

Own Initiative Monitoring and Enforcement Programme

Guidance Paper

DRAFT

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About this document

The Telecommunications Regulatory Authority of the Kingdom of Bahrain (the “**Authority**”) is the independent regulator and competition authority for the Bahrain telecommunications industry.

This document sets out the procedures the Authority will normally follow in investigations that it launches under its own initiative pursuant to its powers contained in, non-exhaustively, Article 3 (c) of the Telecommunications Law.

The purpose of these own initiative investigations is to:

- monitor compliance by Licensees with their regulatory obligations, including under the Telecommunications Law and the terms of their Licences; and
- where a Licensee is found to be in breach of its obligations, take appropriate enforcement action.

As this document relates to own initiative investigations by the Authority, if you have a complaint you wish to make about a Licensee, this document is unlikely to be relevant to you. Details of how to make a complaint can be found on the Authority’s website at <http://www.tra.org.bh/en/complaints-and-enquiries/>

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SECTION 1

1. INTRODUCTION

The Authority is the independent regulator and competition authority for the Kingdom of Bahrain telecommunications industry and is empowered under the Telecommunications Law of the Kingdom of Bahrain Legislative Decree No. 48 of 2002 (the “**Telecommunications Law**” or the “**Law**”). Article 3(c)(2) the Law provides that:

“The Authority shall have the power to....monitor and investigate compliance with the provisions of this Law and any regulations, orders and determinations made hereunder, both on its own initiative and at the request of any Person...”

The aim of these Guidelines is to present some key principles and process that the Authority will follow when undertaking compliance monitoring and investigations on its own initiative. The principles and processes have been designed on the basis of best practice with the pursuit of efficient and effective regulatory outcomes for Bahrain’s telecommunications sector in mind.

1.1. The Authority’s compliance objectives

Markets usually work well for consumers and the economy without the need for intervention by regulatory bodies. This is because competition should incentivise service providers to deliver what consumers want; to provide value for money; to produce and allocate goods efficiently and to innovate; whilst well-informed, consumers can actively play a major role in driving competition between service providers.

Compliance is a crucial element in delivering the desired market and consumer outcomes for Bahrain’s telecommunications sector. If there is no oversight and/or sanction for non-compliance, then business and consumers in Bahrain may suffer. The Authority’s main compliance objective is to deliver these public interest outcomes by ensuring that Licensees heed their legal obligations to the greatest extent practicable.

The degree of compliance and enforcement action that the Authority can undertake is constrained by the level of resources available to it. Therefore, the Authority may have to be selective in undertaking compliance activity and prioritise matters accordingly. These Guidelines set out how the Authority will decide to initiate and carry out compliance monitoring or enforcement activity.

As a general rule, the Authority will only intervene where there are clear indications of a potential breach of the Law. This may include intervention necessary to protect competition, or prevent conduct which is unlawful or harms consumer interests. The Authority may take

enforcement action against Licensees for non-compliance and will do so in a manner best calculated to deliver the objectives set out under Article 3 of the Law.

The Authority seeks to ensure that investigations are conducted in a fair, transparent, efficient and timely manner. It also seeks to ensure that interventions are evidence-based, proportionate, consistent, accountable and transparent.

1.2. What do these Guidelines cover?

These Guidelines set out the Authority's procedures and explains the way in which the Authority conducts investigations procedures the Authority will normally follow when it opens an investigation on its own initiative pursuant to its powers under Article 3 the Telecommunications Law. The purpose of these own initiative investigations is to:

- monitor and if necessary, investigate compliance by Licensees with their regulatory obligations, including under the Telecommunications Law, the terms of their Licences and any Regulation or enforceable regulatory decision issued by the Authority (together, the "**Regulatory Framework**"); and
- where a Licensee is found to be in breach of its obligations, take appropriate enforcement action.

The Authority has previously issued guidelines in relation to the method in which it will conduct investigations that arise out of disputes between Licensees. In addition Licensees and interested parties are referred to the terms of the other guidelines issued by the Authority relating to the imposition of emergency interim measures and financial penalties. As such these Guidelines should be read alongside the Authority's following publications:

- Competition Guidelines (Ref: [REDACTED]);
- Adoption of Emergency Orders Guidelines (Ref: LAD/1015/145);
- Dispute Resolution Guidelines (Ref: [REDACTED]); and
- Fining Guidelines (Ref: [REDACTED]).

1.3. What is not in these Guidelines?

These Guidelines do not cover the Authority's work in:

- Resolving regulatory disputes and complaints from Licensees which are subject to the Authority's Dispute Resolution Guidelines and Competition Guidelines; and
- The investigation of complaints from individual consumers which are subject to the Authority's (draft) Consumer Dispute Regulation

1.4. Status of these Guidelines

These Guidelines take effect from [] 2018. They set out the Authority's general approach to own initiative monitoring and investigations and are designed to be flexible.

In the event that it is considered appropriate, in particular where the Authority has received a number of complaints in relation to a similar issue, it may decide to investigate such complaints on a generalised basis and will follow these guidelines in conducting its investigation.

In certain situations, the Authority may be required to modify the approach in conducting its investigation as a result of the statutory or regulatory framework in place.

These Guidelines are not a substitute for any regulation or law, and do not constitute legal advice.

They will be kept under review and amended as appropriate in light of further experience, developing law and practice and any change to the Authority's powers and responsibilities.

SECTION 2

2. WHY AND HOW THE AUTHORITY OPENS OWN INITIATIVE INVESTIGATIONS

This section sets out why and how the Authority decides whether to open an own initiative investigation.

2.1. How the Authority decides whether to investigate

Most cases that the Authority investigates are initiated by a pattern of enquiries and complaints received from the public. In some cases, the Authority will proactively initiate investigations if it identifies an issue of concern, regardless of the number of contacts it has received on any issue.

