



هيئة تنظيم الاتصالات
Telecommunications Regulatory Authority
مملكة البحرين - Kingdom of Bahrain

Article 35 Order No. 2 of 2013

VIVA's Breach of (i) its Frequency Licence issued 22 January 2013 (Document Number LSU/LC/F/13/1); (ii) its Individual Mobile Telecommunications Licence issued 10 December 2012 (Document Number LSU/LC/249) and (iii) its National Fixed Services Licence issued 18 April 2010 (Document Number LSU/LC/268)

An Order issued by
Telecommunications Regulatory Authority
under article 35 of the Telecommunications Law to
VIVA Bahrain B.S.C.

1 August 2013

LAD 0813 080



Article 35 Order No. 2 of 2013

VIVA's Breach of (i) its Frequency Licence issued 22 January 2013 (Document Number LSU/LC/F/13/1); (ii) its Individual Mobile Telecommunications Licence issued 10 December 2012 (Document Number LSU/LC/249) and (iii) its National Fixed Services Licence issued 18 April 2010 (Document Number LSU/LC/268)

ORDER

IN THE EXERCISE OF ITS POWERS

UNDER ARTICLES 3 AND 35 OF THE TELECOMMUNICATIONS LAW,

THE AUTHORITY MAKES THE FOLLOWING ORDER

1. For the reasons set out in the reasoning of this Order, the Telecommunications Regulatory Authority ("the **Authority**") considers that VIVA Bahrain BSC ("**VIVA**") has:
 - a. Without the requisite authorisation from the Authority, upgraded 165 links assigned to it by virtue of a Frequency Licence issued on 22nd January 2013 (Document Number LSU/LC/F/13/1) and in so doing has exceeded the bandwidth limitations set out in the same licence;
 - b. Failed to take all necessary steps to ensure that the use of the spectrum is safe and does not cause harmful interference to other existing radiocommunications stations and telecommunications networks operating in the same area or radio frequency band and in other areas or radio frequency bands; and
 - c. Failed to ensure that all persons using its radiocommunications equipment comprised in any of its radiocommunications stations are made aware of the relevant terms of its licences and comply with such terms;



Article 35 Order No. 2 of 2013

VIVA's Breach of (i) its Frequency Licence issued 22 January 2013 (Document Number LSU/LC/F/13/1); (ii) its Individual Mobile Telecommunications Licence issued 10 December 2012 (Document Number LSU/LC/249) and (iii) its National Fixed Services Licence issued 18 April 2010 (Document Number LSU/LC/268)

in breach of Clause 1, Clause 4, Clause 12 and Schedule A of its Frequency Licence, in breach of Clause 10 of the Mobile Licence ("**Mobile Licence**") and in breach of Clause 20 of the Individual Licence for National Fixed Services ("**NFS Licence**").

2. Therefore VIVA is ordered:

- 2.1. Within 90 calendar days from date of this Order to downgrade all non-compliant links to the assigned frequency and bandwidth set out in the Frequency Licence;
- 2.2. As soon as possible but not later than 5 calendar days from date of this Order, to provide the Authority with a migration plan outlining how VIVA intends to achieve the downgrade of the links over the course of the timeframe stipulated in Clause 2.1 above;
- 2.3. To provide the Authority with all the required information and assistance in order to enable the Authority to confirm that the downgrade has actually been completed; and
- 2.4. Pay, within 30 calendar days from date of this Order, the sum of BD97,641.926 by way of outstanding spectrum licence fees representing the difference in the actual annual spectrum licence fee paid by VIVA in respect of the licensed bandwidth and the spectrum Licence Fee that would have been due in respect of the unauthorised upgraded links ("**the Outstanding Spectrum Licence Fees**").



Article 35 Order No. 2 of 2013

VIVA's Breach of (i) its Frequency Licence issued 22 January 2013 (Document Number LSU/LC/F/13/1); (ii) its Individual Mobile Telecommunications Licence issued 10 December 2012 (Document Number LSU/LC/249) and (iii) its National Fixed Services Licence issued 18 April 2010 (Document Number LSU/LC/268)

3. Fine

3.1. Without prejudice to the obligation to pay the Outstanding Spectrum Licence Fees in Clause 2.4 above, VIVA is also ordered to pay a fine of BD124,688 within 30 calendar days from date of this Order.

3.2. In the event that VIVA fails to downgrade the links within 90 calendar days as set out in Clause 2.1 above, then VIVA shall be liable to a daily penalty of BD20 per MHz for each day of delay or part thereof.

3.3. VIVA shall pay the outstanding licence fee set out in paragraph 2.4 of this Order together with the fine set out in paragraph 3.1 and 3.2 of this Order to the following account:

Account Number: 100000054341

IBAN: BH41 BBKU 0010 0000 0543 41

SWIFT CODE: BBKUBHBM

4. Compliance

In terms of Article 35(d)(3), failure by VIVA to abide by the Order (including the payment of the fine) may lead to the revocation of VIVA's Frequency Licence and/or NFS Licence and/or Mobile Licence.



Article 35 Order No. 2 of 2013

VIVA's Breach of (i) its Frequency Licence issued 22 January 2013 (Document Number LSU/LC/F/13/1); (ii) its Individual Mobile Telecommunications Licence issued 10 December 2012 (Document Number LSU/LC/249) and (iii) its National Fixed Services Licence issued 18 April 2010 (Document Number LSU/LC/268)

5. Entry into force

This Order shall enter into force on 01 August 2013.

Mohamed Hamad Bubashait
General Director

For and on behalf of the Telecommunications Regulatory Authority

01 August 2013



Article 35 Order No. 2 of 2013

VIVA's Breach of (i) its Frequency Licence issued 22 January 2013 (Document Number LSU/LC/F/13/1); (ii) its Individual Mobile Telecommunications Licence issued 10 December 2012 (Document Number LSU/LC/249) and (iii) its National Fixed Services Licence issued 18 April 2010 (Document Number LSU/LC/268)

REASONING

Relevant Legal Provisions

5. The Authority has granted VIVA a NFS Licence, a Mobile Licence and a Frequency Licence pursuant to its powers under the Telecommunications Law.
6. Article 3(c)(2) of the Telecommunications 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)(4) of the Telecommunications Law authorises the Authority to monitor and enforce compliance with Licence terms and conditions by Licensees.
8. By virtue of Article 3(c)(10) of the Telecommunications Law, the Authority is entrusted with approving telecommunications frequencies licences to licensees in accordance with the National Frequency Plan.
9. Article 42(b) of the Telecommunications Law provides that the Authority is responsible for the co-ordination, assignment and monitoring the enforcement of Telecommunications Frequencies.
10. By virtue of Clause 1 of VIVA's Frequency Licence, VIVA was assigned the frequency spectrum described in Schedule A thereto.
11. Clause 4.1 of VIVA's Frequency Licence states:



Article 35 Order No. 2 of 2013

VIVA's Breach of (i) its Frequency Licence issued 22 January 2013 (Document Number LSU/LC/F/13/1); (ii) its Individual Mobile Telecommunications Licence issued 10 December 2012 (Document Number LSU/LC/249) and (iii) its National Fixed Services Licence issued 18 April 2010 (Document Number LSU/LC/268)

"<Omissis> the licensee shall take all necessary steps to ensure that the use of the Assigned Radio Frequency Spectrum is safe and does not cause harmful interference to the other existing radiocommunications stations and telecommunications networks operating in the same area or radio frequency band and in other areas or radio frequency bands."

12. Clause 12.1 of VIVA's Frequency Licence defines the manner in which the licence may be amended: (i) either by written agreement between the Authority and VIVA or (ii) by the Authority unilaterally in the instances mentioned in Clause 12.1(b). VIVA is not however, in a position to amend the frequency licence unilaterally.

13. Schedule A of the Frequency Licence states:

"The Assigned Radio Frequency Spectrum means the radio channel(s) centred on the frequencies listed below and each channel shall not exceed the bandwidth stated below."
(emphasis added)

14. Clause 20.2 of the NFS Licence provides:

"The licensee shall ensure that the radiocommunications equipment comprised in any of its radiocommunications stations is designed and constructed, used and maintained, so as not to cause any undue interference even when in use in compliance with the rules from time to time established by the Regulator."



Article 35 Order No. 2 of 2013

VIVA's Breach of (i) its Frequency Licence issued 22 January 2013 (Document Number LSU/LC/F/13/1); (ii) its Individual Mobile Telecommunications Licence issued 10 December 2012 (Document Number LSU/LC/249) and (iii) its National Fixed Services Licence issued 18 April 2010 (Document Number LSU/LC/268)

15. Clause 20.4 of the NFS Licence states:

"The licensee shall ensure that all persons using its radiocommunications equipment comprised in any of its radiocommunications stations are made aware of the relevant terms of this license and any other applicable license and comply with such terms."

16. Clause 10.2 of the Mobile Licence states:

"The licensee shall ensure that the radiocommunications equipment comprised in any of its radiocommunications stations is designed and constructed, used and maintained, so as not to cause any undue interference even when in use in compliance with the rules from time to time established by the Regulator."

17. Clause 10.4 of the Mobile Licence states:

"The licensee shall ensure that all persons using its radiocommunications equipment comprised in any of its radiocommunications stations are made aware of the relevant terms of this license together with any applicable license and comply them."

Background

18. Radio spectrum is a scarce resource.¹ One of the main responsibilities of the Authority is to effectively manage and, subject to spectrum availability, assign frequency channels to

¹ *Vide* section 7.1 of the Third National Telecommunications Plan – Resolution No. 39 of the year 2012.



Article 35 Order No. 2 of 2013

VIVA's Breach of (i) its Frequency Licence issued 22 January 2013 (Document Number LSU/LC/F/13/1); (ii) its Individual Mobile Telecommunications Licence issued 10 December 2012 (Document Number LSU/LC/249) and (iii) its National Fixed Services Licence issued 18 April 2010 (Document Number LSU/LC/268)

applicants.² It is also responsible to monitor and enforce compliance with the licence terms by licensees.³

19. The Directorate of Wireless Licensing, Frequencies & Monitoring ("DWLF&M") by virtue of a letter dated 30th December 2012 (Ref. 3149/8/ع/ ات ر) informed the Authority that following a random investigation which it had carried out on a tower in Adliya area on the 29th December 2012, it had identified the illegal usage of two microwave point to point links. It was subsequently ascertained that these links pertained to VIVA.
20. The Authority, by virtue of a letter dated 8th January 2013 (ref: LAD0113 001), informed VIVA of the reported breach of its Frequency Licence on the basis of the DWLF&M report.
21. During a meeting held on the 11th February 2013 (and subsequently confirmed by virtue of two separate letters dated 13th February 2013 and 17th February 2013) (ref 0213-Corp-Reg-Gen-007) VIVA:
 - (i) confirmed that the microwave links in question did pertain to it; and
 - (ii) confirmed that it had, "in good faith, upgraded 165 non-MPL: compliant links out of the total links [X]".⁴

² Article 42(a) of the Telecommunications Law.

³ Article 3(4) of the Telecommunications Law.

⁴ VIVA has since informed the Authority that four MW links is no longer in use since it was destroyed following a *Force Majeure* event. A further three MW links have since been deleted.



Article 35 Order No. 2 of 2013

VIVA's Breach of (i) its Frequency Licence issued 22 January 2013 (Document Number LSU/LC/F/13/1); (ii) its Individual Mobile Telecommunications Licence issued 10 December 2012 (Document Number LSU/LC/249) and (iii) its National Fixed Services Licence issued 18 April 2010 (Document Number LSU/LC/268)

22. As confirmed by VIVA, VIVA has upgraded 165 Microwave links, thereby exceeding the bandwidth stipulated in the Frequency Licence, without the prior approval in writing from the Authority. The said 165 links are, as stated in VIVA's letter of the 17th February 2013, currently live and carrying customers' traffic.

The Breach

Clause 1, Clause 12 and Schedule A of the Frequency Licence

23. Schedule A of the Frequency Licence identifies the frequencies on which the radio channels may be centred. It also specifies the maximum bandwidth which each frequency channel may utilise.
24. Exceeding the bandwidth limitations set out in the Frequency Licence may only take place with the specific authorisation of the Authority which would constitute an amendment to the Frequency Licence. The Frequency Licence may only be amended by the Authority in the manner set out in Clause 12 thereof, whilst following the procedure set out in Article 51 of the Telecommunications Law. In other words, VIVA may not unilaterally vary the terms of its Frequency Licence.
25. By altering the assigned frequencies and increasing the bandwidth utilised without the Authority's authorisation, VIVA has exceeded the bandwidth limitations stipulated in Schedule A of its Frequency Licence. Annex 1 includes a document submitted by VIVA which provides a comparison of the upgraded links with their centre frequencies compared to what was assigned to VIVA by virtue of the Frequency Licence. (Annex 1)



Article 35 Order No. 2 of 2013

VIVA's Breach of (i) its Frequency Licence issued 22 January 2013 (Document Number LSU/LC/F/13/1); (ii) its Individual Mobile Telecommunications Licence issued 10 December 2012 (Document Number LSU/LC/249) and (iii) its National Fixed Services Licence issued 18 April 2010 (Document Number LSU/LC/268)

Clause 4 of the Frequency Licence, Clause 10.2 of the Mobile Licence and Clause 20.2 of the NFS Licence

26. The upgrade of the 165 Links has brought about a change in the centre frequencies which in turn has given rise to a high potential of undue and harmful interference due to the fact that the upgraded frequency channels are not registered at the national spectrum database of the Kingdom of Bahrain.
27. Clause 4.1 of the Frequency Licence obliges *VIVA to take all necessary steps to ensure* that the use of the assigned radio frequency does not cause harmful interference to other networks.⁵ It is evident therefore that for there to be a breach of this clause, it is not necessary to prove an actual occurrence of harmful interference. What is mandated of the licensee is that it takes all the necessary measures to ensure that the interference does not take place. Whether that measure is critical or otherwise is also not relevant for the purposes of establishing a breach. What is relevant is whether the measure was necessary as the licence terms speak of *all necessary* measure. It is therefore reasonable to ask whether a prudent operator would view the observance of the frequency licence terms as a necessary step. The Authority is of the view that operating within the parameters of their frequency licences is one measure which all prudent licensees would seek to ensure.
28. In this context, the Authority further notes that establishing a breach of this Clause, is not dependant on the gravity or otherwise of the harmful interference or on the chances that

⁵ Emphasis added.



Article 35 Order No. 2 of 2013

VIVA's Breach of (i) its Frequency Licence issued 22 January 2013 (Document Number LSU/LC/F/13/1); (ii) its Individual Mobile Telecommunications Licence issued 10 December 2012 (Document Number LSU/LC/249) and (iii) its National Fixed Services Licence issued 18 April 2010 (Document Number LSU/LC/268)

harmful interference actually occurs. Indeed Clause 4.1 of the Frequency Licence speaks of "harmful interference" without any qualification whatsoever.

29. Similarly, by virtue of Clause 20.2 of the NFS Licence and Clause 10.2 of the Mobile Licence, VIVA is required to ensure that its radiocommunications equipment is used in a manner that does not cause undue interference.
30. The Authority contends that by failing to follow the prescribed procedure, VIVA has, for the reasons set out in paragraph 26 *et seq.*, failed to fulfil its obligations under Clause 4 of the Frequency Licence.

Clause 20.4 of the NFS Licence & Clause 10.4 of the Mobile Licence

31. By virtue of Clause 20.4 of the NFS Licence and Clause 10.4 of the Mobile Licence, VIVA is obligated to ensure that all persons using its radiocommunications equipment in any of its radiocommunications stations comply with the terms of the NFS Licence, Mobile Licence and any other applicable licence. This therefore incorporates the provisions of the Frequency Licence.
32. The term "persons" under the Telecommunications Law is defined very broadly to include natural or legal persons. The Authority believes that this clause, in the present context, covers natural persons employed by VIVA who, in the course of their employment, use the radiocommunications equipment of VIVA.



Article 35 Order No. 2 of 2013

VIVA's Breach of (i) its Frequency Licence issued 22 January 2013 (Document Number LSU/LC/F/13/1); (ii) its Individual Mobile Telecommunications Licence issued 10 December 2012 (Document Number LSU/LC/249) and (iii) its National Fixed Services Licence issued 18 April 2010 (Document Number LSU/LC/268)

33. Consequently, in failing to adhere to the afore-mentioned provisions of the Frequency Licences, the Authority considers that VIVA has also failed to ensure that its employees comply with the terms of its licences when using VIVA radiocommunications equipment in its radiocommunications stations.

Conclusion

34. The Authority is of the view that VIVA's conduct is in clear breach of the Frequency Licence (Clauses 1, 4, 12 and Schedule A). VIVA has also flouted the provisions of Clause 20.4 of the NFS license and of Clause 10.4 of the Mobile Licence.

Article 35

35. Article 35 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 or any condition of its licence.⁶ The term "Licence" under the Article 1 of the Telecommunications Law is defined as either of a Telecommunications Licence or a Frequency Licence.

36. In the Final Award in the arbitration between Batelco and the Authority, dated 30th October 2012, (hereinafter referred to as "the Flag Arbitration") the Tribunal held that "severe breach" would be taken to mean, "a breach which is more than minor and/or transient, and which contravenes the identifiable purpose of the relevant provision of the Telecommunications Law breached by the conduct in question."⁷ The Authority considers

⁶ The Arabic text speaks of "severe" whereas the English translation mentions "material". In the Flag Arbitration it was universally accepted that the correct term should follow the Arabic version – "severe".

