

Article 35 Order No. 1 of 2019

Batelco's Breach of Batelco's Wholesale Reference Offer

1. For the reasons set out in the reasoning of this Article 35 Order, the Telecommunications Regulatory Authority (the "**Authority**") considers that Batelco, by failing to provide access to the relevant wholesale data connectivity ("**WDC**") services in accordance with the terms outlined in the latest version of Batelco's Wholesale Reference Offer (the "**Reference Offer**") or at all, and by unilaterally imposing a requirement that WDC services can only be supplied to Kalaam Telecom BSC ("**Kalaam**") and/or Zain Bahrain BSC ("**Zain**") using a vendor specific Huawei CPE has breached:

- (a) Article 57(e) of the Telecommunications Law Legislative Decree No. 48 of 2002 promulgating the Telecommunications Law (as amended) (the "**Law**");
- (b) Article 3.3(b), Article 3.3(c), Article 4, and Article 8.2 of the Access Regulation; and/or
- (c) Article 4.1 of the Main Body Terms of Batelco's Reference Offer and Article 3.6(a) to the Schedule containing the WDC Service Description 2-16 of Batelco's Reference Offer.

2. **Therefore Batelco is ordered to:**

2.1. Comply with the terms of the Reference Offer including those which require Batelco to deliver the requested WDC services without mandating use of a vendor specific CPE.

3. **Fine**

3.1. Batelco is ordered to pay a fine of one hundred and thirty thousand Bahraini Dinars (BHD 130,000) to the Authority in cleared funds within thirty (30) calendar days from the date of this Order.

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

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

Account Name: Telecommunications Regulatory Authority
Account Number: 1-0000005433-4
Bank Name: BBK

4. Compliance

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



Nasser bin Mohamed Al-Khalifa
Acting General Director
For and on behalf of the Telecommunications Regulatory Authority
18 July 2019

REASONING

I. Relevant Legal Provisions

Telecommunications Law¹

- 1.1 By virtue of Article 3(b)(2) of the Law, the Authority must promote effective and fair competition among existing Licensed Operators.
- 1.2 Article 3(c) of the Law empowers the Authority to, *inter alia*, monitor and investigate compliance with the provisions of the Law and to make such orders and determinations as are necessary to ensure compliance.
- 1.3 Article 3(c)(13) specifically empowers the Authority to encourage, regulate and facilitate adequate access and interconnection and interoperability of services. This includes the ability of the Authority to require, as necessary, Licensed Operators to share facilities and properties.
- 1.4 Article 3(c)(17) provides that the Authority shall examine complaints and resolve disputes arising between Licensed Operators and take the necessary and proportionate measures in relation to such matters.
- 1.5 Article 3(c)(18) of the Law authorises the Authority to exercise all other powers granted to it and to take all other actions as may be reasonably necessary in order to exercise its powers.
- 1.6 Article 57(e) of the Law stipulates that a public telecommunications operator (Licensed Operator) determined to be in a dominant position in a particular telecommunications market by the Authority is required to offer access (on fair and reasonable conditions) within that market, to its telecommunications network and telecommunications facilities.
- 1.7 The term "Access" is defined at Article 1 of the Law as: *"the making available of telecommunications facilities and/or telecommunications services to another Licensed Operator"*

¹ The Telecommunications Law of the Kingdom of Bahrain – Legislative Decree No. 48 of 2002 promulgating the Telecommunications Law, as amended and published on 28 September 2017.
<http://www.tra.org.bh/media/document/THE%20TELECOMMUNICATIONS%20LAW.pdf>

for the purpose of providing telecommunications services, and including the connection of equipment by wire or wireless means, access to physical infrastructure including buildings, ducts, cables and masts, access to mobile networks and access to number translation or networks offering equivalent functionality.”

- 1.8 Article 57(e) of the Law further provides that the Authority may publish regulations with regard to access, including a regulation concerning a Reference Access Offer similar to a Reference Interconnection Offer (i.e., the provision of interconnection and related terms for interconnection are the subject of Article 57(a) to Article 57(d) inclusive).
- 1.9 Article 57(g) of the Law allows any public telecommunications operator (Licensed Operator) to refer to the Authority any dispute that arises between it and any other Licensed Operator with respect to interconnection or access, in order for the Authority to resolve such dispute.

Access Regulations

- 1.10 The Authority has published the Access Regulation dated 30 April 2005² (referred to as the “Access Regulations”). Article 3.3(a) of the Access Regulations requires dominant Licensed Operators to negotiate in good faith with Access Seekers while Article 3.3(c) of the Access Regulations provides that a Licensed Operator, who is declared to be dominant in a relevant market, must make available a Reference Access Offer in accordance with the terms of Article 4 of the Access Regulations.
- 1.11 Article 4 of the Access Regulations sets out the minimum requirements that must be contained in the Reference Access Offer. It provides, *inter alia*, that the Reference Access Offer must include offers for all Access services that the Licensed Operator is required to provide, and must set out a description of the relevant offerings, unbundled according to market needs where this is technically and economically feasible together with the associated terms, conditions and tariffs. The Reference Access Offer must also contain all necessary information regarding technical

² Access Regulation - A Regulation issued by the Telecommunications Regulatory Authority 30 April 2005, available at: http://www.tra.org.bh/media/document/Final_Access_Regulation_En_30_4_05.pdf

specifications and network characteristics for Access Seekers³ to be able to effectively and efficiently acquire and use each Access service.

- 1.12 The Authority has conducted various *ex ante* analyses regarding the supply of domestic data connectivity services providing guaranteed bandwidth at both the retail and wholesale levels in Bahrain, to determine the relevant market definitions for such services and whether any Licensed Operator has significant market power (or dominance) in such markets. The Authority refers to its determinations regarding Dominance in Wholesale Markets by Batelco 'A Determination issued by the Telecommunications Regulatory Authority dated 22 January 2006'⁴. On foot of that finding, Batelco has been required to publish a Reference Offer in respect of various services including domestic data connectivity services. The Authority also refers to its subsequent determination regarding dominance in the markets for domestic data connectivity dated 10 April 2014 in which the Authority identified and determined that Batelco has a dominant position, *inter alia*, in the wholesale market for the supply of domestic data connectivity services in Bahrain with the exception of Amwaj Islands⁵ (the "2014 Determination").
- 1.13 Batelco has incorporated the relevant terms relating to domestic data connectivity services into the applicable schedule of the Reference Offer published on its website which covers a variety of wholesale services. The current version of the Body Terms of Batelco's Reference Offer is dated 15 February 2006. The relevant Schedule regarding domestic data connectivity services i.e., referred to as wholesale data connectivity or WDC is Schedule 1 2-16⁶ (Wholesale Data Connection Service (WDC)). This Schedule has been updated as at 17 October 2016 (collectively the Body Terms and Schedules are referred to as the "Reference Offer"). The Reference Offer is available on Batelco's website at: <http://batelco.com/business/solutions-by-sector/wholesale/reference-offer-rol/>.