The Authority cannot pursue every possible issue that comes to its attention and must make decisions about whether to open investigations by weighing up the likely benefits of conducting an investigation against the resources that would be required, and the comparative benefits of using those resources in other ways. While all matters are carefully considered, the Authority's role is to focus on those circumstances that will, or have the potential to disrupt the competitive process or result in widespread consumer detriment. The Authority makes decisions about whether to open investigations on a case-by-case basis, having considered all the matters that appear, to the Authority, to be relevant.

To assist with this determination, the Authority prioritises its work according to the three principles set out below. Where appropriate, other relevant factors may be taken into account. The Authority gives compliance and enforcement priority to matters that demonstrate one or more of the following factors, and all relevant considerations will be balanced in the round:

- a) The risk of harm arising from / seriousness of the alleged conduct. For example:
- the likely direct or indirect effect on consumer welfare in a specific market or the entire sector, and the direct and indirect benefit to consumers where intervention takes place (e.g. to deter similar conduct by others);
 - whether the conduct is ongoing;
 - whether the allegation concerns conduct that is, or that appears to be, a repeated, intentional or particularly flagrant contravention or infringement;
 - whether the issue under investigation has a history of similar contraventions or infringements, or a record of poor compliance; and
 - the effects of the conduct on the telecommunications industry of the Kingdom of Bahrain.
- b) The strategic significance of addressing the alleged conduct and whether alternative proceedings are likely to achieve the same ends. For example:
- whether an investigation would help to clarify the regulatory or legal framework for stakeholders;
 - whether the issue that has been identified directly relates to the Authority's and the Kingdom's broader strategic goals or priorities (including those within any work plan issued by the Authority or a National Telecommunications Plan);
 - whether there are other alternative proceedings that are likely to achieve the same ends, or deal with the same issues, as the potential investigation. This could include, for example, whether other agencies may be better placed to investigate the issue or whether planned market reviews may address the potential harm; and
 - in the case of the provisions of the Law concerning anti-competitive conduct, whether the Authority has recently found (for example in a market review) that no Licensee occupies a position of significant market power in the

market which appears relevant to the issue.

- c) The resource implications of the Authority conducting an investigation, for example, what resources (in particular what specialist resources) are required to conduct an investigation, given the need to do justice to the interests of all parties likely to be affected.

Where appropriate, the Authority will also consider other factors it may deem to be relevant.

2.2. Sources of information

Information which could trigger an own initiative investigation can come to the Authority's attention from a number of different sources. For example, the Authority may consider opening an investigation:

- a) The Authority's own research, market and monitoring intelligence may prompt the Authority to make initial enquiries on potentially unlawful conduct. Alternatively, evidence gathered through the Authority's other work streams, for example such as the Authority's merger functions. In these circumstances, the Authority gathers publically available information and may seek further information that it considers could be relevant;
- b) in response to information provided to it by other bodies (for example, where other regulatory bodies, government organisations, Security Organs or the press draw its attention to a particular issue); and/or
- c) where the Authority identifies a particular concern through other areas of its work.

2.3. Self-referrals

A Licensee that considers it has or may have breached the Regulatory Framework may contact the Authority with details.

A Licensee which is or has been involved in a cartel may wish to take advantage of the benefits of the leniency programme prompting them to approach the Authority with information about its operation. In the context of suspected involvement in a cartel, this is known as an application for leniency. By confessing, an undertaking could gain total immunity from, or a significant reduction in, any financial penalties the Authority can impose if it decides that the arrangement breaches the requirements of Article 65 of the Law.

Whilst the Fining Guidelines do not include bespoke provisions relating to self-reporting, the

Authority would take into consideration self-reporting as a “mitigating factor”, as set out at paragraph [] of the Fining Guidelines.

The Authority handles leniency applications in strict confidence. All initial applications for leniency should be made to the Authority at the reporting stage or prior to the response to any draft Article 35 Order issued by the Authority in accordance with the reply mechanism set out in the Law.

2.4. Initial assessment

Prior to opening an investigation, the Authority will first carry out an initial assessment of the issue(s) to ascertain whether there is sufficient concern to warrant committing its resources to an investigation of the relevant matters, having considered all relevant factors (as explained in paragraph [2.1] above). The Authority will not make a substantive decision on whether or not there has been a breach during this initial assessment phase.

As part of its initial assessment, the Authority will normally send the Licensee(s) under investigation a case initiation letter setting out brief details of the conduct that the Authority is looking into, as well as give the Licensee(s) whose conduct it is considering the opportunity to comment on the relevant issue(s) and to provide information to assist the Authority in deciding whether to open an investigation.

However, the Authority may decide not to provide the Licensee(s) with the opportunity to comment and provide information if it considers that it already has sufficient information to conduct its initial assessment and decide whether to open an investigation. This could be based on a previous engagement with the Licensee(s) about the relevant issues, for example, through informal engagement, which might in some cases explore issues similar to those the Authority would explore during its initial assessment. The Authority may also decide not to provide an initial opportunity for comment and to provide information where there are reasons to proceed to an investigation more quickly. This could be, for example, due to the risk of particular harm to Users of the relevant telecommunications services or where it considers this may prejudice the conduct of any subsequent investigation, such as in cases where the Authority may need to use its information gathering powers to obtain and preserve evidence prior to alerting the subject(s) of the investigation. Similarly, the Authority may also decide against providing an initial opportunity for comment at the start of an investigation, as to do so may prejudice the investigation, such as prior to unannounced inspections or witness interviews.

The Authority aims to complete its initial assessment as quickly as reasonably possible, but the length of time that this will take is likely to vary on a case-by-case basis based on the issues under consideration. For example, the initial assessment may include a period

of monitoring by the Authority, which may vary in length.

In cases where the Authority decides that it is appropriate to give the subject(s) of the possible investigation an initial opportunity to comment and to provide information on the issues under consideration, the Authority will write to the subject(s) setting out how long it will have to comment, and how soon after considering any comments or information received the Authority aims to take its decision on whether to open an investigation. If applicable it will also provide contact details for the case leader who will act as the main point of contact while the Authority is making its initial assessment. In some cases, the Authority may meet the subject(s) of the possible investigation where it considers this will assist it in reaching a decision on whether to open an investigation.

