosure and margin squeeze are closely related, although foreclosure can take other forms (such as outright refusal to supply).

<sup>7</sup> Price discrimination refers to the practice of differentially pricing a homogeneous good or service depending on the elasticity of demand of different consumer segments to which the product is sold. For price discrimination to be effective, firms need to be (a) able to distinguish different consumer groups and (b) able to limit / prevent product reselling. For example, mobile telephone Service Providers may sell different mobile packages to business-users and social-users, resulting in different charges per minute between the two user groups.

- (ii) Removal of a vigorous competitor, e.g., a Reviewable transaction between Service Providers where one of the parties is a small but vigorous competitor can therefore have a significant effect on the competitive dynamic of the market even if the resultant increase in concentration is small.
- (iii) “Failing firm” case, e.g., a merger or take-over may provide a means of preventing company collapse and such mergers may be permitted even though they might reduce competition.<sup>8</sup>

## 6.4 Barriers to entry

6.4.1 Notifying Parties are more likely to accrue and be able to exercise market power in markets which have high barriers to entry. In general, high barriers to entry will limit the potential for competitive constraints to develop post-transaction in a given market, as potential entrants will not be able to easily and rapidly enter the market if the merged entity were to raise its prices. Such barriers might include:

- (i) Structural barriers, which are inherent characteristics of the market that make entry less likely. These might include: economies of scale (which may mean that it is not economic for a Service Provider to enter unless it can enter at a scale which allows it to operate efficiently); the existence of sunk costs, which increase the cost of failed entry or exit from the market; a structural limitation on the number of Service Providers that can operate in the market; high consumer switching costs; or the existence of “network effects”<sup>9</sup>.
- (ii) Legal or regulatory barriers, which are constraints placed on the operation of a market by an external agency, and may make entry for new companies more difficult. Examples may include licenses, tariffs, and patents (or other intellectual property rights). As telecommunication markets are highly regulated, these types of regulatory barrier to entry can be significant.
- (iii) Behavioural or strategic barriers, which could be created where an incumbent Service Provider can credibly threaten to respond aggressively to any new entrant, thereby constraining the entrant’s expected profitability in the market (reducing incentives to enter). Factors that could suggest the creation of these barriers could include: creation of excess capacity by incumbent Service Providers; price-wars; and contracting arrangements which increase consumer switching costs (e.g. long-term contracts)<sup>10</sup>.

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<sup>8</sup> The CITC would typically apply a high burden of proof on the parties to justify the use of this defence and that reviewing authorities tend to be mindful of alternative bidders which may result in more competitive outcomes.

<sup>9</sup> Network effects, or network externalities, typically increase the value of a good or service as more people use it (they are a form of economies of scale, but on the demand side). By its nature telecommunications is essentially a network industry. Examples of products which increase in value due to network effects might be a social networking website or a mobile phone Service Provider’s network (where it is cheaper to call people on the network than on other networks).

<sup>10</sup> The potential entrants may anticipate predatory behaviour by incumbent firms on the basis of past behaviour in this or other markets. Such threats may pose an effective deterrent, even in markets which may otherwise appear to have relatively low barriers to entry.

## **6.5 Efficiencies**

6.5.1 One of the motivations behind a proposed Reviewable transaction may be anticipated economies of scale, economies of scope, or other efficiencies which arise through the combination of productive assets. Achieving efficiencies can enhance consumer welfare where cost savings are passed on to consumers, even where a Reviewable transaction might otherwise give rise to competition concerns. Therefore, where a Reviewable transaction is likely to yield competition concerns, the transacting parties may argue in favour of the Reviewable transaction on the grounds that the Reviewable transaction delivers significant cost savings that will augment consumer welfare and could not be achieved otherwise.

6.5.2 Some immediate and once-off efficiencies may be realised at the time of the Reviewable transaction (static efficiencies), while others may provide benefits over a longer time horizon (dynamic efficiencies). Dynamic efficiencies arise where the Reviewable transaction enhances the parties' ability to innovate, or introduce new technologies or processes, and in so doing offer superior products to consumers.

6.5.3 The CITC is likely to assess validity of an efficiency argument by determining that:

- (i) alternative means that have less detrimental effects on competition than the Reviewable transaction;
- (ii) the claimed efficiencies are likely to occur in practice (that they are not speculative) and are likely to occur within a reasonable time period; and
- (iii) the incentives of the merged entity are such that they will pass through these efficiencies and cost savings to consumers in the form of lower prices or better products rather than simply keeping the increased margin for their own profits.

6.5.4 Therefore, it may not be sufficient for the transacting parties to demonstrate clear and substantial efficiencies would occur as a consequence of the Reviewable transaction. They would also need to demonstrate that these savings would deliver benefit to consumers within a reasonable period of time.

6.5.5 There is typically an inverse relationship between the increase in market power through a Reviewable transaction and the extent to which claimed efficiencies of the Reviewable transaction are likely to reach end consumers. Therefore, if a Reviewable transaction does significantly increase market power, the CITC will need very clear and substantial evidence of Reviewable transaction-specific efficiencies for the efficiencies to counterbalance the likely harm to competition.