³ According to the Definitions section in the Access Regulations "...*Access Seeker*" means a Licensed operator seeking Access from a Licensed operator holding a Dominant position. It does not apply or refer to Access by end users. ..."

⁴ http://www.tra.org.bh/media/document/Dominance_Determination_Final_clean.pdf

⁵ Determination of Significant Market Power and Determination of Dominant Position in the Markets for Domestic Data Connectivity Services" dated 10 April 2014, MCD/04/14/026. A copy of the determination is available at: <http://www.tra.org.bh/media/document/MCD%2004%2014%20026%20SMP%20and%20Dominance%20Final%20Determination%20Domestic%20Data%20Connectivity%20PV.pdf>

⁶ The version on Batelco's website is labelled 2-17 – but in opening the document, the document itself is labelled 2-16. Throughout this document the reference that is used is 2-16.

1.14 Article 8 of the Access Regulations provides that a material breach of the Access Regulations shall be deemed to constitute a material breach of the Law, and where appropriate, of any relevant telecommunications license held by the relevant Licensed Operator.

Batelco's Reference Offer

1.15 Article 4.1(a) of the Body Terms of the Reference Offer provides that:

"1. Subject to Batelco first obtaining any approval from the Regulator required by the Telecommunications Law, Batelco may, by notice published on the Batelco Wholesale Services website, amend or vary the Reference Offer, including without limitation:

- (a) offering any new service and any amendment or variation to the Reference Offer arising from the new service; or*
- (b) cancelling any service and any terms or conditions, and any amendment or variation to the Reference Offer arising from the cancellation of that service."*

1.16 The Service Description for the Wholesale Data Connection Service (the WDC) is set out at Service Description 2-16 of the relevant Schedule of the Reference Offer (the "**Service Description**").

1.17 Pursuant to Article 3.2(b) of the WDC Schedule:

"The Access Seeker must submit an Order to Batelco to request supply of the WDC Service in accordance with the WDC Service Agreement and in the form shown at Annex 2".

1.18 The Service Description in the WDC Schedule for provision of WDC services does not mandate nor stipulate that the WDC services can only be supplied with a vendor specific customer premises equipment ("**CPE**").

1.19 Article 3.6(a) of the WDC Schedule further provides that in the event Batelco wishes to amend the terms of the WDC service, it must provide three (3) months' written notice of the proposed changes to Access Seekers. In addition, Batelco is required to obtain the Authority's prior approval for proposed amendments.

Batelco's Licenses

1.20 Batelco holds a number of Telecommunications Licenses granted to it by the Authority under Article 24 of the Law. These include Batelco's:

- Individual License for International Telecommunications Facilities;
- Individual License for International Telecommunications Services;
- Class License for Internet Services;
- Class License for Value Added Services;
- Individual License for National Fixed Services;
- Individual License for Very Small Aperture Terminal (VSAT); and
- Individual License for Mobile Telecommunications Services.

(together, "Batelco's Licenses").

1.21 Batelco's Licenses each impose obligations upon Batelco in relation to the provision of Access to other Licensed Operators (OLOs) (in appropriate circumstances) in accordance with Article 57 of the Law, and not to engage in anti-competitive conduct.

II. Factual Background

The Authority sets out below the factual background to each of the complaints received from Kalaam and Zain.

A. Kalaam Complaint

1.22 Kalaam submitted its complaint including a Request for an Emergency Order (dated 5 September 2018) to the Authority on 6 September 2018 (the "Kalaam Complaint").

1.23 Kalaam's Complaint stated that Batelco "are not adhering to their obligations under the Reference Offer, in particular Service Description 2-16: Wholesale Data Connection Service and Article 65(a) and (b)(1) of the Law to provide Kalaam with WDC services".

- 1.24 The Authority will not, for the purposes of this Order, consider this aspect of the alleged anti-competitive conduct covered by Article 65 of the Law but will instead focus on Batelco's unilateral change to its own Reference Offer and its failure to negotiate in good faith with Access Seekers. For the avoidance of doubt, the Authority's investigation into the alleged refusal to supply is ongoing and subject to a different regulatory process. However, in the context of investigating Batelco's conduct under Article 3.3(b) of the Access Regulations, it is useful to set out the facts leading up to Kalaam's Complaint, and on which Kalaam's Complaint is based.
- 1.25 The factual background involves numerous email and oral interactions between Kalaam and Batelco dating from April 2018. Although lengthy, the main events (which do not appear to be in dispute) can be summarised as follows:
- 1.25.1 Kalaam made its first request to Batelco for provision of the WDC service to Kalaam's customer, the [REDACTED] on 12 April 2018 ("Kalaam's First Request for Access"). Batelco rejected Kalaam's First Request for Access on 15 April 2018 allegedly on the basis that Kalaam had failed to provide correct address details for Kalaam's customer, [REDACTED]
 - 1.25.2 Kalaam made its second WDC service request to Batelco on 15 May 2018 ("Kalaam's Second Request for Access").
 - 1.25.3 On 16 May 2018 Batelco requested that the order form for Kalaam's Second Request for Access was resent with the B-End form (customer form) including the customer's signature and contact information. Kalaam responded to check that they had the correct form. This was confirmed by Batelco but that it was "the older version." Kalaam subsequently requested that Batelco share the correct version of the application form, which Batelco duly did.
 - 1.25.4 Kalaam re-sent Batelco the form on 16 May 2018 ("Kalaam's Third Request for Access"). Kalaam emailed Batelco on 17 May 2018 to check if the order was accepted.
 - 1.25.5 Batelco rejected Kalaam's Third Request for Access on 20 May 2018 due to the B-End form stating that Kalaam was the customer, not the end user (being the US Navy). Later that same day, Kalaam confirmed that they were requesting that a circuit be delivered to their rack inside the [REDACTED] Batelco requested that Kalaam send to them a signed letter by the customer confirming that Kalaam have a rack inside the [REDACTED]