The Authority will not publicise any matters it is considering during its initial assessment phase.

2.5. Resolution through means other than formal enforcement action

In some cases, the Authority may be able to resolve an issue without the need for formal enforcement action. For example, it may be satisfied that the Licensee(s) has taken, or has offered assurances that it will take, appropriate steps to address any concerns the Authority has identified such that there is no need for further action (although there may be a period of compliance monitoring).

In such cases, the Authority will normally write to the Licensee(s) whose conduct it has been considering to explain the basis on which it has decided not to proceed to formal enforcement action, and the circumstances in which it might reconsider the need to take formal enforcement action in future if relevant (for example, in the event that the Licensee did not take the steps which it had said that it would or the Authority received further evidence of a potential breach).

Such informal action will generally not involve the Authority making any decision about whether or not there has been a breach of any Licensee's regulatory obligations. Where the Authority has decided not to pursue formal enforcement action in relation to an issue as a result of informal resolution, but it later becomes aware of further issues relating to the same or a similar issue, it may choose to take formal enforcement action at that stage. If the Authority did so, it would generally take into account any failure on the part of the relevant Licensee(s) to abide by assurances previously given to the Authority relating to this conduct.

The Authority may publish details of assurances that have been given about the steps the

Licensee(s) has taken and/or will take to address the issue, for example where the Authority considers this would be in the interests of potentially affected Users of the relevant telecommunications services. The Authority will usually inform the Licensee(s) concerned shortly before publication on the Authority's website that it will be doing so, and provide them with a copy of the intended text for information only at that stage.

2.6. Next steps following the Authority's decision on whether to open an investigation

Once a formal investigation is opened and the Licensee(s) has been informed of this, the Authority will generally publish a notice of investigation on its website www.tra.org.bh. Where the Authority does publish a notice of investigation, it will generally be published as soon as practicable after the formal investigation has commenced, and updated thereafter as appropriate.

However the Authority may publish or update a notice of investigation at any time following commencement of a formal investigation, but will in general not publish or update any notice where doing so may prejudice the investigation, or any other investigation connected with the same.

Upon notification to a Licensee that the Authority intends to commence an own initiative investigation into the Licensee(s) conduct, the Authority will inform the subject of the identity of the person or department that will oversee the investigation (and with whom the Licensee(s) should correspond during the investigation's tenure) and the subject matter of the own initiative investigation together with the potential breaches of the Regulatory Framework that the Authority is investigating (the "**Investigation Notification**").

The Investigation Notification will usually also require the Licensee(s) that are the subject of the own initiative investigation to provide written representations to the Authority pertinent to the matters set out in the Investigation Notification and provide any documents or other materials requested by the Authority¹. The time limits for response and the nature of the requests will be dependent upon the nature of the investigation. In extreme cases the Investigation Notification may also include an order that the Licensee which is subject to the own initiative investigation refrains from undertaking certain acts and/or takes steps to mitigate and/or prevent any contravention of the Regulatory Framework: such an order will be made in accordance with the guidance provided in the Emergency Orders Guidelines².

Once a formal investigation is opened and the Licensee(s) has been informed of this, the Authority may generally publish a notice of investigation on its website

¹ See Article 53 of the Law in relation to the Authority's powers to demand documents for inspection

² See paragraph 42 of the Emergency Order Guidelines for a diagrammatic representation of the process to be followed by the Authority.

www.tra.org.bh. Where the Authority does publish a notice of investigation, it will generally be published as soon as practicable after the formal investigation has commenced, and updated thereafter as appropriate. However the Authority may publish or update a notice of investigation at any time following commencement of a formal investigation, but will in general not publish or update any notice where doing so may prejudice the investigation, or any other investigation connected with the same.

Following service of the Investigation Notification the Authority will give the Licensee which is the subject of the own initiative investigation an opportunity to make representations to the Authority in the manner set out below. The time limits for response and the nature of the requests will be dependent upon the nature of the investigation.

SECTION 3

3 INVESTIGATING

This section sets out how the Authority is likely to conduct an own initiative investigation. This includes guidance on the Authority's likely engagement and contact with the subject(s) of the investigation and third parties, and how it will gather information, publish information and deal with confidential information.

3.1 Engagement with the Authority during the investigation

The Authority will seek to ensure that own initiative investigations are conducted in a fair, transparent, efficient and timely way. As set out in the relevant sections of this document, the Authority may request representations from, and engage with, relevant third parties.

The Authority will endeavour to keep the subject(s) of its investigations up-to-date on the progress of the investigation. If the Authority receives a request to meet to discuss the case, it will consider it. It will be prepared to meet with the subject(s) of an investigation and third parties and/or provide written or verbal updates, where the Authority considers it to be appropriate for reasons of fairness and transparency. The Authority will decide whether and when it is appropriate to do so on a case-by-case basis, depending on the nature of the investigation and the stage that it has reached in our analysis.

The Authority will explain in the following sections of these Guidelines the type of engagement that Licensee(s) under investigation and third parties can generally expect to have with the Authority at key points during the investigation.

3.2 Case team

At the outset of the investigation, the Authority will usually³ inform the subject(s) of the investigation of:

- a) the case leader – this is the person who will be their main contact at the Authority for the case during the course of the investigation; and
- b) the case supervisor – this is the person who will be overseeing the investigation.

At the same time the Authority may ask the subject(s) to nominate a principal point of contact for communications about the investigation.

If the case leader or the case supervisor changes during the course of the investigation, the Authority will update the subject(s). In certain cases the Authority may request the subject(s) of the investigation to correspond with a specific departmental e-mail address (e.g. LAD@tra.org.bh).

3.3 Investigation plan developed and followed by the case team

Once a matter has reached investigation stage, the Authority aims to ensure that its investigations are effectively managed and progressed on the basis of robust economic and legal reasoning.

