

**Article 35 Order No. 2 of 2021**

**1 BNET'S FAILURE TO COMPLY WITH THE AUTHORITY'S DECISION DATED 26 JANUARY 2021**

For the reasons set out in the reasoning of this Order, the Telecommunications Regulatory Authority (the “**Authority**”) considers that BNET B.S.C (“**BNET**”) has breached (i) Decision No. 2 of 2021<sup>1</sup> (the “**Decision**”); (ii) the Reference Offer Order dated 3 June 2019<sup>2</sup> (the “**Reference Offer Order**” or the “**ROO**”) and specifically section 8 of schedule 6.1 thereof; and (iii) sections 4.1.2, 4.1.4, 4.1.5, 4.14.3 and 10.1 of its Fixed Telecommunications Infrastructure Licence (the “**Licence**”).

**2 THEREFORE BNET IS ORDERED TO:**

- 2.1 Within five (5) business days from the date of this Order to process all pending Transfer Requests<sup>3</sup> in accordance with the Decision and the ROO and to confirm that it will process all future Transfer Requests in accordance with the ROO and the Decision.

**3 FINES**

- 3.1 BNET is ordered to pay a fine amounting to ninety thousand Bahraini Dinars (BHD 90,000) within thirty (30) calendar days from date of this Order.

- 3.2 BNET shall pay the fine set out in Article 3.1 of this Order to the following account:

Account Name: Telecommunications Regulatory Authority

Account Number: 1-0000005433-4

Bank Name: BBK

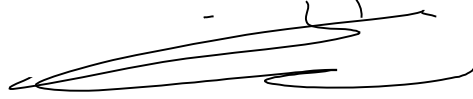
<sup>1</sup> Decision No. 2 of 2021 in relation to a complaint submitted through the Equivalence Compliance and Technical Committee pertaining to an interpretation of a WBS Transfer Request process in Schedule 6.1 of BNET's Reference Offer (Ref: LAD 0121 015).

<sup>2</sup> Order issued by the Authority on the Reference Offer of NBNetCo BSC(c) (Ref: LAD 0619 178) available at [https://tra-website-prod-01.s3-me-south-1.amazonaws.com/Media/Documents/Orders/20191009174537703\\_eocpk30s\\_lev.pdf](https://tra-website-prod-01.s3-me-south-1.amazonaws.com/Media/Documents/Orders/20191009174537703_eocpk30s_lev.pdf).

<sup>3</sup> As defined in the ROO.

#### 4 COMPLIANCE

In terms of Article 35(d)(3) of the Telecommunications Law (the “**Law**”), the Authority advises that should BNET fail to abide by this Order (including the payment of the fine referred to at Article 3.1) the Authority may proceed with the revocation of BNET’s Licence.



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

28 October 2021

## REASONING

### I Relevant Legal Provisions

#### Telecommunications Law, Licence Provisions and Reference Offer Order

- 1 Article 3(c)(1) of the Law grants the Authority the power to issue regulations, orders and determinations as may be necessary for the implementation of the provisions of the Law including those relating to interconnection; access to networks and facilities; the promotion of competition; and compliance with licence conditions.
- 2 Article 3(c)(2) of the Law empowers the Authority to, *inter alia*, monitor and investigate compliance with the provisions of the Law and any decision made pursuant to the Law.
- 3 Article 3(c)(4) of the Law grants the Authority the power to monitor and enforce compliance with Licence terms and conditions by Licensed Operators<sup>4</sup>.
- 4 Article 3(c)(17) of the Law authorises the Authority to examine complaints and resolve disputes arising between Licensed Operators or any other Person involved in the Telecommunications industry.
- 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.
- 6 Section 4.1.2 of the Licence obligates BNET to comply with the Reference Offer ('the RO').
- 7 By virtue of Section 4.1.4 of the Licence, BNET is required to comply with the terms of the Law.
- 8 Section 4.1.5 of the Licence mandates BNET to comply with the terms of all decisions, determinations, orders and/or any other regulatory instrument issued by the Authority.

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<sup>4</sup> Capitalised terms used throughout this document shall have the same meaning attributed to them in the Law, the Licence and/or the ROO unless otherwise defined in this Order.

- 9 Section 4.14.3 of the Licence obliges BNET to fully and promptly implement any recommendations and measures required by the Equivalence Compliance and Technical Committee (“the ECTC”).
- 10 Section 10.1 of the Licence obliges BNET to provide access to the Licensed Network and Licensed Services in accordance with the terms of the Licence, the terms of any RO and/or the terms of any determination or order issued by the Authority.
- 11 Paragraph 8.1 of Schedule 6.1 of the ROO requires BNET to comply with the terms set out in that paragraph when processing a Service Request.
- 12 Under Schedule 8 of the ROO the term ‘Service Request’ includes Transfer Requests.
- 13 By virtue of Paragraph 8.4 of Schedule 6.1 of the ROO, BNET is required to send an Access Seeker an acknowledgment of a Service Request within fifteen (15) minutes of the receipt of a Service Request.
- 14 Paragraph 8.6 of Schedule 6.1 of the ROO in turn provides that BNET must, within one (1) Working Day of the receipt of a Service Request either accept or reject the same, failing which the Service Request is deemed accepted.
- 15 Paragraph 8.15 of Schedule 6.1 of the ROO further provides that BNET must provision and deliver the Wholesale Bitstream Service (“the WBS”) on or before the RFS Date<sup>5</sup> and in accordance with Schedule 7 of the ROO.
- 16 Schedule 7 of the ROO sets out the following deadlines:
- 16.1.1 Service Request Acknowledgment – 15 minutes
  - 16.1.2 Service Request Confirmation – 1 Working Day
  - 16.1.3 RFS Date Maximum Validation Time – 2 Working Days
  - 16.1.4 RFS Date Maximum Delivery Time – 10 Working Days provided that coordination of deactivation and activation is to take place on the same day.

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<sup>5</sup> As defined in the ROO.

## II Factual Background

- 17 On 2 June 2019, BNET was granted the Licence authorising it to provide licensed telecommunications services in accordance with the terms of the RO<sup>6</sup>.
- 18 On 3 June 2019, the Authority issued the ROO, the purpose of which was to set the fair, reasonable and non-discriminatory price and non-price terms of the regulated wholesale products and services in BNET's RO. Schedule 6.1 of the ROO consists of the Service Description<sup>7</sup> for the Wholesale Broadband Service (“WBS”) and includes the terms, conditions and timeframes applicable in the event of a Transfer Request.
- 19 On 17 September 2020, a consultation paper on the WBS Transfer Process was circulated by the Chairman of the ECTC, the purpose of which was to seek feedback from all licensed operators on a proposed transfer process which had initially been put forward and discussed during ECTC meetings.
- 20 On 3 November 2020, the ECTC Chairman confirmed to the Authority that “[t]he ECTC and JWG Meetings have failed to reach any form of agreement on an agreement process.”
- 21 In his Report of ECTC Activities Meeting # 5,<sup>8</sup> the Chairman of the ECTC noted that “[t]he ECTC and JWM meeting have been unable to resolve this issue [agreement on the WBS transfer process]. A separate meeting was held purely to resolve this process issue. This matter will now be passed to the TRA to resolve the issues [agreement on the WBS Transfer Process].”
- 22 On the 26 January 2021, the Authority published the Decision. The Decision required BNET (and retail service providers) to comply with the process set out therein. The process, which is a gaining-operator led process makes it clear that any Subscriber who wishes to transfer their broadband service from one service provider to another does not need to approach the losing service provider. As per the Decision, it suffices that the gaining service provider submits a Transfer Request to BNET on behalf of the Subscriber.

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<sup>6</sup> See section 5.3 of the Licence.

<sup>7</sup> As defined in the ROO.

<sup>8</sup> Report dated 3 November 2020.

- Moreover, the Decision requires BNET to complete the Transfer Request within the timeframes set out in Schedule 7 of the ROO.
- 23 During the ECTC meeting on the WBS Transfer Process held on 9 February 2021, the members of the ECTC agreed to an augmentation of the process flow within the Decision to cover some additional detail to cater for possible cases of bad debts.
- 24 In the afore-mentioned meeting, BNET presented its requirements to automate the process using the Portal. BNET stated that automation would take between 3 and 4 months to complete and that during this period of implementation BNET would support a 'cease and provide' approach to completing WBS Transfer orders. The retail service providers did not accept this proposition and requested BNET to consider a phased approach to the introduction of the automation. The Authority notes that to date (some 8 months having now elapsed since that meeting) this proposed automation process remains outstanding.
- 25 During a subsequent ECTC meeting held on 16 February 2021, BNET stated that it would not accept to receive a single transfer order from the gaining operator and that instead it would have to receive two orders: (i) a Cease Order from the losing provider and (ii) a Provide Order from the gaining operator. During that meeting it was proposed to BNET that the Consent Form signed by the End User to transfer the broadband service should equate to a Cease Order. It was further suggested that, if the issue was due to a limitation of BNET's IT system, then licensed operators could submit a Cease Order via electronic mail. This proposal however, was rejected by BNET on the basis that "*it is against BNET's policies*"<sup>9</sup>.
- 26 In the following meeting held on 23 February 2021, BNET reiterated its earlier stance that it required a Cease Order and a Provide Order submitted by the losing operator and by the gaining operator respectively. It stated that "*[BNET] will push the responsibility to the OLO. When a request for cease is received, it must be executed by the OLO within 24 [hours]*."<sup>10</sup>

<sup>9</sup> See minutes of ECTC meeting dated 16 February 2021 at page 7.

<sup>10</sup> See minutes of ECTC meeting dated 23 February 2021 at page 2.

[REDACTED]

[REDACTED]

- 28 On 4 March 2021, stc informed the Authority<sup>13</sup> that it had submitted a Transfer Request to BNET on 3 February 2021 which request had not been processed in spite of BNET's response that it "*will revert back by next week*"<sup>14</sup>.
- 29 On 11 March 2021 the Authority provided BNET with a draft Article 35 Order in substantially the same form as this Final Order and requested that BNET provide any comments in relation to its terms within thirty (30) days of receipt.
- 30 On 11 April 2021 BNET provided its response to the draft Article 35 Order ("**BNET's Response**"). The Authority notes that belatedly BNET sent a letter to the Authority dated 7 September 2021 ("**BNET's Letter**") in relation to this matter that purports to propose a novel technical solution that BNET considers "... *aligns closely to the Authority's Decision*

<sup>11</sup> *Ibid.* at page 5 emphasis added.

<sup>12</sup> *Ibid.*

<sup>13</sup> Copies of exchange of communication between stc and BNET dated 3 February 2021, 4 February 2021 and 14 February 2021 have been submitted. The duly signed End User Consent Form attached to Transfer Request has also been shared with the Authority.

<sup>14</sup> Electronic communication from Mr. Mohamed Mustafa (Sr. Product Manager) to Mr. Munther Ghareeb (Manager National Services) dated 4 February 2021.

of 26 January 2021 ('Decision') but with certain modification to ensure that the solution is technically and legally feasible..."

31 BNET's Letter advocates a process for the dealing of WBS Transfer Requests which it states is, in its view, akin to the Number Portability Specification Process. The Authority notes however that BNET's Letter raises no new legal arguments from those advanced in BNET's Response vis a vis BNET's obligation to comply with the ECTC's existing Decision and in any event has been provided outside of the specified period for response to the draft Order dated 11 March 2021 set by the Authority pursuant to Article 35(b)(2) of the Law<sup>15</sup>. If BNET wishes to propose future processes for inclusion in the revised ROO (or other regulatory instrument) then it is, of course, free to do so but that does not alleviate it of existing obligations that have been incumbent upon it for many months. As such the Authority does not believe that BNET's Letter is relevant for the considerations of BNET's legal obligations as set out below.

32 BNET's Response advanced several arguments which, along with the Authority's responses, can be summarised as follows:

32.1 **Failure to consult:** BNET submitted that the Authority should have consulted BNET before issuing the Decision. The Authority does not believe there is any validity in the submission.

The Authority does, pursuant to Article 3(f) of the Law, have a duty to "... *Except in emergency cases ... when determining to take measures that will have a material effect on a particular Telecommunications market, give interested parties the opportunity to give their opinions as to such measures within a reasonable period...*"

To this end the Authority notes that the ROO was the subject of a thorough consultation process and the terms and scope of the ROO was discussed and consulted upon with all interested parties, including BNET<sup>16</sup>. BNET was well aware of the terms of the ROO and its obligations to provide the WBS as well as the obligations set out under its Licence (as addressed in the Legal Reasoning section of this Order).

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<sup>15</sup> Being 30 days from the date of the draft Order

<sup>16</sup> Ref: LAD 0619 183

Quite simply it cannot be sensibly argued that BNET has not been given “... *an opportunity to give...*” its opinion

BNET’s Response does not, as far as the Authority understands, seek to suggest that BNET did not have an opportunity to express their opinion on the content of the ROO or, conversely, to give its opinion as to the content of the current dispute through the processes of the ECTC. In that regard it is noted that no dispute has been filed by BNET with regards to the terms of the Decision as allowed for under the terms of the ROO and/or BNET’s Licence. Instead BNET seeks to suggest that the meetings of the ECTC held both before and after the issuance of the Decision, and the opportunities to provide responses to the Authority’s draft Article 35 Order issued by the Authority were, in some unspecified way, insufficient opportunities for it to give its opinion and that a further, broader, consultation should have been conducted by the Authority. Were BNET’s logic to be followed then any dispute by BNET of the application of the ROO or any other regulatory instrument would require a consultation on the part of the Authority to enforce such terms: that is incorrect as a matter of law and would result in any enforcement of BNET’s regulatory obligations being impractical to the point of redundancy.

The Authority further notes, therefore that the terms of the ROO had been consulted upon and prior to issuing the Decision the ECTC had already carried out a consultation on this issue, which had failed to lead to an agreed process – and which had therefore necessitated a decision from the Authority. As a process of consultation had already been facilitated by the ECTC a further consultation before issuing the Decision was unnecessary. In any event, the draft Article 35 Order process has given BNET the opportunity to express its views about the Decision.

- 32.2 **Lack of compliance with eTOM standards:** BNET argued in its Response that the processes in the Decision were not consistent with Enhanced Telecom Operations Map (eTOM) standards. The Authority notes that appropriate processes were considered by the ECTC and then the Authority before issuing the Decision. In any event there is no statutory requirement that processes should be in line with eTOM standards and the Authority has not (as of yet) mandated any operational level processes with regards to the WBS. BNET is free to adopt any industry standard that it chooses so long as doing so is in accordance with the decisions of the Authority

32.3 **Lack of clarity on contractual and legal responsibilities:** BNET's Response seems to express a concern that it may be held liable in the event of a claim from a retail licensed operator that BNET has unlawfully terminated its WBS circuit and that the Decision does not address this issue. The basis of this concern is that BNET might struggle to match an End User/ Subscriber to a Transfer Request and/or that BNET could attract some form of legal liability from the retail licensed operators were it to comply with a Transfer Request as required by the Decision. The Authority does not see the validity in this argument and it is difficult to see how BNET would be held liable where it has acted in compliance with a decision of the TRA.

Firstly, with regards to End User identification, the Authority notes that para. 8.7(b) of the WBS Service Description (Schedule 6.1) states that BNET may reject a Service Request if "... *it does not properly identify the End User Premises...*" BNET's concerns are therefore already addressed in the ROO and its current concerns consequently appear ill founded.

With regards to any legal liability that may attach to BNET due to it following the terms of the Decision, the Authority notes that the ROO Supply Terms (Schedule 9) clearly state at para. 15.1 that "... *neither party is liable for any failure to comply with or observe any term of these Supply Terms to the extent that a ... Regulatory Event caused the failure.*"

The definition of "*Regulatory Event*" in the ROO Dictionary (Schedule 8) includes (inter alia):

"... *the making of a determination or a direction by ... a competent Authority.*"

As such even if BNET's submissions were taken at their highest, there already exists within the regulatory framework sufficient protections to render BNET's purported concerns addressed.

Further, the Authority notes that at para. 22 of its Response BNET selectively quotes from the Minutes of a Meeting held on 16 February 2021 to suggest that the Authority had in that meeting expressed agreement to BNET's analysis of its contractual liability arguments. This is quite simply not the case. The selected quote was made with reference to a cease request and not the transfer process, nor was that standalone statement (when read in the context of the actual meeting Minutes) in any way supportive of the proposal

that BNET did not have to follow the Decision of the ECTC. Further this discussion was in the context of BNET automating the transfer process following receipt of a request which, despite BNET's statements made in the 16 February Meeting that such a process would take three to four months, is still to date (some eight months later) not in place.

The purpose of the Minutes of the ECTC's Meetings is to provide an accurate account of the totality of the discussions held between the concerned parties: it is not to allow parties to selectively misrepresent the comments made to support a position which has been consistently expressed to BNET for over 10 months.

BNET's stance vis a vis its alleged potential liability to other retail licensed operators is therefore (for the purposes of this Order) addressed in the Supply Terms and its arguments are rejected.

**32.4 stc's WBS Transfer Request:** BNET's Response argued that stc's request was not valid and so should not form the basis of the Authority's draft Order. The Authority considers that the stc transfer request is an example of BNET's wider failure to implement the process required by the Decision (see paragraph 47 of this Order). The alleged invalidity of the stc request is not therefore relevant to this wider failure. This position has been further emphasised by a near identical complaint received from Zain in relation to the WBS Transfer Request process on 15 April 2021 (although such complaint has not been considered as part of this Order) and BNET's failure to comply with the Decision.

