

Article 35 Order No. 1 of 2018

Batelco's Breach of Article 57(f) of the Telecommunications Law

1 For the reasons set out in the reasoning of this Article 35 Order, the Telecommunications Regulatory Authority (the "**Authority**") considers that Batelco, by sharing the details of Viva's and Batelco's negotiations in relation to an access request made in June 2015 with at least one (and more likely two) third party(ies), has:

(a) breached Article 57(f) of the Telecommunications Law.

2 **Therefore Batelco is ordered to:**

2.1 Refrain from using any information obtained in relation to the requests from / negotiations with Viva (or any other operator) regarding access or interconnection for any purpose other than that for which it was divulged. Specifically Batelco is obliged to keep such information confidential in accordance with the terms of the Law (and its wider regulatory obligations).

3 **Fine**

3.1 Batelco is also ordered to pay a fine of thirty seven thousand five hundred Bahraini Dinars (BHD 37,500) to the Authority in cleared funds within 30 calendar days from date of the Final Order.

3.2 Batelco is put on notice that in the event that Batelco fails to comply with Section 2.1 of the Final Order that any future Article 35 Order and/or decision required to address the same or similar behaviour shall impose more stringent penalties.

3.3 Batelco shall pay the fine set out in paragraph 3.1 of this Order to the following account:

Account Name: Telecommunications Regulatory Authority

Account Number: 1-0000005433-4

Bank Name: BBK

4 Compliance

In accordance with Article 35(d)(3), failure by Batelco to abide by this Article 35 Order (including the payment of the fine referred to at paragraph 3.1) may lead to:

- (a) the revocation of Batelco's Telecommunications Licences including, for the avoidance of doubt, Batelco's (i) Individual License for International Telecommunications Facilities; (ii) Individual License for International Telecommunications Services; (iii) Class License for Internet Services; (iv) Class License for Value Added Services; (v) Individual License for National Fixed Services; (vi) Individual License for Very Small Aperture Terminal (VSAT); and (vii) Individual License for Mobile Telecommunications Services.



Nasser bin Mohamed al Khalifa

Acting General Director

For and on behalf of the Telecommunications Regulatory Authority

25 April 2018

REASONING

I Relevant Legal Provisions

Telecommunications Law

- 5 By virtue of Article 3(b)(2) of the Law, the Authority must promote effective and fair competition among existing Licensed Operators.
- 6 Article 3(c)(2) of the Law empowers the Authority to, *inter alia* monitor and investigate compliance with the provisions of the Law and to make such orders and determinations as are necessary to ensure compliance.
- 7 Article 3(c)(17) provides that the Authority shall examine complaints and resolve disputes arising between Licensees and take the necessary and proportionate measures in relation to such matters.
- 8 Article 3(c)(18) of the Law authorises the Authority to exercise all other powers granted to it and to take all other actions as may be reasonably necessary in order to exercise its powers.
- 9 Article 57(f) of the Law provides that information obtained from another Public Telecommunications Operator concerning Interconnection or Access procedures shall not use such information for any purpose other than the purpose for which such information is provided, and shall not divulge such information in any way.
- 10 Article 57(g) of the Law allows any Public Telecommunications Operator to refer to the Authority any dispute that arises between it and any other Public Telecommunications Operator with respect to Interconnection or Access, in order for the Authority to resolve such dispute.

II Factual Background

- 11 Viva first made its Submission of a Complaint including a Request for an Emergency Order (Ref 0316-Corp-Reg-Gen-009) and accompanying Annexures (the “**Complaint**”) on 08 March 2016.