To ensure investigations are managed effectively, the case team will develop and follow an investigation plan. Use of the investigation plan will provide a framework to ensure that:

- a) the investigation is conducted in a manner which takes into account the specific goals of the Authority's intervention, noting that the goals are intended to respond to the perceived regulatory detriment arising from the conduct;
- b) the investigation addresses all elements of a suspected contravention;
- c) evidence is gathered in an effective manner and is carefully targeted to each element of the suspected contravention;
- d) the activities of the case team members and directorates are coordinated;
- e) senior management and concerned stakeholders are kept up to date about the progress of the investigation and any key issues arising; and
- f) there is a clear record of the investigation in the event that there is a change in the

³ As noted above, there may be circumstances in which the Authority decides not to do this until a later point in the investigation, for example, where it considers that this could prejudice the conduct of the investigation, such as in cases where it may need to use its information gathering powers to obtain and preserve evidence prior to alerting the subject(s) about the investigation.

case team conducting and handling the investigation.

3.4 Written representations

The subject of the investigation will have the opportunity to make written representations to the Authority on the matters and potential breaches identified in the Investigation Notification.

The deadline for submitting written representations will be set by the Authority having regard to the circumstances of the case, and the Authority will give a longer period in more complex cases. Usually the deadline for the subject to submit written representations will be at least 7 (seven) days from the issue of the Investigation Notification.

Where the Authority considers it to be appropriate for reasons of fairness, it may provide relevant third parties with the opportunity to comment on a non-confidential copy of the Investigation Notification. This will typically be where such third parties may have further information relevant to the investigation and therefore could provide informed comments on the parameters of the investigation as expressed in the Investigation Notification. Another example may be where the Authority's provisional findings may have a direct impact on the economic interests of a third party/ User / Subscriber / Licensee.

The Authority will not usually provide third parties with copies of, or access to, the underlying evidence relied on, but may do so where appropriate for reasons of fairness⁴. In any case, the Authority will require the third party to enter into appropriate agreements limiting the use of and any onward disclosure of information provided. The Authority will provide any written representations on the statement of objections received from the complainant or a third party to the subject of the investigation, providing it with an opportunity for comment.

3.5 Meeting with the Authority

The Authority will usually offer a Licensee that is the subject of an own initiative investigation the opportunity to meet with the Authority to make oral representations on matters referred to in the Investigation Notification. The meeting process provides the subject with an opportunity to highlight, directly to the Authority, issues of particular importance to its case and/or to clarify the detail set out in its written representations.

The Authority will normally ask the subject to confirm by a given date if it wishes to make

oral representations and will then set a date for the meeting.

If agreed to by the Authority in advance of the meeting the subject may bring legal advisers or other relevant expert advisers to the meeting to assist in presenting its oral representations, although the Authority may ask that the subject limits the number of persons attending the oral hearing on its behalf to a reasonable number. Other third parties will not usually be invited to attend these meetings.

The Authority will propose an agenda in advance of the meeting which will include the matters to be discussed and highlight any areas that the subject should consider preparing additional representations on in advance of the meeting.

Following the meeting the Authority may send the subject a copy of the minutes of the meeting and ask that the subject sign and return such to the Authority to confirm the matters discussed or to make such amendments as it believes more accurately reflect the content of the meeting.

3.6 Timescales

The Authority recognises that it is important for all stakeholders that if it opens an investigation it must progress it in a timely manner and conclude it as soon as reasonably possible. The Authority will give the subject(s) an indication of the likely timescale involved in completing an investigation – this will normally be at the point when it opens the investigation.

The Authority will provide updates to the subject(s) on the progress of investigations, including when it expects to reach a specific milestone, and will provide updates where this changes.

The Authority will also aim to publish on its website details of how long it expects to take to reach key milestones in an investigation.

3.7 Changing the scope of an investigation

The Authority may widen the scope of an investigation if it becomes aware of new issues that warrant investigation, or reduce the scope if it decides that it is no longer appropriate to pursue particular aspects of the case. When the Authority changes the scope of an investigation, it will inform the subject(s) of the investigation and any complainant, and may update the entry on its website. Where the Authority considers it necessary for reasons of fairness it will give the subject(s) the opportunity to comment prior to deciding to change the scope of the investigation.

3.8 Information gathering

Written Requests for Information

The Authority relies on accurate information, provided in a timely manner, to carry out efficient investigations. The Authority has powers to gather information under Article 53 of the Law, which it would expect to use in order to obtain information for the purposes of investigations covered by this document.

The Authority will ask for documents or information which, in its opinion, are relevant to the investigation at the time the request is sent out. The information request will tell the recipient what the investigation is about, specify or describe the documents and/or information that the Authority requires, give details of how and when they must be produced, and set out the offences and/or sanctions that may apply if the recipient does not comply. The Authority will set a deadline by which the response to a written information request must be received. This will depend on the demands of the investigation timetable and the nature and amount of the information it has requested. In appropriate cases, the Authority will seek to give recipients of large information requests advance notice so that they can manage their resources accordingly.

Non-compliance with the Authority's information gathering powers

The Authority's information gathering powers, including those under Article 53 of the Law, are a critical tool in obtaining information necessary to carry out an own initiative investigation. The Authority expects recipients to provide correct and complete information in response to information requests by the given deadline. The Authority may take enforcement action against failures to respond properly to information requests.

If the Authority decides to impose a penalty for failure to comply with its information gathering powers, it will follow the procedures set out in the Fining Guidelines.

3.9 Confidentiality

Information provided to the Authority during the course of an own initiative investigation is often confidential. The Authority will always consider whether disclosure of information about a particular business is necessary for the purpose of facilitating the exercise of its functions. In particular, the Authority may judge that it is necessary to disclose information gathered from third parties to the subject(s) of the investigation in order to allow them to respond to the Authority's case. Similarly, the Authority may judge that disclosure of information gathered from the subject(s) of the investigation to third parties is justified in order to facilitate the carrying out of its functions.

