

EMERGENCY ORDER

Emergency Order no. 1/06 – Batelco BD10 Broadband
Package

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An Emergency Order issued by the
Telecommunications Regulatory Authority under
the Telecommunications Law

14 June 2006



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تنظيم
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Telecommunications
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Background

1. The Telecommunications Regulatory Authority (the "**Authority**") granted Bahrain Telecommunications Company B.S.C. ("**Batelco**") an Internet services provider license on 21 June 2003 for the provision of certain Internet services in the Kingdom of Bahrain (the "**License**") pursuant to its powers under the telecommunications law promulgated by Legislative Decree No. 48 of 2002 (the "**Telecommunications Law**").
2. Condition 6.3 of the License requires Batelco, if it wishes to change the tariffs of a licensed service, to file the proposed change with the Authority at least forty-five (45) days prior to the date on which it is proposing that the change is to come into effect.
3. Under Condition 6.4 of the License, the Authority must approve or disapprove the tariff proposal within thirty (30) days of it being filed by the licensee. The Authority may disapprove a proposed tariff proposal if it violates any applicable law, as set out in Condition 6.4(b).
4. Batelco submitted to the Authority tariff proposals dated 28 January 2006 ("**TPR88**") relating, *inter alia*, to the introduction of a BD 10 per month, 256 kbit/s DSL product (the "**Service**"), requesting approval of the same.
5. On 12 February 2006 the Authority granted a partial approval of TPR88 (reference ERU/0106/44), granting approval for all packages included in TPR88 other than the Service, and disapproved the tariff for the Service.
6. Batelco submitted to the Authority a revised TPR88 tariff proposal dated 22 February 2006 in connection with the Service, requesting approval of the same.

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7. On 1 March 2006 the Authority granted an approval to the Service (reference ERU/0306/058), subject to a number of conditions set out in the approval being met by Batelco, which were included by the Authority to enable Batelco to launch the Service in compliance with the Telecommunications Law and the Licenses held by Batelco. The conditions imposed included, among others, the following:

“Batelco must, four weeks prior to the launch of the 256 kbps retail service by any licensed operator in the Kingdom of Bahrain, including Batelco or any company in which Batelco has any form of commercial interest, directly or indirectly, have available, and have informed all other licensed operators, of a TRA approved “fit-for-purpose” wholesale DSL product, together with all related terms and conditions, which can be readily used by those operators who wish to provide a 256 kbps Downlink / 64 kbps Uplink with a 2 GB threshold in the retail market. The wholesale product must be priced so that any competing licensed operators are able to provide a similarly priced retail product and make a reasonable rate of return.” (the “**Condition**”).

8. The Authority received a complaint from Batelco dated 4 May 2006 (reference CE/034) (the “**Complaint**”), over two months from the date of notice to Batelco of the Condition, which stated that Batelco did not consider that the Authority had the ability to grant an approval for a tariff subject to conditions. The Complaint stated that as Batelco considered that the Authority had not approved or disapproved TPR88 within the terms of Condition 6.4 of its License within thirty (30) days of receipt of TPR88, TPR88 was deemed approved by the Authority. In the Complaint Batelco requested that the Authority acknowledge that the Condition was inappropriate and that it did not apply (or that it should be withdrawn) and claimed to reserve its purported right to launch the Service, as it considered the terms and tariff for the Service approved.
9. The Authority responded in full to Batelco with a letter dated 31 May 2006 (reference GDO/LAU/0506/667), explaining why the Condition in the approval for TPR88 (as at the date of the issue of the Condition and as at the date of the letter) was and is

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appropriate. The letter also put Batelco on notice that if Batelco were to launch the Service without tariff approval, thereby circumventing its obligations, the Authority would be forced into taking enforcement action.

10. Under cover of a letter dated 5 June 2006 (reference CE/043) Batelco notified the Authority of a letter dated 4 June 2006 (reference WS/014/06) to other licensed operators of an offer of an *unapproved* wholesale DSL product, as set out in a service description included in the letter (the “**Service Description**”). This Service Description is required to be approved by the Authority in order for it to fulfill the Condition.
11. By a letter dated 8 June 2006 (reference GDO/ERU/0606/715) the Authority informed Batelco of proposed changes to the Service Description that it would require in order for the Authority to approve the Service Description and also stated that it would need to conduct a limited consultation exercise on the Service Description as amended by its proposed changes to ensure that Batelco’s proposal as set out in the Service Description, as amended by the Authority, would be workable and economically viable. As such the Authority clearly stated to Batelco that the Service Description was not approved.
12. As at the date of this Order, the Authority has not received a response to its letter dated 8 June 2006 from Batelco, nor has it approved the Service Description. Consequently, although by the letter dated 8 June 2006 the Authority has described to Batelco the steps Batelco needs to take to produce a Service Description that the Authority would be able to approve, thus enabling Batelco to offer the Service in compliance with its License, the Condition remains to be fulfilled.
13. The Authority became aware through advertisements in the local press on 11 June 2006 and 13 June 2006 that Batelco was purporting to offer registration to the Service and was advertising the activation date of the Service as being 6 July 2006. The Authority also became aware on 11 June 2006 that Batelco is already accepting registrations for the Service for the payment of

