

The Legal Horizon for Telecommunications in Iraq

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The Iraqi Communications and Media Commission ('Commission') was established by Coalition Provisional Authority Order No. 65 in 2004 to license and regulate telecommunications, broadcasting, information services and other media in Iraq.

As of the date of this article, the only way to interpret the available laws with certainty is by direct inquiry with the Commission or other government bodies. A process that, when fruitful, takes a few months at best. To address the needs of this rapidly developing sector, the Commission has recently published a number of public consultations detailing draft future regulations pertaining to various aspects of the Commission's legal domain.

While these consultations are not in force as law, they give a good indication of the Commission's likely future regulatory requirements. This article provides a brief summary of three key public consultations on competition, lawful interception, and quality of service.

Competition Regulation Draft and the Market Reviews Consultation (Published in June 2016)

This proposed telecommunications specific competition regulation builds on the Competition and Monopoly Prevention Law (Law No. 14 of 2010) ('Competition Law'). That said, the Commission's draft regulation is quite different from the Competition Law. The Commission's anticipated regulation will apply only to holders of licenses issued by the Commission because regulation of non-licensed parties requires involvement of other regulatory bodies. The draft regulation contains both preventative and remedial competition preserving measures. Preventative measures or ex-ante regulations are unique to the telecommunication industry in Iraq and aim to intervene in the market before anti-competitive behaviour can occur or cause significant damage to competition. Remedial measures or ex-post regulations in the Commission's competition regulation draft are largely derived from the Competition Law. The telecommunication specific ex-post competition regulation includes prohibitions on licensees from entering into non-retail agreements with parties who are not end customers, anti-competitive tying or bundling of services, customer discrimination, and other forms of abuse of dominant market power. The draft competition regulation states that the Commission will seek enforcement action against licensees for violations of ex-post regulation in a court with jurisdiction under the Competition Law as provided for under Article 15 of that law.

The Commission introduces a number of new concepts in its ex-ante regulation of competition in telecommunications and information services. One such new concept is 'Significant Market Power'. The Commission uses data it collects from licensees as well as definitions and tests set out in a market review policy issued by it to determine Significant Market Power. The Commission published a public consultation on market review in 2015 and a draft policy followed in June 2016 along with the draft Competition Regulation. The market review consultation defines each market using two parameters (1) having demand-side or supply-side substitutability of products, and (2) geographic areas where the conditions of competition are similar. It is important to note that the Kurdistan region was not included in the Commission's consultation document because the Commission was unable to procure the necessary data

from the relevant Kurdistan telecom authority to conduct its review. Due to this disconnect between the relevant authorities and for other practical reasons, the Kurdistan region is likely to be considered a separate market for market review purposes.

According to the most recent draft market-review policy published by the Commission, the decision whether a given market is susceptible to ex-ante regulation is based on a three criteria test. If all three criteria are met, the market is considered susceptible to Ex-ante regulation. If at least one of the criteria is not met, the market is not susceptible to ex-ante regulation. The three criteria are:

- presence of high and non-transitory barriers to entry;
- the market does not tend towards effective competition within the relevant time horizon; and
- insufficiency of competition law alone to adequately address the market failure(s).

When a determination that a market is susceptible to ex-ante regulation, designation of licensees with Significant Market Power will follow. Market share is the most important criterion to designate licensees with significant market power. For example, the June 2016 consultation concluded that Asiacell, Korek and Zain are licensees with Significant Market Power in the mobile market. Designation of Significant Market Power imposes regulations aimed at keeping the market open to new competitors and achieving the best market dynamics possible. For the three licensees mentioned above the market review consultation imposed the following obligations:

- to allow access to and use of specific network facilities;
- not to unreasonably bundle;
- non-discrimination;
- transparency;
- price control;
- cost accounting; and
- separate accounting.

Assistance for Lawful Interception and Data Retention Regulation Draft (Published in June 2016)

The Assistance for Lawful Interception and Data Retention Regulation Draft builds on existing interception law and provides more clarity on compliance requirements. The draft includes some data retention requirements for providers of communications services, as well as operating procedures and standards relevant to interception. The draft regulation defines the type of authorization required to disclose information and contains obligations not to disclose information to unauthorised persons. In addition, the draft regulation contains provisions on cost allocation of its implementation and the penalties for failure to comply. Finally, the draft regulation addresses technical matters such as the use of encryption and what information needs to be collected, retained, and made available on properly authorised request.

Quality of Service Consultation (Published in June 2016)

The Quality of Service Consultation contains a Quality of Service Policy, a Retail Quality of Service Regulation and a Wholesale Quality of Service Regulation. The Commission used the information it received from service providers since the Commission was established to draft those documents. The Commission intends QOS regulation to improve the choice, price or quality of services offered in Iraq and to provide information about quality that will help consumers to make choices and service providers to maintain quality when there are too few choices available. The two regulations and the Quality of Service Policy cover measurements standards, reporting periods and areas, representative samples for reporting of measurements, governance and dispute resolution, sanctions and compliance measures, and measures

aimed at ensuring customer awareness.

The Commission published the Quality of Service Consultation because the quality of service commitments in the existing licenses were poorly defined. While the Commission had copious amounts of information from service providers, it was not easy to compare the quality of service between service providers or verify the information. In addition, some of the new developments were motivated by the Consumer Protection Law (Law No 1 of 2010) and aim to keep the quality of service consistent with prices charged by service providers and claims made by them. The Commission's regulatory requirements do not prevent consumers from exercising preferences that might actually to be to have low prices with low quality or high prices with high quality. However, when consumers are unable to exercise their preferences because there are too few service providers the Commission's regulatory requirements aim to ensure sufficiently high quality and sufficiently low prices.

Conclusion

By publishing public consultations and asking for the input of stakeholders, the Commission seems determined to keep the Iraqi telecommunications industry competitive and open to new service providers by offering a level of predictability to future regulations. The Commission aims to regulate only as and when deemed necessary and has made efforts to ensure transparent implementation of its rule making by publishing a draft Rules of Procedure Regulation that will govern its processes. Institutional independence and accountability of the Commission make the new developments a positive step towards better regulation in line with international standards.

Al Tamimi & Company's Technology, Media & Telecommunications team regularly advises on the regulation of the telecommunications sector across the Middle East, and works closely with the various teams in our regional offices, including in Iraq, to advise on issues of this nature. For further information on the topic in this article, please contact Andrew Fawcett (a.fawcett@tamimi.com) and Ali Al Dabbagh (A.AIDabbagh@tamimi.com)