When the Authority is considering disclosing confidential information, it will consider the extent to which the disclosure of the information is necessary. The Authority will also consider the need to exclude from disclosure (as far as practicable):

- a) information whose disclosure the Authority considers to be contrary to the public interest;
- b) commercial information whose disclosure the Authority considers might significantly harm the legitimate business interests of the Licensee / third party to which it relates;
or
- c) information relating to the private affairs of an individual whose disclosure the Authority considers might seriously and prejudicially affect the individual's interests.

If the subject(s) of the investigation or a third party provides the Authority with information that it considers commercially sensitive and that disclosing it might significantly harm the interests of its business, it should submit a separate non-confidential version of the information and, in an annexe clearly marked as confidential, set out clearly why the redacted information ought to be considered confidential. The Authority will not accept blanket or unsubstantiated confidentiality claims. Non-confidential versions of documents should be provided at the same time as the original document and in any event no later than one (1) week from the date of submitting the original response. Any extension to this one (1) week deadline will be at the Authority's discretion. In the event that the Authority has not received a non-confidential version, the Authority will assume that no confidentiality is being claimed in respect of the information.

It is for the Authority to determine what is, and is not, appropriate to disclose in accordance with its duties and powers under the Telecommunications Law, and the Authority may consider it appropriate to disclose information notwithstanding that a party has asserted confidentiality over it. The Authority will decide on the best means of dealing with confidential information on a case by-case basis, having regard to the respective interests of the party that has provided the confidential information, and of the subject(s) of the investigation.

If the Authority is proposing to disclose information which a party considers to be confidential, it will take reasonable steps to inform that party and will give it a reasonable opportunity to make representations on the Authority's proposal, before making a final decision on whether to disclose the information. This decision will be made by the case team and/or the case supervisor and will be communicated to the party concerned in advance of the disclosure being made. The Authority will not accept blanket or

unsubstantiated confidentiality claims.

The Authority may request that it is provided with a non-confidential version of a submission, if needed, for the purposes of publication and/or disclosure. Such non-confidential version should normally include suggested non-confidential summaries of information (for example “confidential details of contracts”) or ranges of numbers, rather than simply removing the confidential information. Non-confidential versions of documents should be provided at the same time as the original document and in any event no later than **[one week]** from the date of submitting the original response.

In the event that the Authority has not received a non-confidential version within this deadline, the Authority will assume that no confidentiality is being claimed in respect of the information.

3.10 Publicising cases

The Authority ensures that its regulatory activities are transparent and accountable. The Authority reserves the right to publicise the action it takes so it can usefully draw it to the attention of parties who have relevant information, can help deter non-compliance in future as well as educate others about what can go wrong. As such, where the Authority considers it beneficial to do so in the public interest, the Authority may choose to publicise Investigation Notices on its website.

The Authority may also issue media releases regarding the outcome of its investigations, for example where it considers this would be in the interests of potentially affected customers or stakeholders more generally.

3.11 Involvement of third parties

The Authority recognises that in some cases third parties may be directly affected by the outcome of an investigation and can play a valuable role by drawing issues to its attention and by providing the Authority with relevant information during the course of an investigation.

The Authority may seek input from relevant third parties – for example, from other government entities, competitors or customers of the subject(s) of the investigation, in order to assist it in reaching a decision on the case. The Authority will involve third parties in an investigation to the extent it considers it appropriate in order to carry out its functions fairly, transparently and effectively.

If a subject of an investigation or third party (where relevant) is dissatisfied with the way in

which the Authority is proceeding, they should usually raise their concerns in writing with the case leader or case supervisor in the first instance.

Section 4

4 OUTCOMES OF OWN INITIATIVE INVESTIGATIONS AND THE DECISION-MAKING

This section sets out the possible ways in which the Authority may conclude an own initiative investigation. This includes reaching a decision that there has been a breach of regulatory obligations by one or more Licensees, a decision that there is insufficient evidence to find a breach, a decision to close the case without taking a decision on the merits and accepting assurances from the subject(s) of the investigation to address any concerns the Authority may have.

In some cases, the Authority may be able to reach a settlement with the subject of an investigation as a way of resolving a case, in circumstances where it thinks it has grounds to find an infringement of the Law or wider Regulatory Framework. The process for settlement is set out in Section 5 of these Guidelines.

4.1 Investigation outcomes

Investigations that lead to a provisional infringement finding

Where the Authority reaches the provisional view that the conduct under investigation amounts to an infringement of the terms of the Law or the Regulatory Framework, the Authority will proceed in accordance with the enforcement process set out under Article 35 of the Law. This process consists of two stages: (1) the Draft Article 35 Order and (2) the Final Article 35 Order.

Draft Article 35 Order

The Draft Article 35 Order will state the facts and reasons on which the Authority bases its provisional decision. It will also set out the reasons for any provisional decision to impose a financial penalty on the subject(s) and the level of such penalty⁵. The Draft Article 35 Order may also include directions setting out actions the subject(s) will be required to take to bring the infringement to an end and the reasons for imposing these directions.

In determining penalties, the Authority will have regard to the Fining Guidelines, including consideration of any aggravating and mitigating factors.

The Authority will not usually publish the Draft Article 35 Order and will not comment

⁵ See Article 35(b) of the Law

publicly about issuing a Draft Article 35 Order unless it considers it necessary to do so.

The Draft Article 35 Order must set out the notice period for responding, which must be not less than thirty days from the date of the Draft Article 35 Order.⁶

The Final Article 35 Order

After considering any written response⁷ to the Draft Article 35 Order, the Authority will consider whether any amendment is needed to be made to the Draft Article 35 Order. Once such amendments (if any) have been made the Authority will issue a Final Article 35 Order to the subject of the investigation.

Once the Final Article 35 Order has been issued, the Authority will close the case and update the details to the Orders section of its website⁸. This will generally include a non-confidential version of the Final Article 35 Order, once the Authority has finalised the relevant redactions of any confidential information. The Authority will generally inform the subject in advance of the intended date of publication of the Final Article 35 Order.