- 12 Viva's Complaint stated that Batelco had utilised information provided to it by Viva pursuant to an access request as evidence in a protest (the "**Protest**") Batelco had submitted to the U.S. Government Accountability Office (the "**GAO**") objecting to the award of a service contract for the supply of an STM-64 data connectivity service between Juffair and Kuwait by the US Navy, to Viva.
- 13 Viva's Complaint alleged that four of the allegations advanced by Batelco in the Protest had clearly utilised confidential information that had been provided to Batelco's wholesale division by Viva and that the terms of the Protest was prima facie evidence that this information had been shared with Batelco's retail division and then subsequently with the GAO (via the Protest).
- 14 Following receipt of the Complaint, the Authority wrote to Batelco on 20 March 2016 requesting a response from Batelco to the matters raised in the Complaint by no later than 31 March 2016.
- 15 On 28 March 2016, Batelco replied to the Authority requesting that the Authority's investigation be stayed "*until the GOA has issued its decision*" due to the provisions of paragraph 13 of the Dispute Resolution Guidelines dated 25 August 2014, which request was denied.
- 16 On 31 March 2016, Batelco provided its First Response. Batelco's First Response was lengthy but, in essence, rejected Viva's Complaint as, in Batelco's contention, the information provided in the Protest and Declaration was not provided by Batelco's wholesale division but derived from other (unspecified) sources.
- 17 In support of this contention with regards to one of the allegations complained of (the Repair allegation), Batelco attached to its First Response a fault report provided by its Kuwaiti subsidiary, Qualitynet, relating to repair times on the GBI Cable system.
- 18 On 16 May 2016 the Authority, having reviewed Batelco's First Response, wrote to Batelco setting out its queries in relation to the First Response (the "**TRA's Request**").
- 19 Chief amongst these queries was that if, as Batelco submitted in its First Response, the information advanced by Batelco in its Protest had not originated from Batelco's

wholesale division, then it was incumbent upon Batelco “to elaborate on those other sources that have access to the same information which Viva refers to in its complaint including but not limited to the specific four allegations raised by Batelco in the Protest”.

20 Following a series of e-mails (in which Batelco sought an extension of time that was refused) Batelco provided, on 05 June 2016, its second response (“**Batelco’s Second Response**”).

21 Batelco’s Second Response provided a more detailed explanation of the arguments advanced in its First Response and attempted to address the queries set out in the TRA’s Request. It is noted that Batelco requested that the contents of its Second Response remain confidential from Viva (although it is noted that Batelco did not provide a non-confidential version as required under Article 34 of the Dispute Resolution Guidelines).

22 Following a review of the Complaint, the associated correspondence and Batelco’s Second Response, on 20 September 2016 the Authority issued decision No.3 of 2016 (the “**Decision**”).

23 The Decision found that Batelco had breached Article 57(f) of the Law and required Batelco to cease disclosing any information in relation to the requests from/ negotiations with Viva (or any other operator) regarding access and interconnection (including but not limited to the information that formed the basis of the Complaint).

24 In addition the Authority informed Batelco that it would shortly commence this Article 35 process in relation to the conduct covered in the Complaint.

25 The Authority understands that since the submission of the Complaint, the Protest has been dismissed by the GAO.

III The Breach

26 Article 57(f) of the Law states that:

“A Public Telecommunications Operator that obtains information from another Public Telecommunications Operator during or after negotiations concerning Interconnection

or Access procedures shall not use such information for any purpose other than the purpose for which such information is provided, and shall not divulge such information in any way. This restriction also applies to the provision of such information to any other parties or Persons that may derive competitive advantage from such information”.

27 For an operator to fall foul of Article 57(f), the following elements therefore need to have been satisfied:

- (i) The information is obtained from another Public Telecommunications Operator; and
- (ii) The information is obtained during or after negotiations; and
- (iii) The information relates to Interconnection or Access procedures; and
- (iv) The information is used for a purpose other than the intended purpose of disclosure including, by way of example, divulging that information to a third party (regardless of the reason for such disclosure).

Each of these elements has already been considered by the Authority in its Decision no. 3 of 2016 but for ease of reference is reproducing its analysis in the paragraphs below.

28 **Was the information obtained by Batelco from a Public Telecommunications Operator?**

28.1 There is no doubt that Viva falls within the definition of “a *Public Telecommunications Operator*” as set out in Article 1 of the Law as premised by the fact that Viva is a licensed operator that has been authorised by the Authority (i) to provide telecommunications services to the public and (ii) to operate a public telecommunications network.