⁷ At para. 8.4.



Article 35 Order No. 2 of 2013

VIVA's Breach of (i) its Frequency Licence issued 22 January 2013 (Document Number LSU/LC/F/13/1); (ii) its Individual Mobile Telecommunications Licence issued 10 December 2012 (Document Number LSU/LC/249) and (iii) its National Fixed Services Licence issued 18 April 2010 (Document Number LSU/LC/268)

that the case in hand satisfies these elements. The breach of licensing conditions has occurred in shared spectrum i.e. spectrum which is not designated exclusively for public telecommunications purposes in the National Frequency Plan. In addition to causing potential degradation of the quality and availability characteristics of point-to-point links belonging to other public and non-public telecommunications operators; the frequencies which are being used by VIVA in a non-authorized manner could be assigned for important governmental use and may not necessarily be in operation on a continuous basis. The unauthorized use by VIVA of the said frequencies could therefore not only cause harmful interference but could also cause serious disruption to important communications related to defence or security matters.

37. It is the Authority's view that VIVA's actions (i) in exceeding its bandwidth limitations, (ii) in failing to take all necessary steps to ensure that the use of radio frequency does not cause harmful interference to other networks and (iii) in failing to ensure that its employees comply with the terms of its licences, cannot be classified as minor and/or transient breaches. The Authority believes that these actions are tantamount to a severe breach for the purposes of the provisions of Article 35 of the Telecommunications Law.
38. The Authority further considers that the nature of the breach is such that the element of public interest subsists. There can be no doubt that the high potential of harmful interference could negatively impact other licensed operators, which in turn would have a detrimental effect on the telecommunications services being provided to the end users.



Article 35 Order No. 2 of 2013

VIVA's Breach of (i) its Frequency Licence issued 22 January 2013 (Document Number LSU/LC/F/13/1); (ii) its Individual Mobile Telecommunications Licence issued 10 December 2012 (Document Number LSU/LC/249) and (iii) its National Fixed Services Licence issued 18 April 2010 (Document Number LSU/LC/268)

Effects of the Article 35 draft Order

39. This Order is issued without prejudice to further investigation by the Authority into VIVA's alleged breach of its NFS Licence and/or its Frequency Licence.
40. This 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 law of the Kingdom of Bahrain.
41. The issuance of this Order does not prejudice the Authority's right to:
 - a. expand the scope of its investigation into this matter;
 - b. issue further orders relating to other breaches arising out of the same set of facts;
 - c. find, develop or introduce new evidence relating to the alleged breach described herein.

Fining principles

42. Article 35(d)(2) of the Telecommunications Law states that the Authority shall issue an order containing a suitable fine on the Licensee provided that such fine is objectively justified and non-discriminatory.
43. The Telecommunications Law does not provide specific guidance on the setting of fines.



Article 35 Order No. 2 of 2013

VIVA's Breach of (i) its Frequency Licence issued 22 January 2013 (Document Number LSU/LC/F/13/1); (ii) its Individual Mobile Telecommunications Licence issued 10 December 2012 (Document Number LSU/LC/249) and (iii) its National Fixed Services Licence issued 18 April 2010 (Document Number LSU/LC/268)

44. The Authority is aware that it has not published or consulted on guidelines or procedures it will follow in determining the appropriate level of any fine it considers necessary to award against any person subject to an order under Article 35 of the Telecommunications Law. In the absence of any fining guidelines or principles, the Authority considers that it is appropriate to be guided by the Telecommunications Law, its own precedents as well as to consider international best practice.
45. In addition the Authority, whilst acknowledging that it is a matter reserved for a regulator to determine in the first instance the nature of the sanctions that it regards as essential to achieve the statutory objectives of the legislation, recognises that ultimately the level of fine should be expected to achieve a fair result in terms of a punishment appropriate to the breach and to achieve specific or general deterrence.⁸

46. International Best Practice

46.1. The Authority notes that there does not appear to be a uniform approach to setting fines for technical breaches of telecommunications licenses or equivalent conditions of general authorisations. The Authority also notes that the National Regulatory Authority in the United Kingdom, Ofcom, has consistently been ranked as one of the most effective regulator in the European Union by organizations such as the

⁸ See in this regard section 11 of the Final Award in the arbitration between Batelco and the Authority dated 30th October 2012.



Article 35 Order No. 2 of 2013

VIVA's Breach of (i) its Frequency Licence issued 22 January 2013 (Document Number LSU/LC/F/13/1); (ii) its Individual Mobile Telecommunications Licence issued 10 December 2012 (Document Number LSU/LC/249) and (iii) its National Fixed Services Licence issued 18 April 2010 (Document Number LSU/LC/268)

European Competitive Telecommunications Association.⁹ The Authority has therefore studied the approach taken by Ofcom to see if there are lessons that would be useful for application of fining principles in the Kingdom.

46.2. Ofcom has published Penalty Guidelines.¹⁰ In the interim, before the Authority can consult on its own guidelines, the Authority proposes to follow these guidelines, which are reproduced below.

46.3. Criteria that will be taken into account when determining the amount of the Penalty

- a. The Authority will consider all the circumstances of the case in order to determine the appropriate and proportionate amount of any penalty. The central objective of imposing a penalty is deterrence.¹¹ The amount of any penalty must be sufficient to ensure that it will act as an effective incentive to compliance, having regard to the seriousness of the infringement. In addition the Authority will have regard to any representations made to it by the licensee in breach. Accordingly, the Authority, in setting the level of fine will consider all relevant circumstances.

⁹ See ECTA Regulatory Scorecard 2008, published 28 January 2009. All ECTA Regulatory Scorecards are available at: <http://www.ectaportal.com/en/basic651.html>

¹⁰ Penalty Guidelines – Section 392 of the Communications Act 2003, Ofcom. Available at: <http://www.ofcom.org.uk/about/policies-and-guidelines/penalty-guidelines/>

¹¹ *Ibid.*



Article 35 Order No. 2 of 2013

VIVA's Breach of (i) its Frequency Licence issued 22 January 2013 (Document Number LSU/LC/F/13/1); (ii) its Individual Mobile Telecommunications Licence issued 10 December 2012 (Document Number LSU/LC/249) and (iii) its National Fixed Services Licence issued 18 April 2010 (Document Number LSU/LC/268)

b. The factors taken into account in each case will vary, depending on what is relevant. Some examples of potentially relevant factors are:

- The degree of harm, whether actual or potential, caused by the contravention, including any increased cost incurred by consumers or other market participants;
- The duration and nature of the contravention;
- Any gain (financial or otherwise) made by the regulated body in breach (or any connected body) as a result of the contravention;
- Any steps taken for remedying the consequences of the contravention;
- Whether the regulated body in breach has a history of contraventions (repeated contraventions may lead to significantly increased penalties);
- Whether in all the circumstances, appropriate steps had been taken by the regulated body to prevent the contravention;
- The extent to which the contravention occurred intentionally or recklessly, including the extent to which senior management knew, or ought to have known, that a contravention was occurring or would occur;



Article 35 Order No. 2 of 2013

VIVA's Breach of (i) its Frequency Licence issued 22 January 2013 (Document Number LSU/LC/F/13/1); (ii) its Individual Mobile Telecommunications Licence issued 10 December 2012 (Document Number LSU/LC/249) and (iii) its National Fixed Services Licence issued 18 April 2010 (Document Number LSU/LC/268)

- Whether the contravention in question continued, or timely and effective steps were taken to end it, once the regulated body became aware of it; and
 - The extent to which the level of penalty is proportionate, taking into account the size and turnover of the regulated body.
- c. The Authority will have regard to any relevant precedents set by previous cases, but may depart from them depending on the facts and the context of each case.
- d. The Authority will have regard to the need for transparency in applying these guidelines, particularly as regards the weighting of the factors considered.
- e. The Authority may increase the penalty where the licensee in breach has failed to cooperate fully with the investigation.
- f. The Authority will ensure that the overall amount does not exceed the maximum penalty for the particular type of contravention, to the extent that a maximum penalty is set out in any applicable legal instrument.
- g. The Authority will have regard to any representations made to it by the regulated body in breach.



Article 35 Order No. 2 of 2013

VIVA's Breach of (i) its Frequency Licence issued 22 January 2013 (Document Number LSU/LC/F/13/1); (ii) its Individual Mobile Telecommunications Licence issued 10 December 2012 (Document Number LSU/LC/249) and (iii) its National Fixed Services Licence issued 18 April 2010 (Document Number LSU/LC/268)

47. Final amount of fine

Having considered the factors listed above and any other circumstances relevant to the particular case under consideration, the Authority has determined an appropriate and proportionate fine.

48. Considerations in setting the amount of fine

48.1. The Authority notes that there is no maximum fine defined in Article 35 of the Telecommunications Law. Without prejudice to its right to impose any fine under Article 35 that it considers appropriate and proportionate, the Authority does not intend to impose a fine under Article 35 of the Telecommunications Law above the maximum set out in Article 73(g) for a breach of Article 43 (operating without a frequency licence) – five hundred thousand dinars (BD 500,000). The Authority also acknowledges the provisions of Article 65(f)(2) but considers these to be inapplicable in view of the fact that the breach contemplated therein is not comparable to the case in hand.

48.2. The Authority recognizes that for a severe breach of the Law¹², it has been previously held that a fine of BD750,000 was appropriate.¹³ In that case the Tribunal ruled that “the consequences of Batelco’s breach in the FLAG Order case may have

¹² See section 11.8 of the Final Award in the arbitration between Batelco and the Authority dated 30th October 2012.

¹³ *ibid.* at Section 11.11.



Article 35 Order No. 2 of 2013

VIVA's Breach of (i) its Frequency Licence issued 22 January 2013 (Document Number LSU/LC/F/13/1); (ii) its Individual Mobile Telecommunications Licence issued 10 December 2012 (Document Number LSU/LC/249) and (iii) its National Fixed Services Licence issued 18 April 2010 (Document Number LSU/LC/268)

had wider implications for the liberalisation of the market".¹⁴ The Authority believes that while the case in hand constitutes a severe breach of the licence terms, it does not fall within the category of the FLAG order in that the liberalisation of the market is not at stake.

48.3. The Authority considers that for the current enforcement action under Article 35, the most appropriate method would be to begin determination of the level of fine from the licences fees that would have been payable if the bandwidth within the Frequency Licence had been set at the current level because the spectrum licensing fees reflect the value of the spectrum.

Aggravating Circumstances

48.4. In line with the Authority's Resolution Number 3 of 2010 (the Schedule of Fees), the annual spectrum licence fee that would have been due for the utilised bandwidth would have amounted to BD198,660.¹⁵ The annual spectrum licence fee payable in respect of the licensed bandwidth amounts to BD78,260.¹⁶ The difference amounts to BD120,400. Pro-rated to the 29th October 2013¹⁷, the difference in spectrum licence fee would amount to BD99,618.630. Naturally, setting the fine at the same

¹⁴ *ibid.* at Section 11.5.

¹⁵ This is calculated as follows: ([X]).

¹⁶ This is calculated as follows: ([X]).

¹⁷ The 29th October constitutes 90 calendar days from the date of the Order, assuming that the Order is issued on the 1st August and allowing a two weeks for consideration of VIVA's submissions which are to be received by the 17th July.



Article 35 Order No. 2 of 2013

VIVA's Breach of (i) its Frequency Licence issued 22 January 2013 (Document Number LSU/LC/F/13/1); (ii) its Individual Mobile Telecommunications Licence issued 10 December 2012 (Document Number LSU/LC/249) and (iii) its National Fixed Services Licence issued 18 April 2010 (Document Number LSU/LC/268)

level as the difference in spectrum licence fee is not appropriate because this would not act as an effective deterrent and incentive to comply.

48.5. Moreover, the fine has to reflect the actual or potential degree of harm. In this case, the unauthorised increase in bandwidth could have led to spectrum interference to the detriment of other licensed operators and ultimately the consumers.

48.6. The fine should also take into account the fact that VIVA has made unauthorised use of a scarce resource of the Kingdom of Bahrain, which the Authority considers to be a very serious matter.

48.7. Another consideration that the Authority has to bear in mind is the fact that VIVA has made a non-financial gain to the detriment of its competitors in not seeking the necessary approvals. The Authority has received a number of applications from licensees requesting that they increase the bandwidth assigned to them in the frequency licence. The Authority has had to consider each application separately, on a first come first served basis, and in detail after taking into account the various legal instruments and documents that are applicable including but not limited to the Fixed Point to Point Links – Licensing and Assignment Policy. These considerations require adequate time for proper analysis. VIVA, through its actions, has effectively not only put itself at the front of the queue but has placed itself in a situation where



Article 35 Order No. 2 of 2013

VIVA's Breach of (i) its Frequency Licence issued 22 January 2013 (Document Number LSU/LC/F/13/1); (ii) its Individual Mobile Telecommunications Licence issued 10 December 2012 (Document Number LSU/LC/249) and (iii) its National Fixed Services Licence issued 18 April 2010 (Document Number LSU/LC/268)

it did not wait for the Authority's deliberation thus granting itself the benefit of time when compared to its competitors.

Mitigating Factors

48.8. The Authority notes that VIVA has stated, in its meeting and various communication, that the upgrade was unintentional and coming as a result of a misunderstanding of an Authority's earlier communication on a related yet separate subject.

48.9. Moreover, VIVA has no previous history of a severe breach of the Telecommunications Law or of its licence terms.

48.10. In addition to the criteria set out in paragraph 46.3, the Authority also notes that VIVA has co-operated with the investigation and for this reason it will apply a reduction of 10% on the final penalty.

48.11. The Authority acknowledges that the period of investigation was significant which in turn affects the calculation of the penalty. As such, the Authority will reduce the length of time over which the penalty is calculated by a period of three months.



Article 35 Order No. 2 of 2013

VIVA's Breach of (i) its Frequency Licence issued 22 January 2013 (Document Number LSU/LC/F/13/1); (ii) its Individual Mobile Telecommunications Licence issued 10 December 2012 (Document Number LSU/LC/249) and (iii) its National Fixed Services Licence issued 18 April 2010 (Document Number LSU/LC/268)

Fine under this Order

49. Fixed Fine

In applying the guidelines and principles above, the Authority notes the following:

- (i) The difference in bandwidth between that which is licensed and that which is currently being utilised by VIVA amounts to [~~3~~];
- (ii) In accordance with the Authority's Schedule of Fees for 2010 the annual spectrum licence fee for non-temporary assignments are calculated by multiplying the relevant entry from the table in Clause 4.2(a) by the required bandwidth. In this case, the relevant entry is that under column F – Fixed P-P in conjunction with row 7 – SHF/EHF (10-55GHz) – BD43.
- (iii) Therefore the applicable spectrum licence fees that would have been due in respect of the upgraded links would have amounted to BD 198,660. The annual spectrum licence fee payable in respect of the licensed bandwidth amounts to BD78,260.¹⁸ The difference amounts to BD120,400. Pro-rated to the 29th October 2013, the difference in spectrum licence fee would amount to BD99,618.630;
- (iv) Considering the fact that a penalty to be effective has to serve as a sufficient deterrent; that VIVA's conduct has resulted in potential

¹⁸ This is calculated as follows: ([~~3~~]).



Article 35 Order No. 2 of 2013

VIVA's Breach of (i) its Frequency Licence issued 22 January 2013 (Document Number LSU/LC/F/13/1); (ii) its Individual Mobile Telecommunications Licence issued 10 December 2012 (Document Number LSU/LC/249) and (iii) its National Fixed Services Licence issued 18 April 2010 (Document Number LSU/LC/268)

harm to other licensees by way of spectrum interference; that spectrum is a scarce resource and that VIVA has made a non-financial gain as a result of its contravention;

(v) Considering that VIVA's conduct is mitigated by the fact that the contravention seems to have been unintentional and not reckless; that VIVA does not have a history of contraventions;

(vi) In this instance the Authority, has decided that the appropriate fine would consist in the doubling of the difference in the applicable spectrum charge per MHz leading to a fine of BD86 per MHz. Accordingly the applicable fine is $BD\ 86 \times \frac{210}{365}$ days X 210 days, less 10% which amounts to BD124,688. For the avoidance of doubt, the Authority reiterates that the fine is without prejudice and therefore in addition to VIVA's obligation to pay the Outstanding Spectrum Licence Fees set out in Clause 2.4 above.

50. Variable Fine for each day of Delay

VIVA is required by virtue of Clause 2 of this Draft Order to downgrade the aforementioned non-compliant links to the frequency bands set out in the Frequency Licence within 90 days from date of this Order. In the event that VIVA fails to comply with this



Article 35 Order No. 2 of 2013

VIVA's Breach of (i) its Frequency Licence issued 22 January 2013 (Document Number LSU/LC/F/13/1); (ii) its Individual Mobile Telecommunications Licence issued 10 December 2012 (Document Number LSU/LC/249) and (iii) its National Fixed Services Licence issued 18 April 2010 (Document Number LSU/LC/268)

order, then, without prejudice to Article 35(d)(2) of the Telecommunications Law, VIVA will be subject to a daily fine of BD 20 per MHz per link for each day of delay.¹⁹

¹⁹ The Authority has benchmarked the variable fine with the fees payable for temporary frequencies licences which are set at BD20 per MHz per assignment in respect of bandwidth in excess of 1MHz