Investigations that do not lead to an infringement finding

Not all of the Authority's own initiative investigations result in a finding that the Licensee(s) under investigation has infringed its obligations under the Regulatory Framework. The Authority may decide that it does not have sufficient evidence to find an infringement or that it is appropriate to close an investigation without making a finding on whether there has been an infringement. Alternatively, the Authority may accept assurances as to future conduct from the subject of the investigation which address the Authority's regulatory concerns.

No grounds for action decision

The Authority may decide that it does not have sufficient evidence to find any infringement. In these circumstances the Authority may issue a provisional "*no grounds for action decision*" to the subject of the investigation stating the facts on which it bases its provisional decision and the reasons for this proposed decision. The Authority may invite written representations from the subject(s) of the investigation on the matters set out in our provisional decision.

If the Authority decides to issue a final no grounds for action decision, it will close the case

⁶ See Article 35(b)

⁷ See Article 35(c)

⁸ <http://www.tra.org.bh/en/legal-instruments/orders/>

and may publish details of this on our website. The Authority will also generally publish a non-confidential version of the decision once it has finalised the relevant redactions of any confidential information, and it will generally inform the subject in advance of the intended date of publication.

Case closure without a decision on the merits

The Authority may close an investigation without taking a decision on the merits of the case and without making a finding on whether or not there has been a breach of the Regulatory Framework.

If the Authority decides to close an investigation on this basis, it will usually write to the subject(s) of the investigation in advance setting out the reasons why it is minded to make a decision to close the investigation and invite comments from them. The timeframe for comment may be short, particularly where the Authority considers there is limited scope for comment on the reasons underpinning its proposed decision to close the investigation.

The Authority will inform the subject(s) that it has decided to close the case.

In the majority of cases, a case closure decision of this type is likely to be a brief statement indicating case closure and the basis on which the Authority has decided to close the case. The Authority may publish details of its decision to close the case on its website.

4.2 Assurances

The Authority may accept assurances which fully address its concerns from the subject(s) of an investigation in relation to future conduct. If accepted by the Authority, the assurances become legally binding on the subject and are enforceable as regulatory obligations.

The subject may offer assurances to the Authority at any time during an investigation up until a final decision is made. However, the Authority is unlikely to consider it appropriate to accept assurances offered at a very late stage of the investigation (i.e. just before the issuance of a decision).

The Authority is likely to consider it appropriate to accept assurances only in cases where the concerns of the Authority are readily identifiable, will be fully addressed by the assurances offered, and the proposed assurances can be implemented effectively and, if necessary, within a short period of time.

The fact that the subject of an investigation has approached the Authority to discuss assurances, and the substance of assurances, is not relevant to its consideration of whether an infringement has occurred. The Authority will therefore not use any offer of assurances as evidence in any subsequent decision about the matters under investigation.

If a subject would like to discuss offering assurances, it should contact the Authority and set out formally in writing the assurances proposed. If, following that, the Authority considers that assurances may be appropriate, then the Authority will send a summary of any concerns it may have to the subject. The Authority may discuss with the subject the form and content of any assurances offered in order to reach an agreement as to what might be acceptable to the Authority.

If the Authority proposes to accept the assurances offered, it will consult those likely to be affected by them, including any third party. The Authority will give those persons an opportunity to make representations within a time limit suitable given the nature of the investigation. The Authority will then discuss these representations with the subject of the investigation and indicate whether the Authority considers that changes are required to the assurances before it would consider accepting them.

If the subject offers revised assurances with significant changes, the Authority will consult affected persons and give them another opportunity to make representations, within a reasonable time limit. The Authority will discuss these representations with the subject.

If the Authority decides to accept assurances, it will notify the subject of the investigation and publish the assurances on the Orders section of its website.

4.3 Compliance monitoring

Following the conclusion of an investigation, the Authority may decide to adopt a period of compliance monitoring. The purpose of this monitoring may be to ensure that the subject of an investigation does not repeat behaviour that the Authority has deemed to breach the Regulatory Framework, that it complies with any assurances given and/or that it implements any directions imposed by the Authority. Its purpose may also be to enable the Authority to keep a watching brief on a particular area of activity.

The process that the Authority will follow during the compliance phases will differ from case to case. The length of the compliance phase will depend on the circumstances of the case and the measures that are to be monitored. Generally, the Authority will not grant extensions to any deadline set for compliance with a direction, unless it receives an application prior to the expiry of the deadline together with an explanation of why the deadline should be extended, including supporting evidence.

Section 5

5 SETTLEMENT PROCEDURE

5.1 Introduction

In rare cases, the Authority may consider that it is appropriate to settle an own initiative investigation. Settlement is a voluntary process for resolving an own initiative investigation which leads to a formal, legally binding, infringement decision. It involves the subject of the investigation admitting it has breached the Regulatory Framework and accepting that the remainder of the investigation will follow a streamlined administrative procedure. In such cases, the Authority will impose a reduced penalty on the subject.

Settlement in appropriate cases facilitates the Authority's enforcement work as a whole. It allows the Authority to achieve efficiencies through the adoption of a streamlined administrative procedure, resulting in earlier adoption of possible infringement decisions as well as resource savings. This is distinct from any current or future leniency policy the Authority might publish; a leniency policy and the use of settlements are not mutually exclusive – it is possible for a leniency applicant to settle a case and benefit from both leniency and settlement discounts.

The Authority is under no obligation to enter into a settlement process or to settle simply because the subject of the investigation admits to any alleged breaches. The Authority retains broad discretion in determining which cases to settle. This includes the discretion whether to explore interest in settlement discussions, whether to continue or withdraw from settlement discussion and whether to settle at all. The Authority has broad discretion to decide whether a case is appropriate for settlement or to agree to settlement.