#### **32.5 The ECTC's Terms of Reference and BNET's Licence terms**

BNET's Response at paras. 40-42 suggests a possible contradiction between the ECTC's terms of reference and the terms of BNET's Licence. It is difficult to see in the context of the passing of the Decision and the service of the draft Article 35 Order what this submission is driving at. The ECTC has been established as an industry forum to allow all stakeholders to discuss the delivery and improvement of BNET's services. BNET's submission appears to seek a clarification as to whether it can ignore the recommendations of the ECTC and not breach its Licence, or whether it would only breach its Licence if the Authority were to step in and make a Decision in support of the ECTC's recommendations. In the current circumstance (where the latter is the case) it does not seem to have advanced BNET's position very much.

32.6 **Reasonableness and proportionality of the fine:** BNET argued that the fine imposed was disproportionate compared to other fines imposed by the TRA, was incorrectly imposed on the basis of a refusal to comply and covered failure to comply with ECTC measures where no such measures existed. The Authority considers that (i) the fine imposed is proportionate having regard to the seriousness of BNET's conduct (ii) it is clear that BNET has refused to comply with the Decision and (iii) BNET has failed to comply with the process agreed at the ECTC meeting held on 9 February 2021.

The Authority notes that at paras. 33 - 34 of its Response, BNET makes reference to the level of fine made in a previous Order of the Authority that are characterised as having "... *an undisputed effect on the national security of the Kingdom of Bahrain...*" The Authority does not intend to engage in an exhaustive commentary on the differences between the Order referenced in BNET's Response and the current circumstances, save to say that the referenced Order was drafted with a view to potential rather than actual breaches of national security and whilst the Order was drafted with that potentiality in mind, it does not automatically follow that every breach of certain Regulations were national security is a factor would merit an automatic upper level sanction regardless of factual circumstance. BNET's Response appears to deliberately conflate a breach of a Regulation that could by its nature have national security implications, with a deliberate breach that did have such a result. The Authority has set out below the levels of fines applied in cases far more applicable to the current circumstances than the one that BNET has selectively decided to reference. It is sufficient to say that when calculating the baseline fines that the Authority has had regard to appropriate previous fines for refusal to supply services in breach of a Reference Offer.

As such the Authority does not believe that BNET's Response requires the substantive sections of the draft Order to be revisited and/or amended.

### III Considerations

33 The Authority does not see merit in repeating *ad nauseam* the sequence of events that gave rise to the Decision. That is well documented in the Decision itself. It suffices to point out that the Decision resulted from a complaint raised by service providers during an ECTC meeting regarding the WBS transfer process that is to be adopted by BNET and

- the Decision is issued pursuant to the Authority's powers that stem from the Law including Article 3(c)(17) thereof.
- 34 The Decision was primarily motivated by the Authority's overarching duty to ensure consumer welfare and to promote effective and fair competition as required by Articles 3(b)(1) and 3(b)(2) of the Law respectively.<sup>17</sup>
- 35 The ROO imposes a clear obligation on BNET to process Transfer Requests including the imposition of definite deadlines.<sup>18</sup> The ROO does not however, set out a detailed Transfer Request process and that is what the Decision addressed.
- 36 The Decision was published on 26 January 2021 and was applicable immediately.
- 37 BNET did not formally contest the Decision – it did not exercise its right to resort to arbitration pursuant to Article 66 of the Law and neither did it file a request to temporarily stay the execution of the Decision.
- 38 BNET initially stated that it required three to four months for it to automate the porting process. It is noted however, that after the passage of more than eight months that automation has not materialised.
- 39 BNET subsequently proposed that it would implement the Transfer Request upon receipt of a cease request and a provide request – a proposal that was rejected by the Authority and members of the ECTC<sup>19</sup>.
- 40 It should be uncontested that, in terms of the Decision, a Transfer Request may only be submitted by the gaining service provider and is not dependent on the submission of a cease request by the losing operator. The reasons for this are captured in the Decision but in essence it serves to safeguard against win-back tactics by the losing operator which increase consumers' hassle and switching costs, does not promote competition on the merit and, in fact, weakens competition overall. The Authority's Decision is clear in that the Transfer Request is one that is gaining-operator led which therefore means that the Subscriber need only to approach a gaining service provider to request the transfer of his

<sup>17</sup> See page 3 of the Decision.

<sup>18</sup> See para. 16 above.

<sup>19</sup> See minutes of JWG Meeting held on 9 February 2021 at page 2.

service from one operator to another. BNET's proposed approach at the ECTC meetings following issuance of the Decision would have required the Subscriber to first request the termination of their service with the losing service provider and subsequently request the gaining operator for the installation of its service. Accordingly, BNET's proposal is wholly inconsistent with the Decision. It is inconvenient to the Subscriber, allows for win-back opportunities and is unnecessarily complex. BNET's belated attempts on 7 September 2021 (served almost 9 months after the Decision) to propose alternative processes that, it alleges, are more in line with the Decision are not of relevance to the considerations of this Order due to their being served outside of the time specified for responses to the Authority's draft Article 35 Order and as the solutions required by the Decision (or even those proposed by BNET's Letter) are still not in place.

- 41 BNET's message during the ECTC meeting held on 16 February 2021 was simple and unequivocal:

*"BNET will not accommodate this request [that it is a gaining operator led process such that the cease order should originate from the gaining operator] after internal discussions. BNET [is] not ready to accommodate at this stage."*<sup>20</sup>

- 42 BNET has steadfastly refused to comply with the Decision. Its claims (as propounded by a member of its Executive Team) that compliance with the Decision is not "*top of BNET's agenda now*" and that "*BNET want to put this on hold and focus on priorities*" does not constitute, in the Authority's view, a legitimate excuse.

- 43 Equally, BNET has failed to comply with its obligations under the ROO as manifested by its evident disregard of stc's Transfer Request<sup>21</sup>. As per the ROO, BNET was required to: (i) acknowledge the Service Request<sup>22</sup> within fifteen minutes – it did not; (ii) confirm the Service Request within twenty-four hours – it did not; and (iii) confirm the RFS Date by confirming the Maximum Validation Date within two Working Days and the Maximum Delivery Time within ten Working Days – it did not.

<sup>20</sup> See N. 9 above at page 6 emphasis added.

<sup>21</sup> See para. 28 above.

<sup>22</sup> As per Schedule 8 of the ROO, a Service Request includes a Transfer Request.

#### IV The Breaches

##### Non-compliance with the terms of the Decision, the Licence and the ROO

- 44 BNET's insistence on a cease request and refusal to accept a Transfer Request submitted by a gaining operator puts it in breach of the Decision. In turn this means that BNET is in breach of Section 4.1.5 of its Licence.
- 45 During the JWG meeting held on 9 February 2021, the ECTC agreed to a detailed process governing the transfer of broadband services<sup>23</sup>. BNET's act of omission means that it has failed to fully and promptly implement the measures required by the ECTC resulting in non-compliance with section 4.14.3 of its Licence.
- 46 BNET's treatment of the Transfer Request submitted by stc and more specifically its failure to abide by the deadlines imposed on it through Schedule 7 of its ROO places BNET in breach of Section 4.1.2 and Section 10.1 of its Licence in addition to Paragraphs 8.4, 8.6 and 8.15 of Schedule 6.1 of the ROO.

#### V Conclusion of the Findings

- 47 Having considered BNET's conduct, the Authority is satisfied that BNET has clearly failed to comply with the terms of the Decision, of the ROO and of the Licence.

#### VI Effects of the Article 35 (Draft) Order

- 48 This Article 35 Order is issued without prejudice to further investigations by the Authority into BNET's alleged breaches of the Law referred to above.
- 49 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.
- 50 The issuance of this Article 35 Order does not prejudice the Authority's right to:
- (a) expand the scope of its investigation into this matter; and/or

<sup>23</sup> See attachment to the Minutes of JWG Meeting.

- (b) issue further orders relating to other breaches arising out of the same set of facts; and/or
- (c) find, develop or introduce new evidence relating to the alleged breach described herein.

## VII Article 35

- 51 Article 35 of the Law may be applied by the Authority in the event that a Licensed Operator has been or is in severe breach of any provision of the Law.
- 52 BNET has breached the Law by failing to adhere to its regulatory obligations outlined in the earlier sections of this Order.
- 53 A “severe breach” is understood to mean a breach that is more than minor and/or transient. The Authority considers that BNET’s failure comply with the ROO and the Licence is a severe breach of the Law.
- 54 This Article 35 Order is issued without prejudice to further investigation by the Authority into BNET’s breach of the Law.

## VIII Imposition of Financial Penalty

### Fining principles

- 55 Article 35(d)(2) of the Law states that the Authority shall issue an order containing a suitable fine on the Licensee provided that such fine is objectively justified and non-discriminatory. The Law does not provide specific guidance on the setting of fines.
- 56 In setting an appropriate fine for BNET’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 Telecommunications Law (the “Fining Guidelines”).
- 57 The Fining Guidelines reflect the Authority’s fining practices to date, which in turn have been guided by international best practices.

### Procedure followed to determine the amount of the financial penalty

58 The Authority has undertaken the following steps in determining the quantum of the fine to be imposed on BNET for the breaches set out above:

59 Firstly, a baseline figure is established by reference to a value that is germane or relevant to the infringement in question. 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 or 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 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;
- 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.

60 Consideration will then be given to whether the amount of the fine calculated on the basis of the considerations listed above has a sufficient deterrent effect.

61 Finally, a proportionality review of the final amount of the fine is carried out.

## Calculation of the baseline amount

62 The Fining Guidelines at PART II B; DETERMINING THE AMOUNT OF A FINE TO BE IMPOSED FOR A VIOLATION OF ART 35 OF THE TELECOMMUNICATIONS LAW THAT IS NOT ADDRESSED UNDER PART I 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 Licences.

63 Article 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...”*

64 Article 46 then goes on to give some examples of how the Authority might seek to establish this value. The most relevant example to this case would appear to be any comparable penalties.

65 BNET is in breach of a number of obligations under the Licence and the Reference Offer, but in essence they can be categorised into (i) failure to provide a licensed service in accordance with the terms of the ROO; (ii) a refusal to comply with a lawful decision of the Authority and (iii) failure to implement measures required by the ECTC.

## **BNET's failure to provide a Licensed Service in accordance with the terms of the ROO, therefore breaching Sections 4.1.2 and 10.1 of the Licence**

66 The Authority notes that in its Order Number 1 of 2019<sup>24</sup> it had imposed a fine on Batelco for a breach of its own Reference Offer. The baseline penalty imposed in that instance was one hundred thousand Bahraini Dinars (BHD 100,000). While there are undoubtedly similarities between the incident that gave rise to the issuance of Order Number 1 of 2019 and that covered by these current proceedings, the Authority acknowledges that they are not identical. The level of the fine levied in that instance was commensurate, in the Authority's view, with a refusal to supply by Batelco – in itself an extremely serious breach of the anti-competitive conduct provisions of the Law and was itself consistent with

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<sup>24</sup> Ref: LAD 0719 229.

- previous decisions of the Authority. The Authority further notes that the baseline fine imposed by Order No. 1 of 2019 was based on complaints from two Licensees (Kalaam and Zain) for the failure by Batelco to provide a regulated service.
- 67 As stated above, the Authority is of the view that in this circumstance there are some clear distinctions between the current situation and the factual matrix that gave rise to Order No. 1 of 2019. In the first instance, the Authority is persuaded that BNET's conduct in this instance is not motivated by the urge to take competitive advantage of its competitors.
- 68 Secondly, and as referenced above, the 2019 Order was the result of complaints filed by multiple Licensees (hence indicating a wider effect on the competitive landscape) and that, along with the Authority's view as to BNET's motivation, has led the Authority to see merit in halving the baseline figure for those infringements that relate to non-compliance with the ROO and therefore covering Sections 4.1.2 and 10.1 of the Licence. The Authority's view is that this level of fine is commensurate with the severity and effect of BNET's actions whilst at the same time recognising the differences between the current factual matrix and the previous examples of higher baseline fines being imposed for a failure to provide a regulated service.
- 69 Accordingly, the Authority has decided to set a baseline figure of fifty thousand Bahraini Dinars (BD 50,000).

**BNET's refusal to comply with a lawful decision of the Authority therefore breaching Section 4.1.5 of the Licence**

- 70 The Authority notes that no enforcement action has been taken in respect of an equivalent infringement. The most comparable fine would be that imposed against 2Connect for its failure to comply with an Article 53 request for information.<sup>25</sup> In that instance a baseline figure of fifteen thousand Bahraini Dinars (BHD 15,000) was imposed.
- 71 The Authority sees merit in adopting the same baseline figure for this first-time incident but reserves the right to impose harsher penalties in respect of any future disregard of the Authority's decisions.

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<sup>25</sup> Order No. 10 of 2015.

72 Accordingly, the Authority has decided to set a baseline figure of fifteen thousand Bahraini Dinars (BHD 15,000) in respect of BNET's breach of Section 4.1.5 of its Licence.

### **BNET's failure to implement measures required by the ECTC**

73 The Authority notes that there are no directly comparable fines that can be drawn upon for a breach of Section 4.14.3 of BNET's Licence, also because this licence provision applies exclusively to BNET.

74 In the absence of any comparable fine, when setting the baseline fine, the Authority has had regard to the purpose and intent of BNET's obligations and the severity of the breach as well as analogous penalties that exist under existing regulatory instruments.

