



Decision No. 2 of 2019

**Complaint against VIVA Bahrain under Article 72 of the
Telecommunications Law
Misleading Advertisement**

Ref: LAD/0319/071

18 March 2019

Introduction

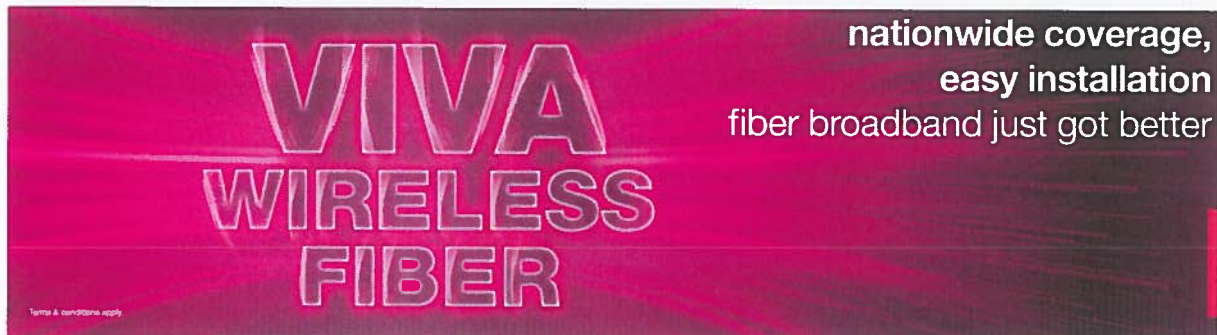
This Decision applies to VIVA Bahrain ("VIVA"), a licensed telecommunications company registered in the Kingdom of Bahrain, providing mobile and fixed services in addition to other licensed services. This Decision:

1. establishes that VIVA's advertising campaign identified below is misleading; and
2. orders VIVA to withdraw or amend said advertising campaign.

The Complaint

The Telecommunications Regulatory Authority ("the Authority") is in receipt of a complaint submitted by Bahrain Telecommunications Company BSC ("Batelco") on 15 January 2019 ("the Complaint") regarding the advertising activities of VIVA Bahrain, specifically with regards to its 'wireless fibre' campaign ("the Advertisement"), alleging that it breaches Articles 6 and 7 of the Consumer Protection Regulation, Article 65(a) of the Telecommunications Law, and Articles 2 and 6 of Law (35) of 2012 with respect to Consumer Protection. Batelco therefore invoked Article 72 of the Telecommunications Law.

The Advertisement is reproduced below:



In the complaint, Batelco maintained its understanding that 'wireless fibre' refers to the combined use of two technologies for telecommunications: (a) conventional radio-frequency wireless, and (b) optical fibre. Batelco therefore questioned whether VIVA had indeed implemented this technology in its new advertised offering. If this was not the case, Batelco argued that the Advertisement was misleading and was in violation of:

1. Articles 6 and 7 of the Consumer Protection Regulation;
2. Article 65(a) of the Telecommunications Law; and



3. Articles 2 and 6 of Law (35) of 2012 with respect to Consumer Protection.

Batelco therefore requested the Authority to: (a) investigate the complaint, and (b) take appropriate action as a result of the investigation.

VIVA's reply

The Authority informed VIVA of the Complaint by way of letter dated 17 January 2019 and requested the same to provide comments on Batelco's submissions pursuant to the Authority's Dispute Resolution Guidelines published on 25 August 2014. The Complaint was attached to the Authority's letter.

On 22 January 2019 VIVA replied to the Authority's request ("Reply") by submitting a non-confidential version of its response.

In its Reply, VIVA rejected Batelco's allegation that its Advertisement was misleading consumers and that it violated the Consumer Protection Regulation and the Telecommunications Law. VIVA claimed that it clearly described in the Advertisement that "the new Wireless Fibre Broadband offers speeds... as fast as Fibre but wireless" as shown in a snapshot provided by the same:

VIVA Wireless Fiber

The future of fiber broadband is here!

Fiber broadband just got better. Enjoy an extreme new broadband experience from VIVA offers:

- Speeds as fast as fiber, but wireless
- Network availability across Bahrain
- Fast and easy installation

VIVA pointed out that the statement it makes in the Advertisement is "*clear, where it states that its new offering is a "VIVA Wireless Fibre" which has "nationwide coverage" featured with "easy installation", which hence means "fibre broadband just got better" as shown below*" (also provided by VIVA):

**nationwide coverage,
easy installation
fiber broadband just got better**

VIVA also stated that it clarified the nature of the type of connectivity used in its offering, and that this is detailed in the offering's brochure where VIVA lists the plan's name using the term "Wireless Fibre XX". A snapshot of this was also provided by VIVA:

All you need to do is sit, relax and enjoy the Wireless Fiber experience!

Monthly Data	Monthly Rental	Plans
40 GB	BD 10	Wireless Fiber 10
140 GB	BD 15	Wireless Fiber 15
200 GB	BD 20	Wireless Fiber 20
300 GB	BD 30	Wireless Fiber 30

Ask about sharing SIMs

VIVA Wireless Fiber Device

Available with Wireless Fiber Plans starting at **BD 1.4/month only*** with no upfront

* Applicable for new customers subscribing to Wireless Fiber 15, Wireless Fiber 20 & Wireless Fiber 30; otherwise, device will cost only BD 2/month over 24 months.

VIVA also pointed out that its relevant terms and conditions state that "this broadband offer is only compatible with VIVA's Data SIM". VIVA did not provide a copy or snapshot of this in its documentary evidence.

VIVA then claimed that its 'wireless fibre' offering utilises the 3.5 GHz frequency (TDD band) leveraging on Huawei's new technology, namely the Massive Multiple-Input Multiple-Output ("Massive MIMO") technology which allows wireless networks to transmit and receive more than one data signal simultaneously over the same radio channel while using separate antennae for transmitting / receiving data signals. VIVA therefore concluded that its offering "*offers better and enhanced performance in terms of data rate and link reliability when compared to normal mobile broadband products*".

Finally, VIVA claimed that "*the term "wireless fibre" is a well-known term which has been used globally by many operators and vendors to reflect the nature of high-speed internet access, particularly that of wireless fixed internet access*".

In light of the above arguments, VIVA refuted Batelco's claims, as it does not consider the Advertisement either false or misleading to consumers.

Legal analysis

The basis of Batelco's challenge takes as its central point that VIVA is advertising its product as a fibre broadband product when it is not. In its Reply VIVA makes it clear that it is using the 3.5 GHz frequency band leveraging on Huawei's Massive MIMO technology to deliver the product described in the Advertisement.

From the outset it is worth noting that the information submitted by VIVA detailing the nature of the technology being utilised for its offering is extremely vague and lacks supporting evidence. The Authority takes this opportunity to urge parties involved in any case which is referred to the Authority to ensure that their submissions are clear, complete and include substantial supporting evidence.

Misleading nature of the Advertisement

MIMO stands for Multiple-Input Multiple-Output ("MIMO"). While it involves multiple technologies, MIMO can essentially be boiled down to this single principle: a wireless network that allows the transmission and receipt of more than one data signal simultaneously over the same radio channel, typically using a separate antenna for the transmission and receipt of each data signal.¹ Standard MIMO networks tend to use two or four antennae to transmit data and the same number to receive it.² Massive MIMO, on the other hand, is a MIMO system with an especially high number of antennae.³ In either case, MIMO is run on wireless technology – not on fibre optic cables.

There is a distinction to be drawn between products which rely on fibre from the transmitting station into the final destination and can therefore properly be described as "full fibre", and those which take the optical fibre transmission part-way but the last lap is provided in a different way⁴ which are then described as "part fibre" or "hybrid fibre", and then those which are labelled as "fibre-like" but use a completely different technology unrelated to fibre technology, including for example copper or wireless based networks.

Advertisements which use the term "fibre" to describe services delivered over copper or wireless-based networks could potentially lead to consumers mistakenly believing that what they are receiving is genuine fibre, and not understand the technological differences between fibre and non-fibre products. By labelling copper or wireless-based networks as "fibre" when it is neither a

¹ Jon Mundy, 'What Is Massive MIMO Technology?' (5G.co.uk) <<https://5g.co.uk/guides/what-is-massive-mimo-technology/>>

² *ibid*

³ *ibid*

⁴ For example when using fibre-to-the-cabinet (FTTC) technology, which still relies on existing copper for the last section between the street-level cabinet and the final destination

full-fibre or hybrid-fibre product, consumers are prevented from making informed decisions and are lead into purchasing pseudo-fibre products. Furthermore, Massive MIMO run on a completely wireless technology, and not on hybrid or part-fibre network.

The Consumer Protection Regulation defines 'Misleading Advertisement' as *an Advertisement which contains information, statements, or visual presentation which directly or by implication is likely to mislead or deceive the Consumer about an Applicable Product or Service.*

According to Article 6(a) of the Consumer Protection Regulation titled 'Obligations of Advertisers', *Advertisers shall ensure that:*

- (a) Advertisements are fair, truthful and accurate, and shall not, directly or by implication, mislead or confuse any Consumer.*

The Authority considers that advertisements may be capable of misleading consumers if they misrepresent the nature and characteristics of a product / service in a way that it may affect the purchasing decision of a consumer. Such misrepresentation may result from providing false information, or information that is otherwise capable of persuading the targeted audience that the product / service at stake presents characteristics that, in reality, it lacks. Such misrepresentation may also result from a partial disclosure of the information relating to the product or service at stake, when the information omitted may allow consumers to reach a better understanding of the characteristics of the product / service to which it refers and to adopt purchasing decisions accordingly. Indeed, Article 7(d) of the Consumer Protection Regulation obliges *Advertisers... not to engage in Misleading Advertisement, in particular with regard to:*

- (d) the main features of the Applicable Product or Service, such as its availability, benefits, risks, composition, execution, accessories, after-sale customer service, complaint handling process, method and date of manufacture, delivery, quantity, fitness for purpose, usage, specifications, geographical or commercial origin.*

VIVA is therefore under an obligation make clear the features that specifically characterise the Advertisement, with particular reference to the technology underlying the offer.

Finally, the Authority discourages service providers from designing advertisements that are capable of misleading consumers by attracting them not based on the actual merits of a particular product / service, but rather on the claims the advertisement is suggesting. The Authority acknowledges that it is in the very nature of advertising to influence the purchasing decisions of consumers. However, the Authority wishes to highlight that advertising should not do so by

providing information capable of misrepresenting the product / service advertised, therefore misleading consumers into ill-informed purchasing decisions.

Reference to VIVA's website and terms and conditions

VIVA argues that it has included a description of the technology being utilised in its terms and conditions and on its website. The Authority notes Article 6(1)(e) of the Consumer Protection Regulation which obliges Advertisers (as defined) to *ensure that:*

(e) where a full description of the Applicable Product or Service or the terms and conditions cannot be accommodated in the Advertisement, state that it is "subject to terms and conditions", or words which have the same effect.

With respect to Article 6(1)(e) the Authority does not consider VIVA's evidence of this text to constitute a full description of its offering. Indeed, VIVA does make it clear in the Advertisement that 'terms and conditions apply' but does not provide for a full description of the offering in the terms and conditions – which the Authority points out were not submitted as part of VIVA's documentary evidence – or on its website. Instead, VIVA merely makes unsubstantiated claims, such as "speeds as fast as fibre but wireless", "nationwide coverage" and "fibre broadband just got better". As such the Authority does not believe that VIVA's description of its 'wireless fibre' offering in its terms and conditions and on its website satisfies the requirements set out in Article 6(1)(e) of the Consumer Protection Regulation.

The usage of the term "wireless fibre"

In its Reply VIVA states that the term "wireless fibre" is a common term used by the industry across the world, and as such ought not be construed as false and misleading.

With respect, the Authority finds this argument insubstantial. The Authority would like to bring to VIVA's attention recent cases central to the misuse of the term "fibre" around the world.

In the United Kingdom, the Advertising Standards Authority ("ASA UK") determined in November 2017 that advertisements which describe broadband services as "fibre broadband" but are in fact "part fibre" or "fibre-like" products are not false and misleading.⁵ This determination is currently

⁵ Advertising Standards Authority UK, 'Broadband Fibre Qualitative Research Report' November 2017
<<https://www.asa.org.uk/uploads/assets/uploaded/d791272c-805a-495d-8e25650af1740ab7.pdf>>

undergoing judicial review by the High Court of Justice. The criticisms made of the ASA UK's determination were many and various, but the central point in which the appeal for judicial review was accepted upon was that the ASA UK, in reaching its determination, gave low consideration to key findings of its investigation and instead relied on moot points.

Similarly, the Commerce Commission in New Zealand recently laid 27 charges against Vodafone under its Fair Trading Act at court alleging false and misleading conduct in relation to its "fibre-like" advertising (known as FibreX), regardless of the fact that its advertisement was initially cleared by the Advertising Standards Authority ("ASA NZ") in 2017.⁶ Vodafone has pleaded guilty to nine charges under the Fair Trading Act, admitting it may have misled customers about the availability of fibre networks and broadband options in certain areas.⁷ The courts are reviewing the admissibility of the ASA NZ's decision as well.

In late February 2018 the Italian Competition Authority ("ICA") reviewed a case involving the provision of telecommunications services with specific reference to the supply of fibre optic communication networks.⁸ The ICA determined that claims by service providers concerning the use of optical fibre connectivity services must fully inform users of the actual characteristics of the service offered. The ICA's decision made reference to diverse types of advertising campaigns (online, TV spots, below the line, billboards) that may be used to promote optical fibre, noting that claims referencing top performance and no limitations must be qualified.⁹ In the specific case at hand, the ICA concluded that the service provider under investigation had omitted or at least did not provide complete information with respect to the type of connectivity service offered by the operator. The ICA stated that by using the generic term "fibre", consumers were misled as to the type of connectivity service they were acquiring and, as such, blurred the content of the offer. This lack of clarification, according to the ICA, resulted in consumer choices being severely affected as to the characteristics and quality of the service.¹⁰

⁶ Commerce Commission New Zealand, 'Commission lays charges against Vodafone for its FibreX broadband advertising' April 2018 <<https://comcom.govt.nz/news-and-media/media-releases/2018/commission-lays-charges-against-vodafone-for-its-fibre-x-broadband-advertising>>

⁷ Stuff New Zealand, 'Vodafone admits misleading customers over broadband options' November 2018 <<https://www.stuff.co.nz/business/industries/108647958/vodafone-admits-misleading-customers-over-broadband-options>>

⁸ AGCM Italy, 'Sanction of € 4,400,000 imposed on Fastweb for misleading advertising of fibre optics' April 2018 <<http://en.agcm.it/en/media/press-releases/2018/4/alias-2459>>

⁹ MONDAQ, 'Italy: Misleading Advertising Leads To Record Fines In Italy' <<http://www.mondaq.com/italy/x/692394/advertising+marketing+branding/Misleading+Advertising+Leads+To+Record+Fines+In+Italy>>

¹⁰ *ibid*

Towards the end of last year, the Fibre to the Home Council Europe ("FTTH Council") issued an open letter¹¹ to the Transport, Telecommunications and Energy Council of the European Union warning against misusing the word "fibre" in advertisements – dubbing the term "fake fibre" – as it prevents consumers from making informed choices about the products which are available to them. The FTTH Council urged member states, NRAs and BEREC to take action individually / collectively against service providers to prevent misleading fibre advertising.¹²

Conclusion

After reviewing the complaint, the Reply and all related legal instruments, the Authority believes that the complaint is justified and that the Advertisement does indeed fall within the scope of misleading advertising as set out in Chapter 3 of the Consumer Protection Regulation.

The Authority believes that VIVA's arguments are not supported or substantiated. By misusing the word "fibre" in advertisements this prevents consumers from making informed choices about the products and services available to them. The Authority believes that the Advertisement constitutes a misleading advertisement pursuant to the provisions of the Consumer Protection Regulation. The Authority also believes that VIVA failed to provide clear, complete and accurate information within the Advertisement itself or by other means when necessitated. The Authority considers that the Advertisement is capable of leading a significant portion of consumers to believe that VIVA is offering full fibre or part fibre services.

The Authority therefore does not consider VIVA's argument that "wireless fibre" is a commonly used term in the industry an objectively justifiable basis for its Advertisement not to be construed as false and misleading. On the contrary, the Authority has laid out instances above where the misuse of the same term in advertisements has been subject to much criticism around the world due to its misleading nature and, in some cases, subject to legal action.

¹¹ Fibre to Home Council Europe, 'Open Letter to Telecoms Council – The FTTH Council Europe Warns Against Misleading Fibre Advertising' <https://www.ftthcouncil.eu/home/latest-news/open-letter-to-telecoms-council-the-ftth-council-europe-warns-against-misleading-fibre-advertising?news_id=3832&back=/events>

¹² *ibid*

Decision

In light of the above, the Authority requires VIVA to withdraw the Advertisement from all media outlets and Advertising Means (as defined in the Consumer Protection Regulation) within seven (7) days from the date of this Decision.

The Authority reserves all its rights in respect of the matter including its right to take further action pursuant to Article 35 of the Telecommunications Law.



Nasser Bin Mohamed Alkhalifa
Acting General Director
For the Telecommunications Regulatory Authority

18 March 2019