## **6.6 Benefits to the Public**

6.6.1 In assessing a Proposed Reviewable transaction, if the CITC concludes that the Reviewable transaction is likely to have the effect of substantially lessening competition, the CITC will consider whether the Reviewable transaction is likely to have a benefit to the public and whether that benefit outweighs any detriment to the public from the lessening of competition.

6.6.2 Just as with the consideration of efficiencies, see paragraph (6.5), the transacting parties may be required to demonstrate clear and substantial benefits would occur as a consequence of the Reviewable transaction. They may also need to demonstrate that these savings would deliver benefit to the public within a reasonable period of time.

## **7 Filing Requirements**

### **7.1 Form of notification / information to be submitted at the start of the review (first phase)**

- 7.1.1 The Annex to these Guidelines contains an Application, which must be submitted to the CITC to initiate the first phase of CITC review and obtain approval for a Reviewable transaction pursuant to Article 25 of the Act.
- 7.1.2 The Application must be accompanied by a declaration that the information provided is true, accurate and not misleading as per paragraph (7) of the Application.
- 7.1.3 Notifying Parties should note that the provision of false or misleading information to the CITC is subject to a financial or penalties under CITC statutes.
- 7.1.4 The CITC may dispense with the obligation for Notifying Party to complete a particular section of the Application or to not provide any particular information where it considers the relevant information is not necessary for its review of a specific Reviewable transaction.

### **7.2 Additional Filing Requirements in case there is a change of control or other competition concern**

- 7.2.1 Where the CITC determines as part of its review that a Reviewable Transaction results in a change in control or poses other competitive concerns, the Notifying Party must provide any information requested by the CITC, including but not limited to the following additional information.
  - (i) a short description of the impact, if any, of the proposed transaction on competition.
  - (ii) confirmation that the proposed transaction will have no impact on access to ICT Services. If the proposed transaction will have an impact, provide the details of and the reasons for such impact including any steps proposed to be taken to minimize such impact.
  - (iii) an assessment of the costs and benefits of the proposed transaction to the consumers of the parties to the transaction.
  - (iv) identification and quantification any costs, efficiencies and/or economies of scale that may result from the proposed transaction.
  - (v) description of the steps that will be taken to ensure that safety and network integrity are maintained after completion of the proposed transaction, if relevant.
  - (vi) details, including of any capital expenditure plans, of how quality and reliability of service will be maintained after completion of the proposed transaction.
  - (vii) an evaluation of any assets or shares that will be transferred in the transaction and details on how this value was determined.
  - (viii) details of the financing of the proposed transaction.

# Annex A: Application

## APPLICATION FOR APPROVAL OF MERGERS AND ACQUISITIONS PURSUANT TO ARTICLE 25 OF THE TELECOMMUNICATIONS ACT

### INTRODUCTION

#### The purpose of this Application

This Application specifies the information that must be provided by parties submitting an application to the CITC for approval of a proposed Merger pursuant to Article 25 of the Telecommunications Act (the "**Act**").

#### Who must apply

In this Application, the phrase "**Notifying Party(ies)**" means the party or parties actually submitting an application to the CITC for approval. In the case of a Reviewable transaction within the meaning of Article 25(1) of the Act, the application must be completed jointly by the parties to the Reviewable transaction. In case of the acquisition within the meaning of Article 25(2) of the Act, the acquirer must complete the notification. In this Application, the phrase "**Reviewable Transaction party(ies)**" means the parties to the proposed transaction (i.e. the merging parties or the acquiring and acquired parties).

#### The requirement for a correct and complete application

All information required by this Application must be correct and complete. The information required must be supplied in the appropriate section of this Application. The Notifying Party should note that the time-limits outlined in paragraph (5.3.1) of these Guidelines will not begin to run until a complete application has been received by the CITC.

### 1. Information about the parties

- 1.1. name and address (registered office) of applicant;
- 1.2. full name, address, telephone number, fax number and e-mail address of Reviewable Transaction parties.
- 1.3. full name, address, telephone number, fax number and e-mail address of the contact person for each of Reviewable Transaction parties
- 1.4. corporate organizational chart describing each party to the proposed transaction and each of their affiliates.

### 2. Details of the Merger Entity

- 2.1. Describe the business of each of the Reviewable Transaction parties.
- 2.2. Describe the nature of the Reviewable Transaction being notified. For example, whether it is a Reviewable Transaction of two Service Providers or an acquisition of shares in a Service Provider.