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BD 10 and is misrepresenting to consumers that it has obtained the approval of the Authority for the launch of this Service.

Legal Analysis


14. It appears to the Authority that Batelco is offering the Service without tariff approval, contrary to Condition 6.3 of its License.
15. It further appears to the Authority that the conduct of Batelco described above, including its offer of the Service without tariff approval, may amount to an abuse of a dominant position, which is a breach of section 65 of the Telecommunications Law.

Breach of Condition 6.3 of the License

16. It appears to the Authority that the purported offer of the Service is a breach of Condition 6.3 of its License, which Batelco engaged in despite correspondence from the Authority warning against the introduction of the Service without tariff approval and without approval of the Service Description for a wholesale DSL product.

Breach of Section 65 of the Telecommunications Law

17. Section 65(a) of the Telecommunications Law states that a licensed operator may not do or omit to do anything which has the effect of materially preventing, restricting or distorting competition in any commercial field connected with telecommunications in the Kingdom of Bahrain, where such act or omission is done in the course of operating a telecommunications network or providing a telecommunications service, or in connection with any such matter.
18. Section 65(b) of the Telecommunications Law states that the act or omission referred to in section 65(a) includes abuse by the licensed operator, either independently or with others, of a dominant position in the market or in a substantial part of it which materially prevents or limits competition in the market.



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19. Batelco was found to be dominant in the Authority's Determination on Batelco's Dominance in Wholesale Markets issued on 22 January 2006 (Determination No. 1 of 2006) (the "**Dominance Determination**") in the market for wholesale fixed access to customer premises.
20. It appears to the Authority that Batelco is leveraging its dominance as determined in the Dominance Determination in the market for wholesale fixed access to customer premises into the adjacent market for retail fixed access to customer premises for Internet services, by one or more categories of abuse, including, but not limited to, the following:
- (a) discrimination at the wholesale level in favor of its own retail operation as against competitors or potential competitors; and/or
 - (b) margin squeeze,
- in all cases with significant likelihood of foreclosure effects on competitors or potential competitors.
21. In particular:
- (a) by launching its own retail package prior to offering an Authority approved wholesale service, Batelco has potentially discriminated in favor of its retail business by allowing it to obtain a head start over other competitors or potential competitors; and
 - (b) Batelco's conduct may amount to margin squeeze as all the elements required for a finding of margin squeeze appear to the Authority to be met as follows:
 - (i) *Dominance upstream:* Batelco is dominant in the wholesale market in fixed access to customer premises, as set out in the Dominance Determination;

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- (ii) *Upstream input essential to competitors downstream:* competitors or potential competitors to Batelco's retail business for the provision of the Service require access to a wholesale DSL product;

- (iii) *Unprofitable downstream margins:* it appears to the Authority that the provision of the Service by Batelco may be "only marginally above the cost of provision of X BD per month (*Changed for reasons of commercial confidentiality*) resulting in a profit of X percent" (below 5% *Changed for reasons of commercial confidentiality*) but "if the threshold charges are removed rental charges are then below cost" (Authority approval letter dated 12 February 2006 (reference ERU/0106/44)). It further appears to the Authority that in Batelco's wholesale Service Description the over-threshold charge of X fils/MB (*Changed for reasons of commercial confidentiality*) that Batelco proposes to charge other operators, is significantly in excess of Batelco's stated cost as shown in TPR88 of X fils/MB (*Changed for reason of commercial confidentiality*) (Authority letter to Batelco dated 8 June 2006 (reference GDO/ERU/0606/715)). As such, the existence of predatory retail pricing and/or excessive wholesale pricing cannot be excluded; and

- (iv) *Likelihood of foreclosure effects:* the conduct in question appears to the Authority to be likely to have significant foreclosure effects on competitors or potential competitors.