75 The Authority notes that under certain regulations (such as the Quality of Service Regulation - Resolution No. (11) of 2018<sup>26</sup>) fixed penalties in the region of BHD 1,000-5,000 per act of occurrence are stipulated for failures to provide information or taking "*Any action or omission that may, directly or indirectly, delay, hinder or impede the Authority's ability to exercise its enforcement powers*" are set out (see Schedule 6 of the Quality of Service Regulation).

76 Whilst no directly comparable penalty therefore exists for BNET's conduct (given the novel role of the ECTC and BNET's Licence obligations), the Authority is minded to have regard to its treatment of analogous behaviour where such is helpful to ground the baseline fine within existing enforcement parameters.

77 The description of the behaviour set out at paragraphs 40-41 of this Order would in the Authority's view lend itself towards a penalty of such magnitude as it undoubtedly relates to a decision by BNET to take actions that hindered or impeded (or elongated) the Authority's ability to exercise its powers. In this case the Authority views the actions of BNET as being analogous to a number of occurrences of obstructive behaviour and/or disregard for the ECTC's processes (as BNET's conduct with regards to the ECTC's processes was ongoing and ultimately obstructive).

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<sup>26</sup> [https://tra-website-prod-01.s3-me-south-1.amazonaws.com/Media/mediafiles/document/Final%20QoS%20Reg\\_Eng1.pdf](https://tra-website-prod-01.s3-me-south-1.amazonaws.com/Media/mediafiles/document/Final%20QoS%20Reg_Eng1.pdf)

78 In this instance therefore, the Authority believes that a baseline fine of ten thousand Bahraini Dinars (BHD 10,000) is apt to cover an infringement of Section 4.14.3 of the Licence.

### **Overall Baseline Fine**

79 Based on the guidance laid out in the Fining Guidelines and the previous orders issued by the Authority, the Authority has calculated that in view of the severity of these issues therefore, the Authority has decided to set a baseline figure of BHD 75,000 (BHD 50,000 + BHD 15,000 + BHD 10,000).

### **Article 47(a) of Fining Guidelines: “the degree of severity of the breach or violation”**

80 As set out above, the Authority finds that the breaches outlined above are severe breaches of BNET’s obligations under the Law.

81 As such the Authority is minded to have regard to this factor when calculating the level of the fine.

82 Self-evidently the breaches outlined above constitute a material breach of BNET’s obligations under the ROO, the Licence and the Law.

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

### **Article 47 (d) of the Fining Guidelines: “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”**

84 It is noted that the statements emanating from BNET confirming its non-compliance with the terms of the Decision were made by members of its Executive Team and therefore the Authority is satisfied that BNET’s senior management was aware of the ongoing breaches and the Authority’s instructions thereof.

85 BNET's failure to satisfy the provisions of ROO and the Licence terms is clearly within the knowledge of said senior management – as can be evidenced from the BNET officers who have participated in the ECTC meetings.

86 As such the Authority is minded to have regard to this factor when calculating the level of the fine.

87 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.

#### **IX Mitigating factors**

88 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 Article 48 of the Fining Guidelines are relevant.

#### **X Conclusion - Final amount of financial penalty**

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

90 In conclusion, the Authority sets the fine under this Order (the "**Fine**") as follows:

$$\begin{aligned} \text{Fine} &= \text{Baseline Fine} + \\ &\quad \text{Baseline Fine} \times \text{Severity Factor} + \\ &\quad \text{Baseline Fine} \times \text{Management Factor} \\ &= \text{BHD } 75,000 + \text{BHD } 7,500 + \text{BHD } 7,500 \\ &= \text{BHD } 90,000 \end{aligned}$$

91 The Authority notes that there is no maximum fine defined in Article 35 of the Law. Without prejudice to its right to impose any fine under Article 35 that it considers appropriate and proportionate, the Authority believes that a fine in the sum of BHD 90,000 is appropriate and proportionate in this case.

### **Need to ensure deterrence**

- 92 The Authority's fining practice under Article 35 of the Telecommunications Law acknowledges the importance of deterrence when determining the amount of a financial penalty.
- 93 The Authority considers that the amount of the fine imposed on BNET for failure to comply with the obligations set out above should act as a sufficient deterrent against any future material breaches of the same.
- 94 The Authority does not, therefore, consider that there is any need in this case to make any adjustments for deterrence.

### **Proportionality**

- 95 The Authority considers that the payment by BNET of a fine of ninety thousand Bahraini Dinars (BHD 90,000) is proportionate, considering all the circumstances of this case.