29 Was the information obtained by Batelco during or after negotiations?

29.1 The Complaint sets out a chain of e-mails between Batelco and Viva in relation to access to Kuwait on the GBI Cable (the “E-mails”). The E-mails concern details of price, delivery, budget and availability and evidence negotiations in relation to these issues (especially price).

29.2 The information exchanged in the E-mails is clearly from “*negotiations concerning Interconnection or Access procedures*” taking place between two Public Telecommunications Operators.

29.3 As such the content of the E-mails falls within the ambit of Article 57(f) and consequently Batelco is under a clear duty to “*not use such information for any purpose other than the purpose for which such information is provided, and shall not divulge such information in any way*”.

30 Was the information obtained by Batelco related to Interconnection or Access?

30.1 This third element is equally satisfied because the exchange of information related to negotiations leading to the eventual provision of domestic connectivity data services to access Batelco’s telecommunications facilities in Hidd. These services fit squarely within the broad definition of the term “Access” given in Article 1 of the Telecommunications Law.

31 Was the information obtained by Batelco used for a reason other than the intended purpose divulged to a third party in breach of Article 57(f) / are any defences available to Batelco?

31.1 Viva alleged that the confidential information obtained by Batelco in relation to an access request made in June 2015 was divulged by Batelco to GAO in the Protest.

31.2 Batelco has argued in its First and Second Responses that all information that formed part of the Protest and the Declaration is publically available information and as such the prohibitions set out in Article 57(f) are not engaged.

31.3 In order to address each element of the Complaint clearly, this analysis deals with Batelco's Responses to each of Viva's Complaints concerning the "Allegations" raised in its Protest in turn.

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Conclusion of the findings

36 Having considered each of the limbs of Article 57(f) of the Law, the Authority had, in its Decision no. 3 of 2016 already established that it is satisfied that Batelco has clearly breached Article 57(f) of the Law.

IV Effects of the Article 35 (Draft) Order

37 This Article 35 Order is issued without prejudice to further investigations by the Authority into Batelco's alleged breaches of the Law referred to above.

38 This Article 35 Order and any further action taken by the Authority is without prejudice to the rights of any other entity to take relevant action as they may deem appropriate under the laws of the Kingdom of Bahrain.

- 39 The issuance of this Article 35 Order does not prejudice the Authority's right to:
- (a) expand the scope of its investigation into this matter; and/or
 - (b) issue further orders relating to other breaches arising out of the same set of facts; and/or
 - (c) find, develop or introduce new evidence relating to the alleged breach described herein.

V Article 35

- 40 Article 35 of the Law may be applied by the Authority in the event that a licensee has been or is in severe breach of any provision of the Telecommunications Law.
- 41 Batelco has breached the Law by sharing the details of Viva's and Batelco's negotiations in relation to an access request made in June 2015 with at least one (and more likely two) third party(ies).
- 42 A "severe breach" is understood to mean a breach that is more than minor and/or transient. The Authority considers that Batelco's failure comply with Article 57(f) is a severe breach of the Law.
- 43 This Article 35 Order is issued without prejudice to further investigation by the Authority into Batelco's alleged breach of the Law.

VI Imposition of Financial Penalty for Breaches

Fining principles

- 44 Article 35(d)(2) of the Law states that the Authority shall issue an Article 35 order with the imposition of a suitable fine on the Licensee provided that such fine is objectively justified and non-discriminatory. Article 73(i) of the Law sets out that a fine for a breach of Article 57(f) should not exceed one hundred thousand Bahraini Dinars (BHD 100,000), however it stops short of providing specific guidance on the setting of fines.

- 45 In setting an appropriate fine for Batelco's infringement in this case, the Authority has taken into consideration the relevant provisions of the Law and the Guidelines for the Setting of the Amount of a Fine for Violations of Article 35 and/or 65 of the Law (the "**Fining Guidelines**").
- 46 The Fining Guidelines reflect the Authority's fining practices to date, which in turn have been guided by international best practices, including the basic methodology used by Ofcom and other telecommunications regulatory authorities when establishing fines for licence breaches.

Procedure followed to determine the amount of the financial penalty

- 47 The Authority has followed the following steps in determining the quantum of the fine to be imposed on Batelco for sharing the details of Viva's and Batelco's negotiations in relation an access request made in June 2015 with at least one (and more likely two) third party(ies):
- (a) Firstly, a baseline figure is established by reference to a value that is germane or relevant to the infringement in question;
 - (b) This baseline figure may then be adjusted upwards or downwards to take into consideration the following "aggravating" and "mitigating" factors at the Authority's discretion:
 - (i) the degree or severity of the breach in question;
 - (ii) any gain (financial or otherwise) accrued by the party perpetuating the breach;
 - (iii) the extent to which the infringement was perpetrated intentionally or recklessly, including the extent to which senior management knew, or ought to have known, that an infringement was occurring or would occur;

- (iv) the extent to which any contravention was caused by a third party, or any relevant circumstances beyond the control of the licensee;
 - (v) whether in all the circumstances, appropriate steps had been taken by the perpetuating party to prevent or remedy the breach in question;
 - (vi) any steps taken by the perpetuating party to mitigate the consequences of the breach; and
 - (vii) any other factors that, in the Authority's view, constitute an aggravating or mitigating circumstance.
- (c) Consideration then will be given to whether the amount of the fine calculated on the basis of the considerations listed above has a sufficiently deterrent effect.
- (d) Finally, a proportionality review of the final amount of the fine is carried out.

Calculation of the baseline figure

48 The Fining Guidelines at PART II B: DETERMINING THE AMOUNT OF A FINE TO BE IMPOSED FOR A VIOLATION OF ART 35 OF THE TELECOMMUNICATIONS LAW sets out those factors that the Authority will have regard to when deciding upon an appropriate level of base fine for a breach of the terms of the Telecommunications Law and/or an Operator's Licences.

49 Article 46 of the Fining Guidelines states that:

"to determine the amount of the fine to be imposed for a given infringement, a baseline figure will first be established by the Authority by reference to a value that is germane to the infringement in question..."

- 50 Article 46 then provides examples of how the Authority might seek to establish this value. That article refers *inter alia* to any comparable penalties.
- 51 The Authority notes that there has been no Article 35 order issued imposing a fine for a breach of Article 57(f) of the Law and as such there is no comparable fine against which the current Article 35 order could be measured.
- 52 In the absence of any directly comparable fines, when setting the baseline figure, the Authority has on this occasion been minded to have regard to the previous baseline fines applied in cases where there has been a severe breach of the Law that has not previously been sanctioned by the Authority.
- 53 The Authority notes however that whilst there has been no previous Article 35 Orders addressing a breach of Article 57(f) of the Law, there have been recent examples of the Authority imposing financial penalties for severe breaches of the Law that are tangentially analogous to the current breach (see for example Order No. 10 of 2015, which imposed a baseline fine of BHD 15,000 for a first time breach of Article 53 of the Law).
- 54 The Authority wishes for it to be clear that whilst the facts of these two cases are clearly distinct, but since both orders relate to severe first time breaches of the Law relating to the use/misuse of information, the Authority sees merit, on this occasion, in imposing the same baseline figure as in the aforementioned Final Order. In addition it is acknowledged that on this occasion Batelco's breaches of the applicable regulatory provisions have not resulted in Batelco accruing a direct financial benefit (e.g. from succeeding in the Protest's stated aim of having the GOA award the underlying US Navy Agreement to Batelco): had such happened the level of fine to be imposed on Batelco would, in line with the principles set out in the Fining Guidelines, have had to have acted as a sufficient deterrent to prevent similar future conduct.
- 55 As such, in view of the foregoing, the Authority has decided to set a baseline figure of BHD 15,000.

Aggravating factors

56 Having established a baseline figure of BHD 15,000, the next step of the process is to consider the aggravating factors set out at Article 47 of the Fining Guidelines. Each of the factors identified in Article 47, which in the Authority's view are applicable, is considered below in relation to Batelco's current breach.

Article 47(a): "the degree of severity of the breach or violation"

57 Self-evidently a breach of Article 57(f) of the Telecommunications Law will qualify as a matter of grave severity especially in cases like the one at hand where the information obtained by the wholesale arm of Batelco from a competing licensed operator (namely Viva), is used by a different unit of Batelco, in an attempt to sabotage a significant contract for the provision of telecommunications services to the United States Navy Base in the Kingdom of Bahrain.

58 The Authority therefore considers that it is appropriate to apply to the baseline figure to take into account the seriousness of the breach (the "**Seriousness Factor**") a factor equating to fifty percent (50%) of the baseline figure, which should be added to the baseline figure.

Article 47(c): "whether the Licensed Operator has a history of infringement (recidivism may lead to significantly increased penalties) during the previous ten years"

59 It is noted that Batelco has been served with a number of Article 35 Orders and Emergency Orders over the course of the past ten years¹. These include:

- (a) Article 34 Order 1 of 2009;
- (b) Emergency Order No. 2 of 2010;

¹ Only Emergency Orders that relate to an infringement by Batelco are considered.

- (c) Emergency Order No. 3 of 2010;
- (d) Emergency Order No. 1 of 2015; and
- (e) Emergency Order No. 1 of 2016.

60 Batelco's clear history of infringement covering the previous ten years leaves the Authority with no choice other than to apply to the baseline figure to take into account the recidivism of Batelco (the "**Recidivism Factor**") a factor equating to fifty percent (50%) of the baseline figure, which should be added to the baseline figure.

Article 47 (d): "the extent to which the infringement was perpetrated intentionally or recklessly, including the extent to which senior management knew, or ought to have known that an infringement was occurring or would occur"

61 There can be little doubt that the conduct was perpetrated intentionally (as opposed to negligent) and that senior management knew that an infringement was occurring. This is supported by the fact that the Protest was accompanied by a Declaration of Mr. Adel Ahmed Mohammed Daylami who holds the position of General Manager – International Services in Batelco.

62 It is therefore evident that knowledge of Batelco's illegal conduct is known to Batelco's executive team at the highest level. The Authority therefore considers that a senior management factor (the "**Management Factor**") of fifty percent (50%) of the baseline figure should be added to the baseline figure.

Mitigating factors

63 The next step in the process is to consider whether there are any mitigating factors that should be taken into account. The Authority does not consider that any of the mitigating factors set out at Article 48 of the fining guidelines are relevant.

Need to ensure deterrence

- 64 The Authority's fining practice under Article 35 of the Telecommunications Law acknowledges the importance of deterrence when determining the amount of a financial penalty.
- 65 The Authority considers that the amount of the baseline figure of the fine imposed on Batelco for a breach of Article 57(f) of the Law should act as a sufficient deterrent against any further breaches.
- 66 The Authority does not, therefore, consider that there is any need in this case to make any adjustments for deterrence.

CALCULATION

- 67 The computation of the fine after taking into account the aggravating and mitigating factors is as follows

$$\begin{aligned} \text{Fine} &= \text{Basic Amount} + \\ &\quad \text{Basic Amount} \times \text{Seriousness Factor} + \\ &\quad \text{Basic Amount} \times \text{Recidivism Factor} + \\ &\quad \text{Basic Amount} \times \text{Management Factor} \\ &= \text{BHD } 15,000 + \text{BHD } 7,500 + \text{BHD } 7,500 + \text{BHD } 7,500 \\ &= \text{BHD } 37,500 \end{aligned}$$

Proportionality

- 68 The Authority considers that the imposition on Batelco of a fine in the amount of BHD 37,500 is proportionate, considering all the circumstance of this case. In particular, the amount in question is sufficient to reflect the important issues at stake in this case.

Conclusion – Final amount of financial penalty

68. Having considered the factors listed above, and any other circumstances relevant to the particular case under consideration, the Authority has determined that a fine in the amount of BHD 37,500 is appropriate and proportionate.