- 1.25.6 Various interactions ensued over the coming months, including multiple communications regarding the address to which the WDC service should be delivered. Batelco raised a number of objections that the address provided was not as per the procedure, despite Kalaam's assertion that Batelco delivers circuits using the same address. The issue of address appears to have been finally resolved late July 2018.
- 1.25.7 A new order for the relevant address was raised (with a new reference number) on 26 June 2018. Various site visits were arranged during the course of July 2018 to check usability of fibre locations for the WDC service.
- 1.25.8 On 8 August 2018 Batelco requested Kalaam to:
- Arrange access for Batelco's delivery team at [REDACTED]
 - Provide a formal no objection/approval from [REDACTED] Batelco to install a vendor specific Huawei Customer Premises Equipment ("CPE") at [REDACTED] and
 - Provide confirmation of availability of suitable space and power for the CPE at the site.
- 1.25.9 By letter dated 9 August 2018, [REDACTED] provided the "no objection letter" to Kalaam in relation to the Huawei CPE. Notwithstanding this, Kalaam sent an email to Batelco on 12 August 2018 indicating, *inter alia*, that Huawei equipment is not allowed to be brought into the base, and requesting that Batelco check the availability of a Cisco router.
- 1.25.10 On 9 August 2018, Batelco wrote to the Authority (Batelco ref: GL/341/18) expressing its desire to provision existing and new WDC with CPE supplied by Batelco, and to amend the WDC service description in the Reference Offer accordingly ("**Batelco's 9 August Letter**").
- 1.25.11 The Authority responded to Batelco's 9 August Letter on 6 September 2018 (ref: MCD/09/18/072) indicating that Batelco had failed to follow the correct procedure for seeking amendment to the WDC service description. Specifically the Authority's response noted that Batelco's 9 August Letter did not constitute a request (less so a formal application). The Authority also noted that it was in receipt of a copy of Batelco's letter dated 28 August 2018 (Batelco ref: GCL/360/18) (referenced below at para 1.25.14) regarding Batelco's rejection of a WDC order from Kalaam. The Authority stated that it considered that Batelco's imposition of the requirement that WDC is supplied with vendor-

specific CPE provided by Batelco is not consistent with the WDC service description - a fact that appears to be acknowledged by Batelco itself in Batelco's 9 August Letter. The Authority concluded that Batelco therefore appears to have offered access to Kalaam on terms and conditions that are not as per the approved Reference Offer which (if proven) would constitute a breach of Article 57 of the Law and the Access Regulations.

- 1.25.12 In any event it is clear from this correspondence that the Authority did not approve and that it refuted any suggestion of approval on its part of an amendment to Batelco's WDC service description that would allow for the inclusion of any such vendor-specific CPE in Batelco's WDC service description. The Authority's prior approval would be necessary under clause 3.6(a) of the WDC Schedule.
- 1.25.13 The parties held discussions around using alternative routers to deliver the WDC service, and Batelco indicated on 14 August 2018 that (based on the suggestion from senior management at Batelco) if Kalaam had a Cisco CPE, Batelco could use this for activating the circuit before replacing it when Batelco had stock. Kalaam shared the details of the (Cisco) CPEs they had in stock and requested confirmation as to which one was acceptable.
- 1.25.14 On 28 August 2018 Batelco emailed Kalaam to reject the WDC order. Batelco stated as part of their reasoning that the use of Kalaam's (Cisco) CPE would be a network integrity and security issue.
- 1.25.15 It should be noted that Kalaam claimed to have seen non-Huawei equipment in use by Batelco for the delivery of circuits, including [REDACTED] based on their own observations in a site survey. Kalaam's claims are stated in a signed witness statement of Kalaam's Head of Wholesale and Carrier Relations dated 2 September 2018.
- 1.25.16 Batelco informed the Authority of its decision to refuse Kalaam's order by way of letter dated 28 August 2018 (Batelco Ref GCL/360/18) (the "28 August Letter"). The 28 August Letter stated that "*Batelco's current supply contracts for its national fixed infrastructure network are with Huawei...It is imperative that a single vendor solution be maintained to ensure quality of service SLAs ordered as part of the WDC service... From a legal supply perspective, incorporating second hand third party equipment as part of the service presents a number of risks relating to liability for ongoing security and reliability of service...*"

- 1.25.17 The 28 August Letter further stated that "Kalaam has proposed and provided a Cisco CPE for technical evaluation by Batelco. However for the reasons mentioned above, the service must be delivered with a Huawei CPE, if we are to ensure service reliability, availability, resilience, performance and security. The Huawei CPE is a critical element in Batelco meeting its SLA obligations for WDC".
- 1.25.18 On 29 August the [REDACTED] wrote to Kalaam informing it that they could not accept Huawei CPE as part of the Kalaam circuit [REDACTED]
[REDACTED]
- 1.25.19 On 6 September 2018, Kalaam filed the Kalaam Complaint.
- 1.26 Returning to the procedural aspects of the Authority's review of the Kalaam Complaint, following a review of Kalaam's Complaint the Authority considered that there was a *prima facie* case to answer under Article 65 of the Law and hence undertook to commence a further investigation into the factual and legal background to the Kalaam Complaint.
- 1.27 On 12 September 2018 the Authority wrote to Batelco attaching a non-confidential copy of Kalaam's Complaint and requesting a meeting take place between the Authority and Batelco the next day (13 September 2018).
- 1.28 The Authority also wrote to Kalaam on 13 September 2018 confirming that the Authority had decided that the Kalaam Complaint should be pursued and an investigation will be opened. On the same day the Authority again wrote to Batelco attaching Kalaam's Complaint (and the cover letter) requiring that Batelco provide its comments on these documents by 23 September 2018. On 16 September 2018 the Authority wrote to Kalaam requesting additional information be provided by Kalaam in relation to the Kalaam Complaint. Kalaam responded to the Authority's request on 23 September 2018.
- 1.29 On 24 September 2018 Batelco made a submission to the Authority in relation to Kalaam's Complaint ("**Batelco's 24 September Response**"). In summary, Batelco submitted that there was no abuse of a dominant position because:
- 1.29.1 There were objective reasons for its actions in relation to the Kalaam Complaint;
- 1.29.2 Not all the delay was due to Batelco's actions; and

- 1.29.3 There was reasonable justification for requiring use of Batelco supplied CPE and, in the light of the no objection letter Batelco received, Batelco was relying on Huawei to supply that CPE for that site.
- 1.30 Whilst Batelco's 24 September Response denied any breach of Article 65 or the regulatory matrix with regards to the matters set out in the Kalaam Complaint, and rejected the necessity of an Emergency Order being granted by the Authority, it purported to set out "... *the following possible four options in relation to this matter...*" In fact, Batelco set out two options in relation to the provision of a WDC to Kalaam: (i) CPE from the equipment supplier Huawei (Option D(a)); or (ii) using CPE from a different equipment supplier (Option D(b)).
- 1.31 On 27 September 2018 the Authority wrote to Kalaam rejecting its request for an Emergency Order against Batelco and attaching a non-confidential version of Batelco's 24 September Response.
- 1.32 On 27 September 2018 the Authority received an e-mail from Kalaam which repeated Kalaam's assertion that Batelco is abusing its dominant position and attaching an e-mail sent earlier that day to Batelco responding to the two options Batelco had provided in Batelco's 24 September Response ("Kalaam's 27 September E-mail"). Kalaam's response to Batelco indicated that Kalaam wanted to go ahead with the option to deliver the service using Kalaam's CPE (Cisco). Kalaam drew attention to the fact that the Cisco CPE was already installed in [REDACTED] and Batelco's fibre is already patched into this CPE. Accordingly, Kalaam requested the service be delivered on the same day.
- 1.33 On 30 September 2018 the Authority was copied to a reply from Batelco to Kalaam's 27 September E-mail which stated that "*This matter is with our legal department as it's part of an ongoing dispute. We only recently responded last week to the notice of complaint and we understand the TRA is considering its response to that submission, and will notify both parties accordingly.*"
- 1.34 On 1 October 2018 the Authority e-mailed a letter to Batelco (in response to its 30 September e-mail), and copied Kalaam. The Authority's letter clearly stated that "... *The ongoing investigation by the Authority for alleged breach of Article 65... does not relieve Batelco from complying with its obligations under the Reference Offer.*"

- 1.35 Over the course of the next two days, Kalaam renewed its request to Batelco by e-mail correspondence (copying the Authority) for Batelco to deliver the service over Kalaam's Cisco CPE, and repeating its request that delivery be made "as per the Reference Offer".
- 1.36 On 2 October 2018 the Authority wrote to Kalaam requesting further additional information be provided in support of the Kalaam Complaint (the "2 October Request"). Kalaam responded to the Authority's 2 October Request and provided numerous additional documents relating to the Complaint on 3 October.
- 1.37 On 3 October Kalaam again wrote to Batelco (copying the Authority) attaching a letter of "No Objection" issued by [REDACTED]. The e-mail from Kalaam stated that:

"As discussed and confirmed by you in our call today that the fastest route to delivery would be to go for the Huawei option [Option D (a)], We have communicated the same to the customer who has finally agreed for the same. Since the customer has no time to afford more delays, we have been able to obtain an NOC form.

Please find attached the NOC from [REDACTED] as requested in your response Dated on the 24th of September 2018.

Now since we will be using a compatible CPE which you is available in stock, and the fact that everything is ready at [REDACTED] site which includes the fiber pulled all the way till our rack, Can we ensure the service is delivered by tomorrow latest before 12 PM."

- 1.38 On 4 October 2018 the Authority replied to Kalaam's 3 October e-mail to Batelco requesting that Batelco expedite the delivery of this service request. Batelco responded on the same day stating that:

"Delivery has already been arranged for today... we're working with them (Kalaam) to complete the delivery of the circuit."

- 1.39 On 4 October however, Kalaam wrote to the Authority and Batelco stating that:

"As discussed in our call, please note that the Huawei option is no more viable as per [REDACTED] (who is our end customer). [Attached email for your reference]

Up to yesterday we have been working on the cisco option, which you mentioned that the response letter should be shared with us yesterday. Can you please share the same asap and confirm the exact timelines to deliver the circuit using the Option D (b) [Supply of the WDC using Cisco CPE]

We appreciate to get this letter within the next hour."

- 1.40 On 7 October Kalaam reiterated its request for a timeline for delivery of the WDC service using the Cisco option.
- 1.41 On the same day, Batelco e-mailed a letter to the Authority ("**Batelco's 7 October Letter**"). Batelco's 7 October Letter requested clarifications from the Authority concerning the licensing arrangements in respect of Kalaam and the Almoayyed Tower site, noting that Kalaam did not have an IFL License and "*so would have to rely on ... another duly licensed IFL holder to allow traffic to be conveyed and pass through one of the six fixed international gateways in the Kingdom... Batelco does not have visibility of the arrangements.*"
- 1.42 On the 8 October 2018, the Authority wrote to Batelco in response to its 7 October Letter (the "**Authority's 8 October Reply**").
- 1.43 The Authority's 8 October Reply stated that the Authority had had regard to the licensed status of Kalaam and had satisfied itself that the provision of the requested service by Batelco would not and could not lead to any unforeseen breach of the TRA's licensing regime. The Authority therefore reiterated its request that Batelco confirm the date for the delivery of the circuit by Batelco to Kalaam as a matter of priority.
- 1.44 On 11 October 2018 Kalaam received a further letter from Batelco in relation to its request for the WDC service. Batelco's letter set out the following points, namely that:
- (a) Despite repeated attempts the circuit to Kalaam could not be completed without a software upgrade;
 - (b) Batelco required Kalaam to enter into a "CPE Declaration" requiring Kalaam to provide an indemnity to Batelco in relation to the CPE's operability; and
 - (c) The likely delivery of the WDC service would be 6-8 weeks hence.

1.45 On 14 October 2018 Kalaam replied to Batelco's 11 October 2018 letter taking issue with the claims and requests made in Batelco's 11 October letter and stating with regards to the CPE Declaration that:

"Kalaam cannot give a full indemnity to Batelco regarding the use and operation of the CPE and waive off the protection that is otherwise provided to Batelco's wholesale customers under the Reference Offer..."

and, with regards to the 6-8 week delivery delay, that:

"...We have received confirmation from our contacts in Huawei, that there are no foreseeable issues in using a third-party CPE for the provisioning of the service. We note that Batelco has listed the steps that need to be taken in order for approving the use of the Cisco but the input we have received from different CPE suppliers is not consistent with the timeline that Batelco has provided to conduct the listed steps. Therefore, Kalaam cannot accept delivery timelines short of immediate delivery, seeing as we have been waiting for the delivery since 30th May 2018."

1.46 Batelco responded on 17 October to Kalaam's 14 October letter. Kalaam subsequently responded to Batelco on 22 October 2018 requesting, *inter alia*, that Batelco expedite delivery of the WDC service. Kalaam also provided a revised version of the declaration regarding the third party CPE.

1.47 The Authority understands that Batelco delivered the required service to Kalaam on 19 November 2018 using a Batelco provided Cisco CPE. The fact that Batelco subsequently delivered the WDC service to Kalaam just over two (2) months after submission of the Kalaam Complaint does not affect the existence (or otherwise) of a breach of Batelco's obligations under the Law, Access Regulations and Reference Offer. The relevant time for establishing breach is at the time of the behaviour complained of, which is assessed at latest at the time of submission of the Complaint

B. Zain Complaint

1.48 Zain submitted a complaint to the Authority on 16 October 2018 (the "Zain Complaint").

1.49 Zain states that its Complaint "*is premised on acts or omissions by Batelco in failing to adhere to the "Final Order on the Reference Offer of Batelco" issued by the Authority (ref: MCD/08/16/066,*

dated: 18 August 2016) ("RO Order"). Zain further asserts that Batelco has acted in breach of Articles 58 and 65 of the Law, and contravenes the principles outlined in the Authority's Competition Guidelines.

1.50 Zain's Complaint highlights the following behaviour by Batelco as the basis for its Complaint regarding Batelco's alleged anti-competitive conduct:

- 1.50.1 The substantial portion out of the number of WLA & WDC requests placed by Zain Bahrain, that according to Batelco required new fibre cabling pulling, due to an alleged lack of free fibre pair availability in the requested addresses;
- 1.50.2 The excess charges imposed by Batelco for deploying new fibre cable, beyond the allowed charges thresholds;
- 1.50.3 Batelco's failure to deliver the requested circuits in accordance with the communicated Ready for Service ("RFS") date; and
- 1.50.4 Altering the technical solution of Wholesale Data Connection ("WDC") by adding an active switch at the customer premises in disregard of the requirements of the Reference Offer.

1.51 For the purposes of this Article 35 Order the Authority will not address the first three allegations (as they form the subject of a separate procedure) but will instead focus on the last claim, namely that Batelco has unilaterally altered the technical solution of WDC by adding an active switch at the customer premises. The submissions and cross-submissions that do not relate to the last limb of the Zain Complaint will not be considered further in this Order. The facts relating to the relevant aspects of Zain's Complaint are set out below:

- 1.51.1 According to Zain, Batelco introduced a change to the technical topology of the WDC service, without notice. The change comprised in Batelco having started to install a switch at the end-users' premises for any new WDC requested circuits. According to Zain's Complaint, the service delivery on the new WDC circuits could not be successfully completed due to incompatibility with the existing set-up and new configuration was required. While Batelco did implement configuration changes from its end, this was done without notifying Zain, and resulted in service interruptions. Zain lodged a complaint with Batelco on 2 October 2018 regarding Batelco's unilateral introduction of a CPE, namely an additional switch that was Huawei specific. Zain informed Batelco that the

unilateral introduction of the CPE by Batelco had caused service interruption to Zain and impacted its customer relationships and Zain's business.

On 28 October 2018 the Authority wrote to Batelco attaching a non-confidential copy of Zain's Complaint and inviting Batelco's comments in response. Batelco submitted its response to Zain's Complaint to the Authority on 11 November 2018. On 3 December 2018, the Authority shared Batelco's submission with Zain for cross-submission. Zain submitted its cross-submission to the Authority on 18 December 2018.

In relation to its introduction of the CPE, Batelco claims that its inclusion of a CPE in provisioning the WDC service is in compliance with the Reference Offer, which contemplates use of a CPE, and is justified as a security obligation.⁷ Batelco's claim is in direct contradiction to Batelco's 9 August letter in which Batelco specifically requests an amendment to the WDC service, so as to include a CPE. This would indicate an admission by Batelco that the WDC service contemplated in Batelco's Reference Offer does not comprise a CPE or afford Batelco the ability to stipulate use of a CPE at all, much less a vendor specific CPE.

- 1.51.2 Zain disagrees with Batelco's position on this matter. Zain argues that Batelco's introduction of the CPE comprising a vendor-specific additional switch by Huawei was a unilateral change by Batelco to the service description of an existing WDC product. Zain further contends that this should have been the subject of formal notification by Batelco to the Authority and formal approval by the Authority as an amendment of the Reference Offer. Zain's position is that this change was not notified to Zain in advance and has caused Zain service interruption.

III. The Breach

- A. Batelco's unilateral imposition of a CPE; that is vendor-specific; and related failure to follow the process in the Reference Offer to seek to vary the terms of the Reference Offer

- 1.52 There is no requirement in the Reference Offer for delivery of the WDC service using a CPE that is vendor-specific. The Authority finds that Batelco's rejection of Kalaam's request for Access on 28 August 2018 due to "technical and security concerns" relating to the decision to employ only Huawei CPEs is unsubstantiated and therefore was not a reasonable refusal. Most importantly,

⁷ See para. 1.25.10 above.

no such configuration or requirement has been specified in the Reference Offer or WDC Schedule. Batelco has failed to explain any previous cases or instances of the technical functionality or efficacy of its WDC service being undermined by any lack of vendor-specific CPE. Batelco has not detailed any previous cases of actual breaches of security or even threats to security concerning its WDC services, which might have justified or supported the imposition of a vendor-specific CPE.

- 1.53 It must be noted that the obligations on Batelco concerning variations to the Reference Offer and WDC Schedule are not mere technical or procedural requirements that could properly be tolerated or overlooked by the Authority. These requirements provide a framework for the assessment by the Authority of the need for and effects of proposed changes. The framework provides an opportunity for the Access Seeker to raise any concerns with the Authority in connection with the Authority's decision whether or not to give approval. An unchecked decision by Batelco to use a vendor-specific CPE in all WDC services raises a number of competition concerns. Not only does it raise concerns regarding competition between Licensed Operators but also raises a number of concerns regarding downstream competition in the Kingdom. For example, at the supplier level, it has the potential to significantly affect competition in the provision of CPE insofar as it would impose a dominant provider's exclusive choice of CPE for all WDC services thereby foreclosing other suppliers' CPE. Furthermore, it would deprive an Access Seeker of the benefits of its investments already made in CPE produced by such other suppliers as these investments would be rendered redundant by Batelco's insistence on using vendor-specific CPE. Such a decision or policy of Batelco may also contribute to frustrating or delaying the development of downstream competition, by creating additional obstacles and/or increased costs to the provision by Public Telecommunications Operators of Public Telecommunications Services to Users. None of these factors are a necessary component of the alleged infringement of the Law by Batelco, but they serve to reinforce the importance of complying with the requirements of the Reference Offer, especially the WDC Schedule, with regard to service delivery and any changes to the configuration or other terms of service delivery.
- 1.54 Batelco's claim to need to use a single vendor-specific (Huawei) CPE is further called into question by two further factors. First, according to Kalaam, Batelco informed Kalaam for the first time of a need to use vendor-specific (Huawei) CPE, on 8 August 2018. If there had been a genuine technical need for such configuration, Batelco could have been expected to inform

Kalaam of this much earlier. This communication on 8 August 2018 took place almost four months after the date of Kalaam's original application for WDC. Second, Kalaam provided evidence in the form of a witness statement of its Head of Wholesale and Carrier Relations dated 2 September 2018, which stated that Batelco had been observed (on a site visit) to have non-Huawei equipment for the provision of circuits (along with Huawei equipment).

- 1.55 Moreover, in Batelco's 24 September Response Batelco itself suggested that one option to deliver the service was to provide the WDC service using Kalaam's (Cisco) CPE (the utilisation of which had apparently informed the rejection as at 28 August).
- 1.56 The fact that, by its letter of 11 October 2018 Batelco purported to make it a condition, of supplying the WDC service without its vendor-specific CPE, that Kalaam agree and sign a declaration of indemnity and exclusion of liability in favour of Batelco with reference to the use of Kalaam's chosen CPE (the Cisco CPE) instead of Batelco's vendor-specific CPE, was itself constructively a refusal by Batelco to supply the WDC service in accordance with the Reference Offer and the WDC Schedule. In so doing, Batelco purported to renounce the levels of service and protection to an Access Seeker that are provided for in the Reference Offer and WDC Schedule.
- 1.57 The fact that the WDC service was ultimately provided by Batelco to Kalaam using a Cisco CPE demonstrates that there is no incompatibility between such third party equipment and Batelco's facilities, contrary to Batelco's allegations. Further, Batelco's 24 September Response stated with reference to Kalaam's chosen CPE that "*there is no expected problem with the interface because an Ethernet standard is being used*"⁸.
- 1.58 Similarly, with regards to Zain's Complaint, Batelco introduced the CPE without following such requirements and without providing any valid reason for failing to do so. Indeed Batelco acknowledged that it had informed Zain only in October 2018 and that this "*could have been communicated in writing earlier*". While Batelco made reference in its arguments to the transparency obligations concerning CPE in the Reference Offer Order, Batelco did not in fact attempt to rely on the content of the Reference Offer to support the revised configuration of its

⁸ At para. D(d) on page 6.

product or service offering. Batelco did not offer any actual justification for its failure to follow the Reference Offer notification and approval requirements.

1.59 Should Batelco have wished to introduce the requirement for provision and delivery of the WDC service using a vendor-specific CPE, Batelco was required to follow the correct process stipulated in the Reference Offer and seek explicit approval from the Authority. Batelco's failure to do so means that its purported introduction of the vendor-specific CPE was and is invalid.

1.60 Article 4.1(a) of the Body Terms of the Reference Offer provides that:

"1. Subject to Batelco first obtaining any approval from the Regulator required by the Telecommunications Law, Batelco may, by notice published on the Batelco Wholesale Services website, amend or vary the Reference Offer, including without limitation:

- (a) offering any new service and any amendment or variation to the Reference Offer arising from the new service; or*
- (b) cancelling any service and any terms or conditions, and any amendment or variation to the Reference Offer arising from the cancellation of that service."*

1.61 Article 4.1 of the Body Terms is clearly subject to the specific provisions of the relevant service Schedule concerning variations of service, but in any event is subject to the prior approval of the Authority. Batelco cannot validly give notice of amendment or variation of the Reference Offer by publishing a notice on its website without obtaining the Authority's approval, and moreover must comply with the additional requirements of the relevant service Schedule concerning variations of the terms of service.

1.62 Article 3.6(a) of the WDC Schedule in the Reference Offer further provides:

"(a) Batelco may upon providing three (3) months' written notice to the Access Seeker and subject to the approval of the Regulator, vary the WDC Service or withdraw the WDC Service relating to these terms and Annexes 4, 6, 7 and 8, or any part thereof, by issuing a revised Service Description. Annexes 1, 2, 3 and 5 (circuit speeds, order form, presales process and technical characteristics) can be varied in writing by Batelco upon issuing 10 Working Days written notice to the Access Seeker."

- 1.63 It is evident from the factual background that Batelco has failed to follow the correct process to seek to vary the terms of the Reference Offer so as to introduce the requirement of a vendor-specific CPE. As confirmed in the Authority's letter to Batelco dated 6 September 2018, Batelco's 9 August Letter does not satisfy the threshold of a formal application to vary the Reference Offer. Moreover it is clear that no approval has been given by the Authority to Batelco's revised service structure and that no notice was given by Batelco to Kalaam as the Access Seeker as required by Article 3.6(a) of the WDC Schedule. Therefore, the purported introduction by Batelco of the vendor-specific (Huawei) CPE was and is invalid under the terms of the Reference Offer and the Law.
- 1.64 In addition, under Article 57(e) of the Law Batelco, as a Public Telecommunications Operator enjoying a position of dominance, must offer access to its telecommunications network on the terms and conditions that have been deemed appropriate by the Authority. The terms and conditions which the Authority has considered to be appropriate are those set out in the published Reference Offer of Batelco. Any unauthorized deviation by Batelco from the approved terms of the Reference Offer would mean that Batelco would be attempting to offer access to its network on terms which have not been determined by the Authority as being reasonable or appropriate.
- 1.65 By failing to follow the correct process to seek to vary the terms of the Reference Offer so as to introduce the requirement of the CPE, Batelco's introduction of the CPE into its service description constitutes an incorrect and improper act.

B. Batelco's failure to negotiate in good faith with Access Seekers

- 1.66 Each of Kalaam and Zain qualify as Access Seekers under the defined term of the Access Regulations. Accordingly, Batelco was obliged to negotiate with each of these operators in good faith.
- 1.67 The Access Regulations do not define the term "good faith". However, the obligation to act in good faith has been summarised by English Courts as an obligation to "*adhere to the spirit of the contract, to observe reasonable commercial standards of fair dealing, to be faithful to the agreed common purpose, and to act consistently with the justified expectations of [the other party]*"⁹. The Authority has had regard to the summary provided by English Courts and therefore whether the

⁹ CPC Group Limited v Qatari Diar Real Estate Investment Company [2010] EWHC 1535.

Authority's own views on the meaning of the term '*good faith*' under the Access Regulations is in line with best practice.

- 1.68 Insofar as Kalaam's Complaint is concerned, the Authority considers that Batelco's conduct as summarised in paragraphs 1.41 et seq. above manifests how Batelco has been trying to raise extraneous and unconnected issues to deflect away from providing the WDC service.
- 1.69 Without prejudice to the Authority's consideration of the complaint of alleged anti-competitive conduct by Batelco under Article 65 of the Law, the Authority does conclude for the purposes of this Article 35 Order that Batelco's failure to entertain Kalaam's request for Access in accordance with its own terms, conditions and tariffs does not equate to it adhering to the spirit of the Reference Offer. Neither is it tantamount to Batelco observing reasonable commercial standards of fair dealing.
- 1.70 Similarly, Batelco's conduct as described in paragraphs 1.51.1 et seq. namely Batelco's introduction of the CPE without following the prescribed requirements, without providing any valid reason for failing to do so and without even informing its own client is conclusive evidence that Batelco has acted in a misleading manner. Indeed according to further English precedent, the Courts have held that the duty of good faith requires the disclosure of material facts to the other party.¹⁰ Again, while the Authority has had regard to the English precedent cited, the Authority has reached its own conclusions on the meaning of the term '*good faith*' under the Access Regulations and application of this term to the facts of the cases at hand. Factually, Batelco acknowledged that it had informed Zain only in October 2018 and that this "*could have been communicated in writing earlier*". Batelco made reference in its arguments to the transparency obligations concerning CPE in the Reference Offer Order. Batelco did not attempt to rely on the content of the Reference Offer to support the revised configuration of its product or service offering, and did not offer any actual justification for its failure to follow the Reference Offer notification and approval requirements.

¹⁰ Horn v Commercial Acceptances [2011] EWHC 1757.

Conclusion of the findings

- 1.71 Having considered the terms of the Reference Offer, the Authority is satisfied that Batelco has breached the terms of the Reference Offer. In turn, the Authority finds that Batelco's breach of the Reference Offer constitutes a breach of Article 57(e) of the Law and the Access Regulations. In addition the Authority also believes that Batelco has failed to negotiate in good faith, in breach of the Access Regulations.

IV. Effects of the Article 35 Order

- 1.72 This Article 35 Order is issued without prejudice to further investigations by the Authority into Batelco's alleged breaches of the Law referred to above, including in particular, Article 65 of the Law.
- 1.73 This Article 35 Order and any further action taken by the Authority is without prejudice to the rights of any other entity to take relevant action as they may deem appropriate under the laws of the Kingdom of Bahrain.
- 1.74 The issuance of this Article 35 Order does not prejudice the Authority's right to:
- 1.74.1 Expand the scope of its investigation into this matter; and/or
 - 1.74.2 Issue further orders relating to other breaches arising out of the same set of facts; and/or
 - 1.74.3 Find, develop or introduce new evidence relating to the alleged breach described in this Order.

V. Article 35

- 1.75 Article 35 of the Law may be applied by the Authority in the event that a Licensee has been or is in material or 'severe' breach of any provision of the Law.
- 1.76 Batelco has breached the Law by failing to adhere to the terms of the Reference Offer as required under the Access Regulations and Article 57(e) of the Law. Specifically Batelco has failed to provide access to the relevant WDC services in accordance with the terms specified in Batelco's

Reference Offer (including the WDC Schedule), and by unilaterally imposing a requirement that WDC services can only be delivered to the complainants, Kalaam and Zain, using a vendor-specific Huawei CPE, and (in the case of Kalaam) by purporting to vary the configuration and terms of provision of its WDC service without complying with the requirements concerning variations set out in the Reference Offer and in the WDC Schedule. Batelco has also failed to enter into good faith negotiations with Kalaam and/or Zain.

- 1.77 A “*material or severe breach*” is understood to mean a breach that is more than minor and/or transient. The Authority considers that Batelco's conduct in making service provision subject to unjustified conditions (including imposition of a vendor-specific CPE) represent a flagrant disregard of the terms of the Reference Offer and in turn, with the Access Regulations and Article 57(e) of the Law. Together these constitute a material breach of the Law.
- 1.78 This Article 35 Order is issued without prejudice to further investigation by the Authority into Batelco's alleged breach of the Law.

VI. Imposition of Financial Penalty for Breaches

- 1.79 Article 35(d)(2) of the Law states that the Authority shall issue an Article 35 Order with the imposition of a suitable fine on the Licensee provided that such fine is objectively justified and non-discriminatory.
- 1.80 In setting an appropriate fine for Batelco's infringement in this case, the Authority has taken into consideration the relevant provisions of the Law and the Guidelines for the Setting of the Amount of a Fine for Violations of Article 35 and/or 65 of the Law¹¹ (the “**Fining Guidelines**”).
- 1.81 The Fining Guidelines reflect the Authority's fining practices to date, which in turn have been guided by international best practices, including the basic methodology used by Ofcom and other telecommunications regulatory authorities when establishing fines for license breaches.

¹¹ <http://www.tra.org.bh/media/document/2014%2003%2016%20-%20Fining%20Guidelines%20-%20LAD%200314%20039.pdf>

Procedure followed to determine the amount of the financial penalty

- 1.82 The Authority has observed the following steps in determining the quantum of the fine to be imposed on Batelco for failing to comply with the terms of the Reference Offer, Article 57(e) of the Law and the Access Regulations (as more clearly described above):
- 1.82.1 Firstly, a baseline figure is established by reference to the value that is germane or relevant to the infringement in question;
 - 1.82.2 This baseline figure may then be adjusted upwards or downwards to take into consideration the following "aggravating" and "mitigating" factors at the Authority's discretion:
 - (a) The degree of severity of the breach in question;
 - (b) Any gain (financial or otherwise) accrued by the party perpetuating the breach;
 - (c) The extent to which the infringement was perpetuated intentionally or recklessly, including the extent to which senior management knew, or, ought to have known, that an infringement was occurring or would occur;
 - (d) The extent to which any contravention was caused by a third party, or any relevant circumstances beyond the control of the licensee;
 - (e) Whether in all the circumstances, appropriate steps had been taken by the perpetuating party to prevent or remedy the breach in question;
 - (f) Any steps taken by the perpetuating party to mitigate the consequences of the breach; and
 - (g) Any other factors that, in the Authority's view, constitute an aggravating or mitigating circumstance.
 - 1.82.3 Consideration then will be given to whether the amount of the fine calculated on the basis of the considerations listed above has a sufficiently deterrent effect.
 - 1.82.4 Following this, a proportionality review of the final amount of the fine is carried out.