Legal Basis for the Emergency Order

22. The Authority has a duty under section 3(b)1 and 2 of the Telecommunications Law to, *inter alia*, protect the interests of subscribers and users and promote effective and fair competition.

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23. Under sections 3(c)1 and 3(c)18 of the Telecommunications Law, the Authority has the power, *inter alia*, to issue orders as may be necessary for the implementation of the Telecommunications Law, including the promotion of competition, compliance with license conditions and other applicable provisions. The Authority also has the power to take "*all other actions as may be reasonably necessary*" to give effect to the Telecommunications Law, as set out in section 3(c)18 of the Telecommunications Law.
24. Under section 3(f) of the Telecommunications Law the Authority must grant the opportunity to interested parties to give their opinions on any measures that may have a material effect on a particular market, *except in emergency cases*. The Authority is satisfied that this is such an emergency case so that it is not required to grant Batelco or any other interested parties an opportunity to give their opinions on the form of this Order.
25. The Authority has determined that in order to fulfill its duties under section 3(b)1 and 2 of the Telecommunications Law, an emergency order is required pursuant to its powers under sections 3(c)1 and 3(c)18 of the Telecommunications Law.
26. In particular, in connection with its duty to protect the interests of subscribers and users under section 3(b)1 of the Telecommunications Law, the Authority is satisfied that the purported offer of the Service may cause significant harm to consumers in that:
- (a) it may mislead consumers into believing that the Service has been approved by the Authority;
 - (b) it enables Batelco to collect money wrongfully from consumers in payment or deposit for a service that cannot lawfully be offered;
 - (c) it enables Batelco to collect and retain money from consumers in respect of a service it will not be capable of providing by its advertised launch date and potentially,

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dependent upon Batelco's compliance with the Condition, on any date; and

- (d) it may adversely affect competition in the relevant market, with the consequent medium to long term adverse effect on the interests of consumers.
27. In particular, in connection with its duty to promote effective and fair competition under section 3(b)2 of the Telecommunications Law, the Authority is satisfied that the purported offer of the Service without approval of the Service Description may materially prevent, restrict or distort competition in that the launch of the Service may lead to the foreclosure of the market for retail fixed access to customer premises for Internet services and/or Batelco gaining of an unfair advantage over competitors or potential competitors.
28. The Authority is satisfied that in the current circumstances, time is of the essence as:
- (a) any delay in the implementation of the steps required by Batelco in this Order may seriously prejudice the ability of potential new market entrants to offer competing products in the market for retail fixed access to customer premises and such delay may lead to a permanent and material prevention, restriction or distortion of competition in this market; and/or
 - (b) any delay in the implementation of the Order may cause consumers significant harm, in that they are being misled that the Service has been approved by the Authority, that the package will be legally available to launch on 6 July 2006 and/or that their money is currently being collected on a legal basis.
29. This emergency order is without prejudice to any further orders or determinations that the Authority may consider necessary under section 35 or 65 of the Telecommunications Law in connection with the conduct of Batelco described above.



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30. It appears to the Authority that in order to protect the interests of subscribers and users and to promote effective and fair competition, this emergency order should include steps to ensure that Batelco stops all current advertising or promotion of the Service.

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The Order

In the exercise of its powers under sections 3(c)1 and 3(c)18 of the Telecommunications Law the Authority makes the following emergency order:

- (a) Batelco is required to cease with immediate effect to offer, advertise, promote or sell or otherwise deal with consumers for the provision of the Service until such time as Batelco fulfills the Condition; and

- (b) by 2pm on 15 June 2006 issue a press release for immediate publication to all forms of media and to make the same available by way of a notice to those consumers that have paid any monies in connection with the Service as well as to consumers in response to any enquiry concerning the Service, in each case in a form to be forwarded to the Authority prior to its publication for the approval of the Authority, such press release or notice to include the following terms (without amendment):

“Batelco has today been ordered by the Telecommunications Regulatory Authority to cease to offer a BD 10 per month, 256 kbit/s DSL package. This is because Batelco failed to meet its obligations under the Telecommunications Law and its License. Batelco apologizes to its consumers in that it has misled them through the advertisements issued that it could offer such packages when it was aware that it could not do so legally. This announcement is issued pursuant to the order of the Authority.”; and



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- (c) Batelco shall within 10 working days of the date of this order refund in full or return to any subscribers or potential subscribers all deposits, advance payments, registration fees, activation fees or any other monies received in respect of the Services

A. Andreas Avgousti

General Director

for and on behalf of the Telecommunications Regulatory Authority

Issued: June 14, 2006