In determining whether a case is suitable for settlement the Authority will take into account a number of factors. The primary factor is whether the Authority considers that the evidential standard for giving notice of its proposed infringement decision is met. The Authority will not proceed with settlement discussions unless this standard is met. The Authority will also consider other factors such as the likely procedural efficiencies and resource savings that can be achieved. When assessing the likelihood of resource savings, the Authority will take into account factors such as the stage in the case at which settlement is reached, whether it would result in a shortening of the case timetable and a reduction in case team resources, the number of stakeholders involved in the investigation and the number potentially interested in settlement, and the number of alleged infringements in the case. A further factor that may be relevant is the prospect of reaching settlement in a reasonable time frame. The Authority will consider throughout the settlement discussions whether procedural efficiencies and resource savings can still be achieved from settlement.

Where the settlement process is successful, the Authority may issue a final decision that sets out the non-confidential terms of that settlement agreement and makes further recommendations as to next steps: these could include any of the further steps set

out above at section 4.

Settlement is distinct from the Authority's ability to accept assurances (as described above) and the ability to consider mitigating factors relating to financial penalties set out under the Fining Guidelines⁹ (although the Authority recognises that these areas are not entirely mutually exclusive).

5.2 Requirements for settlement

As a minimum, a successful settlement will require the subject of the investigation to:

- a) make a clear and unequivocal admission of liability in relation to the nature, scope and duration of the infringement. This would need to reflect the Authority's position on the nature of the infringement(s) it is minded to find and the appropriate level of penalty (as explained further below);
- b) cease the infringing behaviour immediately from the date it enters into a settlement process with the Authority and refrain from engaging again in the same or similar infringing behaviour;
- c) confirm that it accepts that there will be a formal and published finding of infringement against it, it will pay a penalty and will comply with any directions imposed;
- d) confirm that it will accept a streamlined administrative process; and
- e) confirm that it accepts that it will no longer benefit from the settlement discount if it appeals the decision.

5.3 Settlement discounts

Where the settlement process results in a final infringement decision being issued, that decision will contain the penalty amount, which will include a settlement discount.

The Authority's aim will be to conclude the settlement process as swiftly as possible. In line with this aim, the earlier the settlement process is commenced, the greater the level of mitigation, as the resource savings that the Authority could achieve would be greater.

Settlement discounts will be capped at the level of 50%. The discount will be considered on a case-by-case basis. The Authority would normally expect this discount to be:

- a) up to 50% where a successful settlement process is commenced before a Draft

⁹ See the Fining Guidelines at paragraph [] re: mitigating factors that may be considered by the Authority

Article 35 Order is issued; and

- b) up to 25% where a successful settlement process is commenced after a Draft Article 35 Order is issued.

Where the Authority is concerned that the process is not progressing as swiftly as possible due to delays or inefficiencies caused by the subject(s) of the investigation or that it is not showing its full co-operation with the settlement process, the Authority is likely to bring the settlement process to an end or reduce the available discount on account of the time taken and resources used. The Authority would give the subject(s) notice that it is minded to do so at that point.

5.4 Decision making in a settlement case

Any decision regarding the settlement of an own initiative investigation will be made by the Authority on a case by case basis. Should a settlement be agreed between the Authority and the Licensee(s) the Authority may issue a decision setting out the terms of the settlement arrived at and the reasons for the settlement being accepted by the Authority and may publish that document on its website.

5.5 Process

If the subject of an investigation wishes to discuss the possibility of exploring settlement, it should approach the Authority in the first instance.

As noted above, the level of discount on the penalty as a result of settlement will depend on the stage at which a successful settlement process is commenced.

If the settlement process is unsuccessful and the subject wishes to enter into a further settlement process at a later stage of the investigation, it remains open for it to do so. However, as noted above, it is at the Authority's discretion whether and on what bases to enter into a settlement process at any stage.

5.6 Settlement before a Draft Article 35 Order is issued

If the subject(s) of the investigation approaches the Authority about settlement before a Draft Order is issued, and the Authority considers this to be an appropriate case in which to consider settlement, it will normally set out its initial thinking on the case where it considers this will assist the parties to decide whether to engage in a settlement process.

Following this, if the Authority and the subject(s) wish to continue with the settlement process, it will send the subject a statement of facts setting out the Authority's provisional findings and the evidence on which it is relying. The Authority will also provide an indication

of the provisional level of penalty that it would be minded to impose, including the settlement discount. The Authority will also provide access to key documents it is relying on, if appropriate, for reasons of fairness and transparency.

The subject(s) will be asked if it would be prepared in principle to agree to make admissions on the basis of a statement of facts prepared by the Authority. The timeframe for doing so will be set on a case-by-case basis having regard to possible resource savings through the settlement process. If the subject(s) wishes to pursue settlement on the basis set out in the statement of facts, it will be asked to make written representations on manifest factual inaccuracies in the statement of facts. If its representations appear to go beyond this (for example into the merits of the Authority's provisional findings or on the level of the penalty), the Authority would reassess whether the case remained appropriate for settlement at this stage.

If the subject(s) is not prepared to agree to a settlement on the basis of the position set out in the statement of facts, it is unlikely to be appropriate to pursue settlement at this stage and the Authority would normally expect to proceed to continue with the formal investigation procedures. If the subject(s) wishes to enter into a further settlement process at a later stage of the investigation, it remains open for it to do so (subject to the Authority also considering this to be appropriate), although a lower settlement discount would then apply.

If the subject(s) indicates that it does wish to pursue settlement on the basis set out in the statement of facts, the Authority would proceed to issue a Draft Article 35 Order which would take account of any representations made on manifest factual inaccuracies in the statement of facts, and would contain the proposed penalty amount. The Authority would expect to provide the subject(s) with access to key documents it is relying on as appropriate for reasons of fairness and transparency, to the extent that access to such documents has not been provided following the statement of facts (as set out in this paragraph 5.7 above).

5.7 Settlement process after a Draft Article 35 Order is issued

If the subject(s) of an investigation is, in principle, prepared to agree to the settlement requirements and admit to the contraventions as set out in a Draft Article 35 Order, it may inform the Authority that it wishes to enter into a settlement on that basis. In such a case, one of the settlement requirements would be that the subject(s) agrees not to make written representations on the Draft Article 35 Order except in relation to manifest factual inaccuracies. The Authority notes however that a settlement offer made at such a late stage may be more likely to be rejected by the Authority.

The Authority will provide the subject(s) with an indication of the penalty and level of the discount on the penalty which it would be minded to apply.

The Authority would expect to set a deadline for the subject(s) to indicate its willingness to settle the case and will provide a short period of time for representations on manifest factual inaccuracies in the Draft Article 35 Order. The timeframe for doing so will be set on a case-by-case basis having regard to possible resource savings through the settlement process (this will usually not be extended beyond the 30 day reply time set at Article 35(b)(3) of the Law).

The Authority would then expect the subject(s) to provide written confirmation of admissions and its acceptance of the settlement requirements as discussed further below.

If the subject(s) wishes to make written representations on the Draft Article 35 Order (which are more extensive than identifying manifest factual inaccuracies), it may nonetheless indicate to the Authority that it wishes to enter into a settlement process after doing so. The Authority would consider any written representations made to it in line with the process set out under Article 35 before deciding whether to or not to engage in a settlement process.

As noted above, settlement is not a negotiation. Therefore, in the event that the Authority considers it appropriate to engage in a settlement process, after considering the subject's written representations, the Authority would expect to provide it with a written statement of any revised position. This would set out:

- a) the infringement(s) the Authority is minded to find; and
- b) an indication of the level of penalty it would be minded to impose, taking into account its revised assessment of the nature of the infringement and after having applied the settlement discount on the penalty at that stage of the process.

The Authority will set a deadline for the subject(s) to indicate to the Authority its willingness to settle the case on the basis of the written statement. The timeframe will be set on a case-by-case basis having regard to possible resource savings through the settlement process.

The Authority would not expect to receive any further representations at this stage and will expect the subject(s) to provide written confirmation of admissions and its acceptance of the settlement requirements as discussed further below.

5.8 Successful conclusion of the settlement process

If the settlement is successful and the subject(s) of the investigation has indicated to the Authority that it is prepared to agree to the settlement requirements and to make

admissions on a basis which reflects the Authority's position, it must provide written confirmation of its admissions and acceptance of the settlement requirements. That letter should be sent by its Chief Executive Officer or another senior member of its executive management team.

Before the subject(s) provides its written confirmation letter, the Authority will provide the subject(s) with a draft of the terms of the infringement decision it would expect to take (either via draft Article 35 Order or otherwise), reflecting the subject's admissions and having taken into account any representations from the subject(s) on manifest factual inaccuracies:

- a) Where settlement is agreed prior to the subject(s) making substantive written representations on the Draft Article 35 Order, this will normally be in the form of the Draft Article 35 Order. The Authority normally expects in such cases that the Final Article 35 Order would be in the same terms as the Draft Article 35 Order (subject to any corrections of factual inaccuracies). The Authority therefore expects the subject(s) to provide its written confirmation of its admissions and acceptance of the settlement requirements following receipt of the Draft Article 35 Order.
- b) Where settlement is agreed after the subject(s) has made written representations on the Draft Article 35 Order, this will normally be in the form of a written statement setting out the Authority's position following consideration of the subject's written representations (as set out in the Draft Article 35 Order), as the Authority would normally expect in such cases the final infringement decision would be in the same terms as that written statement (subject to any corrections of factual inaccuracies). The Authority would therefore expect the subject(s) to provide its written confirmation of its admissions and acceptance of the settlement requirements following receipt of the Authority's written statement of position.

Once the Authority has received the subject's written confirmation of its admissions and acceptance of the settlement requirements, the relevant decision maker will then formally make the Authority's Final Article 35 Order, reflecting the position agreed during the settlement process and the subject's admissions.

5.9 What happens if the settlement process is unsuccessful?

The subject(s) of the investigation may withdraw from the settlement process at any time before confirming that it has accepted the requirements for settlement and confirming its admission in writing (in accordance with above). The Authority may also withdraw from the

settlement process at any stage, though prior to doing so it would notify the subject(s) and give it the opportunity to respond.

If settlement is unsuccessful then the case will revert to the usual procedure.

The subject(s) of the investigation would not have entered into the settlement agreement and therefore would not have made any formal admissions.

As noted above, settlement is not akin to “without prejudice” negotiations for the purposes of seeking to resolve litigation. Any additional documentary evidence provided during the settlement process would be placed on the case file and could be taken into account by the Authority for the purposes of its final infringement decision even if the settlement process is unsuccessful. In addition, the Authority may follow up any new issues which come to light during the settlement process.

5.10 Publicity in settlement cases

The Authority’s standard practice is not to comment publicly on the fact that settlement discussions are taking place, or that the settlement process has been unsuccessful.

Following the conclusion of a successful settlement process, the Authority will close the case and update the details on the Orders section of the Authority’s website. This will generally refer to the fact that a settlement has been agreed and include a summary of the infringement(s) the Authority has found and details of the penalty (including the level of the settlement discount) and any other directions imposed. The Authority may also publicise the outcome of the case in a media release relating to the case.

The Authority will also publish a non-confidential version of the infringement decision, in accordance with its standard practice.

Section 6

6 TAKING URGENT ACTION

Once the Authority has formally opened an own initiative investigation, it has the power to require a person to comply with temporary directions (known as “interim measures”) while it completes its investigation.

Where the Authority considers that it is necessary to act as a matter of urgency for the purpose of:

- a) preventing significant damage to a particular person or category of person; or
- b) protecting the public interest,

it may impose such interim measures as it considers appropriate for that purpose.

The Authority may exercise these powers following a request to do so by an application or on its own-initiative. For guidance on making an application for the Authority to take urgent action and the method by which the Authority will consider and impose any interim measures, please see the Adoption of Emergency Orders Guidelines.

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