1.83 The Authority considers that Batelco's breach of the terms of its Reference Offer which is the subject of this Article 35 Order should not be confused with the Authority's ongoing investigation(s) under Article 65 of the Law into Batelco's alleged anti-competitive behaviour.

Calculation of the baseline figure

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

1.85 Paragraph 46 of the Fining Guidelines states that:

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

1.86 Paragraph 46 then provides examples of how the Authority might seek to establish this value. That paragraph refers, *inter alia*, to any comparable penalties.

1.87 The Authority notes that there has been no Article 35 order issued imposing a fine for failure to adhere to the terms of the Reference Offer as required under the Access Regulations and Article 57(e) of the Law.

1.88 The Authority notes however that whilst there has been no previous Article 35 Orders addressing a failure to comply with the terms of the Reference Offer as required under the Access Regulations and Article 57(e) of the Law, there have been examples of the Authority imposing financial penalties for severe breaches of the Law that are analogous to the current breach. For example Order No. 1 of 2008, imposed a fine of five hundred thousand Bahraini Dinars (BHD 500,000) reduced to one hundred thousand Bahraini Dinars (BHD 100,000) on a Licensed Operator for failing to provide wholesale leased line services under Article 57(e) of the Law. In that instance, the level of the fine reflected *"the disregard for its wholesale provision obligations and the related regulatory regime imposed upon it by the Telecommunications Law."*

1.89 The Authority wishes for it to be clear that whilst the facts of these two cases are not identical, since both orders relate to a failure to comply with a regulatory and statutory obligation consisting in the granting of access to a regulated product, the Authority sees merit in setting as a baseline figure the fine of one hundred thousand Bahraini Dinars (BHD 100,000) in this instance, based on the reduced fine in Order No.1 of 2008.

1.90 As such, in view of the foregoing, the Authority has decided to set a baseline figure of one hundred thousand Bahraini Dinars (BHD 100,000).

Aggravating factors

1.91 Having established a baseline figure of one hundred thousand Bahraini Dinars (BHD 100,000), the next step in the process is to consider the aggravating factors set out in Paragraph 47 of the Fining Guidelines. Each of the factors identified in Paragraph 47, which in the Authority's view are applicable, is considered below in relation to Batelco's current breach.

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

1.92 Self-evidently the failure to comply with its own Reference Offer and the blatant disregard to the Authority's instructions and forewarning will qualify as a matter of grave severity. No Licensed Operator should be above the Law.

1.93 The Authority therefore considers that it is appropriate to apply to the baseline figure to take into account the seriousness of the breach (the "Seriousness Factor") a factor equating to ten percent (10%) of the baseline figure, which should be added to the baseline figure.

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

1.94 It is noted that Batelco has been served with a number of Article 35 Orders and Emergency Orders over the course of the past ten (10) years¹². These include:

- 1.94.1 Article 35 Order 1 of 2009;
- 1.94.2 Emergency Order No 2 of 2010;
- 1.94.3 Emergency Order No 3 of 2010;
- 1.94.4 Emergency Order No 1 of 2015;
- 1.94.5 Emergency Order No 1 of 2016; and
- 1.94.6 Article 35 Order No 1 of 2018.

¹² Only Emergency Orders that relate to an infringement by Batelco are considered.

There is no requirement that the Orders to be taken into account must relate to the same behaviour¹³.

- 1.95 Batelco's clear history of infringement covering the previous ten (10) years leaves the Authority with no choice other than to apply to the baseline figure to take into account the recidivism of Batelco (the "Recidivism Factor") a factor equating to ten percent (10%) of the baseline figure, which should be added to the baseline figure.

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

- 1.96 There can be little doubt that the conduct was perpetuated intentionally (as opposed to negligently) and that, at least in relation to Kalaam's Complaint, senior management knew that an infringement was occurring. This is supported by the fact that the proposal in Batelco's 14 August 2018 response to Kalaam was directly attributed to a suggestion from the CEO and therefore from senior management.
- 1.97 It is evident that knowledge of Batelco's breach is known to Batelco's executive team at the highest level. The Authority therefore considers that a senior management factor (the "Management Factor") of ten percent (10%) of the baseline figure should be added to the baseline figure.

Mitigating factors

- 1.98 The next step in the process is to consider whether there are any mitigating factors that should be taken into account. The Authority does not consider that any of the mitigating factors set out at Paragraph 48 of the Fining Guidelines are relevant.

¹³ Paragraph 29(a)(ii) of the 2014 Fining Guidelines expressly acknowledges that (unlike paragraph 29(a)(i) of those Guidelines) the previous infringements include a pattern of anti-competitive conduct of different types affecting the same relevant market or markets.

Need to ensure deterrence

- 1.99 The Authority's fining practice acknowledges the importance of deterrence when determining the amount of a financial penalty.
- 1.100 The Authority considers that the amount of the baseline figure imposed on Batelco for breach of the terms of the Reference Offer, Article 57(e) of the Law and the Access Regulations should act as a sufficient deterrent against any further breaches.
- 1.101 The Authority does not, therefore, consider that there is any need in this case to make any adjustments for deterrence.

CALCULATION

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

$$\begin{aligned}
 \text{Fine} = & \text{Basic Amount} + \\
 & \text{Basic Amount} \times \text{Seriousness Factor (a)} \\
 & \text{Basic Amount} \times \text{Recidivism Factor (b)} \\
 & \text{Basic Amount} \times \text{Management Factor (c)} \\
 & \text{BHD100,000} + \text{BHD10,000} + \text{BHD10,000} + \\
 & \text{BHD10,000} \\
 = & \text{BHD130,000}
 \end{aligned}$$

Proportionality

- 1.103 The Authority considers that the imposition on Batelco of a fine in the amount of one hundred and thirty thousand Bahraini Dinars (BHD 130,000) is proportionate, considering the circumstances of this case. In particular, the amount in question is sufficient to reflect the important issues at stake in this case.

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Conclusion – Final amount of financial penalty

1.104 Having considered the factors listed above, and any other circumstances relevant to the particular case under consideration, the Authority has determined that a fine in the amount of one hundred and thirty thousand Bahraini Dinars (BHD 130,000) is appropriate and proportionate and complies with the Fining Guidelines.