- 2.3. State the value of the Reviewable Transaction and give brief details of the economic rationale for the Reviewable Transaction and a summary of its commercial terms.
- 2.4. Provide a brief description of each product or service of the Reviewable Transaction parties and identify any areas of overlap.
- 2.5. State the expected timescale for: (i) signature of a binding agreement, and (ii) completion of the Reviewable Transaction.
- 2.6. State whether the proposed Reviewable Transaction has been notified to any other regulatory body for approval (whether in the Kingdom of Saudi Arabia or in any other country).
- 2.7. Provide the financial statements (including balance sheet and sources and uses of funds) of the Reviewable Transaction parties for the 2 complete years prior to the proposed transaction and after completion of the proposed transaction

### **3. Ownership and control**

- 3.1. Provide details of the group structure of each of the Reviewable Transaction parties. For each Reviewable Transaction party, this should include (i) any natural or legal person holding an ownership interest of 5% or more (direct or indirect) in that Reviewable Transaction party, and (ii) all other companies in the telecommunications sector in which a Reviewable Transaction party holds an ownership interest of 5% or more (direct or indirect). In relation to each such ownership interest, please state the type of interest, the percentage held, and whether the interest carries preferential or special rights. The information sought in this section may be illustrated by the use of organisation charts or diagrams, where appropriate.
- 3.2. List any members of the board of a Reviewable Transaction party who are also members of the boards of any other companies in the telecommunications sector, and list the position held.
- 3.3. List all licences held by the Reviewable Transaction parties or any other company referred to in question 3.1.
- 3.4. Provide details of any shareholding agreement or joint ventures between any of the Reviewable Transaction parties and any other person or Service Provider in the ICT sector.

### **4. Supporting documentation**

Notifying parties must provide the following documents with their application. For each of these documents, indicate (if not contained in the document itself) the date of preparation.

- 4.1. a copy of the final or most recent versions of the agreement(s) bringing about the Reviewable Transaction, or a copy of the offer document in the case of a public bid;
- 4.2. copies of the most recent annual reports and accounts of each of the Reviewable Transaction parties;
- 4.3. for each of the Reviewable Transaction parties, an indication of their annual revenues derived from telecommunications markets and value of assets devoted to telecommunications business;

- 4.4. [a copy of the business plan for each of the Reviewable Transaction parties for the current and previous year and any business plan prepared for the post-transaction entity;]
- 4.5. [copies of all analyses, reports, studies, surveys, and any comparable documents prepared for any member(s) of the board of directors or the shareholders' meeting (or similar bodies), for the purpose of assessing or analysing the proposed Reviewable Transaction with respect to market shares, competitive conditions, competitors (actual and potential), the rationale for the Reviewable Transaction and/or general market conditions.]

## **5. Market definition**

- 5.1. Provide a definition of the relevant product and geographic market(s) in which the Reviewable Transaction parties operate (reference should be made to paragraph (6.2) in the Process Guidelines).
- 5.2. For products or services identified in question 2.4 above, provide:
  - 5.2.1. a brief description, in terms of characteristics/price differences, of any product(s) or service(s) that might be considered close substitutes, on the demand or supply side;
  - 5.2.2. the market share (in terms of monetary value, volume/capacity and subscriber base) of each of the Reviewable Transaction parties and all affiliated companies in the telecommunications sector;
  - 5.2.3. the contact details (to include name, contact address, e-mail address, fax and telephone number) and market share of the top five competitors to each of the Reviewable Transaction parties (including overseas companies, where appropriate) for each product or service;
  - 5.2.4. [the contact details (to include name, contact address, e-mail address, fax and telephone number) and market share of the top five suppliers to each of the Reviewable Transaction parties (including overseas companies, where appropriate) for each product or service;]
  - 5.2.5. [the contact details (to include name, contact address, e-mail address, fax and telephone number) of the top five customers of each of the Reviewable Transaction parties and their estimated share of relevant Reviewable Transaction party's business (including overseas customers where appropriate) for each product or service.]
- 5.3. For the product and geographic market(s) identified in question [5.1] above, please provide:
  - 5.3.1. an assessment of the level of competition in the market and a description of how competition works in the market;
  - 5.3.2. an estimate of the capital expenditure required to enter the market on a scale necessary to gain a 5% market share, both as a new entrant, and as a company which already has the necessary technology and expertise. Please estimate the extent to which this cost is recoverable should the Service Provider decide to exit the market;
  - 5.3.3. an estimate of the ratio of annual expenditure on advertising/promotion relative to sales required to achieve a market share of 5%;

5.3.4. details of any other factors affecting entry, e.g. licensing requirements, technology or R&D requirements, length of contract etc including, where possible, an estimate of the time and resources necessary to overcome these factors, citing any relevant examples;

5.3.5. an assessment of the ease of exit from the market citing any relevant examples.]

5.3.6. provide a brief assessment of any other features of the market that the CITC should take into account in considering the effect of the proposed Reviewable Transaction.

## **6. Conditions**

6.1. In the event the notifying parties wish to propose any conditions to address possible competition concerns arising from the Reviewable Transaction, please describe the proposed conditions and the manner in which they will address these competitive concerns (see paragraph (5.4) of these Guidelines).

## **7. Declaration**

The application must conclude with the following declaration which is to be signed by or on behalf of all the Notifying Parties:

The Notifying Party or Parties declare that, to the best of their knowledge and belief, the information given in this application is true, correct, and complete, that true and complete copies of documents required by this Application have been supplied, that all estimates are identified as such and are their best estimates of the underlying facts, and that all the opinions expressed are sincere.

Signature(s)

Names(s)

On behalf of :

Place and date: