هيئة تنظيم الاتصالات
Telecommunications Regulatory Authority
Kingdom of Bahrain - مملكة البحرين

Guidelines for the setting of the amount of a fine for violations of Articles 35 and/or 65 of the Telecommunications Law of the Kingdom of Bahrain

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Annex 3

GUIDELINES FOR THE SETTING OF THE AMOUNT OF A FINE FOR VIOLATIONS OF ARTICLES 35 AND/OR 65 OF THE TELECOMMUNICATIONS LAW[1]

INTRODUCTION

1 These Guidelines for the Setting of the Amount of a Fine for Violations of Articles ("Arts.") 35 and/or 65 of the Telecommunications Law (the "Guidelines") describe the methodology that will ordinarily be followed by the Telecommunications Regulatory Authority (the "Authority") to determine the quantum of a fine imposed pursuant to:

(1) an order issued by the Authority in accordance with Art. 35(d)(2) of the Telecommunications Law based on its determination that a Licensed Operator[2] has committed a severe breach of a provision of the Telecommunications Law or its Individual, Class or Frequency Licence;[3] and/or

(2) a determination issued by the Authority in accordance with Art. 65(f)(2) of the Telecommunications Law based on its conclusion that a Licensed Operator has committed an unlawful act or omission which has the effect of materially preventing, restricting or distorting competition (collectively, "Anti-competitive Conduct") in the Kingdom of Bahrain.

2 The Authority's application of these Guidelines is, in accordance with Art. 3(a) of the Telecommunications Law, intended to promote transparent and non-discriminatory practice in setting the amount of fines. The Guidelines are also intended to ensure that the amount of any fine imposed by the Authority will serve as an adequate deterrent against further violations and is proportionate to the unlawful conduct in question.[4] In accordance with Art. 35(d)(2) of the Telecommunications Law, the Guidelines also ensure that the amount of any fine imposed is objectively justified and provide for consideration of the principle of justice and equality amongst Licensees when setting the amount of a fine.

3 The Guidelines are divided into two parts. Part I sets out the methodology for determining the quantum of fines imposed for violations of Art. 35 of the Telecommunications Law where such violations involve breach of a Licence condition that prohibits Anti-competitive Conduct, as well as for relevant violations of Art. 65 (the focus of which is Anti-competitive Conduct).

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[1] The Telecommunications Law of the Kingdom of Bahrain, which was promulgated by Legislative Decree No. 48 in October 2002 ("the Telecommunications Law").

[2] Terms capitalised herein shall have the same meaning as set out under Art. 1 of the Telecommunications Law.

[3] The focus of these Guidelines is the establishment of a methodology for setting the *amount or quantum* of a fine, after the Authority has determined that there is a sound legal basis for imposing a fine in the first place.

[4] The methodologies described herein will apply to the calculation of the amount of any fine imposed for a violation of Art. 35 and/or Art. 65 that is committed after the formal adoption of these Guidelines. The Authority retains the discretion to deviate from these Guidelines where objectively justified in the circumstances of a particular case, for example, where it is necessary to do so in order to ensure a non-discriminatory or proportionate approach.

4 Part II of the Guidelines sets out the methodology for determining the quantum of fines imposed for violations of Art. 35 of the Telecommunications Law other than those covered under Part I.

PART I: DETERMINING THE AMOUNT OF A FINE TO BE IMPOSED PURSUANT TO ART. 35 AND/OR ART. 65 OF THE TELECOMMUNICATIONS LAW TO PENALISE ANTI-COMPETITIVE CONDUCT

A. SCOPE

5 This Part describes the methodology that will ordinarily be followed by the Authority when determining the amount of a fine to be imposed for relevant violations of Art. 65 of the Telecommunications Law and/or violations of Art. 35 of the Telecommunications Law where such violations involve breach of a Licence condition that prohibits Anti-competitive Conduct.

6 Art. 65(f)(2) of the Telecommunications Law limits the quantum of a fine imposed for Anti-competitive Conduct carried out in violation of Art. 65. The cap is set at 10% of the annual revenues of the infringing Licensed Operator. The revenue figure for establishing the upper limit of any fine imposed under Art. 65 will be the sum of the combined annual revenues generated by the activities covered by all Licences held by the infringing Licensed Operator. This figure should generally correspond to the base revenue figure(s) used by the Authority to determine the applicable annual fees payable under each Individual Licence held by the Licenced Operator.

7 The Guidelines set out in Part I describe the methodology that will ordinarily be followed to determine the appropriate amount of the applicable fine in the given circumstances, which may be less than the upper limit established by Art. 65, depending on the facts of each case.

8 Part I also covers any violation of Art. 35 of the Telecommunications Law to the extent that it involves breach of a Licence condition that prohibits Anti-competitive Conduct. This will help ensure consistency of fining practice in line with Arts. 3(a) and 65(d) of the Telecommunications Law. The amount of a fine imposed for breach of any such condition of an operator's Licence should ordinarily be subject to the same upper limit as that established by Art. 65, even though Art. 35 does not explicitly provide for any cap on the amount of the fine. Likewise, a similar methodology should ordinarily be applied to determine the actual amount of the fine in such cases.

9 Art. 65 of the Telecommunications Law addresses a broad range of Anti-competitive Conduct as compared to violations of this nature under Art. 35, which normally will be triggered by breach of a Licence condition that prohibits Anti-competitive Conduct. For this reason, the methodology for calculating the amount of a fine to be imposed for a violation of Art. 65 is addressed first, in Part 1.B below. A similar methodology to be followed when calculating the amount of a fine for a violation of Art. 35 that involves breach of a Licence condition that prohibits Anti-competitive Conduct is set out in Part 1.C.

B. DETERMINING THE AMOUNT OF A FINE TO BE IMPOSED FOR A VIOLATION OF ART. 65 OF THE TELECOMMUNICATIONS LAW

10 Art. 65 prohibits a broad range of Anti-competitive Conduct, including any act or omission by a Licensed Operator that has the effect of materially preventing, restricting or distorting competition in any commercial field concerning the Telecommunications sector in the Kingdom of Bahrain.

11 The relevant prohibitions include:

(a) any abuse by the Licensed Operator of a Dominant Position, either independently or with others, which materially prevents or limits competition in an unfair manner; and

(b) the conclusion by the Licensed Operator of any anti-competitive agreement, understanding or the undertaking of any concerted practice which materially prevents, restricts or distorts competition in a market.[5]

12 The type of Anti-competitive Conduct covered by (a) above could include, for example, various forms of refusal to deal, including the refusal by a Licensed Operator to grant a competitor wholesale network access or interconnection. It could also include pricing related abuses, such as an anti-competitive margin squeeze.[6]

13 The type of Anti-competitive Conduct covered by (b) above could include, for example, collusion between Licensed Operators to fix wholesale or retail charges or to restrict output, the sharing of sensitive information or market partitioning.

B.1 Overview of methodology for calculating the quantum of a fine for a violation of Art. 65 of the Telecommunications Law

14 Set out below is a six-step methodology for assessing the quantum of a fine where the Authority elects to impose a fine after finding that a violation of Art. 65 of the Telecommunications Law has been committed.

15 Under **Step 1**, a starting point or baseline amount is set for the purposes of calculating the fine. This amount will be established based on the nature and seriousness or severity of the infringement, taking account of the factors identified under Par. 22 below.

16 **Step 2** involves the making of an upward or downward adjustment to reflect the aggravating or mitigating circumstances found by the Authority to exist in each particular case. A list of the aggravating and mitigating factors that may be taken into consideration by the Authority is set out in Part 1.B.2 below.

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[5] Art. 65 also addresses anti-competitive changes in the market structure, in particular anti-competitive mergers and acquisitions in the telecommunications sector (Art. 65(b)(3)). The imposition of fines for a breach of Art. 65(b)(3) is not covered by these Guidelines but, rather, is addressed under Art. 9 of the Telecommunications Mergers and Acquisitions Regulation (Regulation 3 of 2004), 28th September 2004.

[6] For a more detailed discussion of Art. 65 of the Telecommunications Law and the possible forms of Anti-competitive Conduct, see the Authority's "Competition Guidelines", 18 February 2010 (MCD/02/10/019), in particular Sections 4 and 5.

17 Under **Step 3**, the amount determined on the basis of Steps 1 and 2 may be adjusted upwards if the Authority considers that the level of fine thus calculated would not have a sufficiently deterrent effect.

18 Under **Step 4**, the Authority undertakes a general proportionality review of the amount calculated under Steps 1 to 3 in order to ensure that it is not disproportionate or excessive.

19 Under **Step 5**, the Authority checks to ensure that the final amount calculated does not exceed the 10% annual revenue cap established under Art. 65(f)(2) of the Telecommunications Law. This revenue cap will be equivalent to 10% of all of the Licensed Operator's revenues generated on an annual basis from all licensed activities undertaken in the Kingdom of Bahrain.

20 Under **Step 6**, the Authority may, upon request and in exceptional circumstances, choose to reduce the final amount of a fine on account of objective evidence that the imposition of the fine in question would irreversibly jeopardise the economic viability of the infringing Licensed Operator.

B.2 Methodology for calculating the quantum of a fine for a violation of Art. 65 of the Telecommunications Law

Step 1 - Establishment of baseline amount of the fine

Assessing the seriousness or severity of the infringement

21 The baseline figure for determining the ultimate amount of the fine will be assessed on the basis of the perceived seriousness or severity of the Anti-competitive Conduct.

22 When considering the seriousness or severity of the Anti-competitive Conduct, consideration will be taken of the following factors, as relevant:

(a) the nature of the Anti-competitive Conduct (price-fixing, market sharing agreements or other cartel activities are, by their very nature, very serious infringements);

(b) the size, structure and characteristics of the relevant market, including the possibility of market entry and the breakdown of market share, and the state of competition;

(c) the economic impact that the Anti-competitive Conduct has had (or is likely to have) on the market, including:

(i) the unlawful gain (including economic gain or increase of market share) made by the Licensed Operator(s) as a result of the conduct;

(ii) the loss (including economic loss or decrease of market share) incurred by other market players as a result of the conduct; and

(iii) the impact (direct/indirect) that the infringement has had, or is likely to have, on consumers;

(d) the overall effect on the market, taking specific consideration of the (combined) market share and size (including economic power) of the offending Licensed Operator (the greater the market share/size, the larger the likely commercial gain/effect on the market); and

(e) the duration of the Anti-competitive Conduct (infringements of a longer duration will be considered more serious or severe).

Reflecting the seriousness or severity of the infringement as a monetary figure

23 In cases where it is possible to develop a reasonable estimate of the quantum of harm (such as the amount of the unlawful gain or harm) caused by the Anti-competitive Conduct, the baseline amount may be expressed as a reasonable estimate of the quantification of such harm in monetary terms.

24 A reasonable quantification of harm may be possible, for example, in the case of certain pricing abuses that contravene Art. 65 of the Telecommunications Law, such as abusive margin squeeze or predatory pricing. Such abusive pricing conduct will usually be carried out over a defined period of time and directed against a specific competitor(s). The existence of relative price transparency on a market should assist the Authority in the process of retrospectively assessing the effect that such anti-competitive practices have had on that market, or the unlawful gain to the Licensed Operator.

25 In cases where it is difficult to reasonably estimate the quantum of harm caused by the Anti-competitive Conduct,[7] the Authority may express the baseline figure in monetary terms as a percentage of the annual revenue accrued by the Licensed Operator in the relevant product market(s) and relevant geographic market(s) affected by the infringement during the financial year preceding the date when the infringement is known or thought to have ended (the "Relevant Annual Revenue").[8] In such cases, the Authority considers that a range of up to 30% of the Relevant Annual Revenue will be reasonable for the purposes of establishing a baseline amount for calculating the ultimate quantum of the fine to be imposed. This range of up to 30% of the Relevant Annual Revenue will normally represent a fraction of the total annual revenues of the Licensed Operator that are generated by all of its licensed activities.[9]

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[7] It may be difficult to reasonably estimate the monetary value of the harm caused, for example, as a result of secretive anti-competitive agreements or concerted practices that have been implemented on a particular product or service market(s) by multiple Licensed Operators over a prolonged period of time.

[8] If the Authority does not consider this figure to be representative of the annual revenues accrued by the Licensed Operator in the relevant product and geographic market(s) affected by the infringement, and the infringement has been carried out for more than one full financial year, the Authority may instead use the annual revenue accrued by the Licensed Operator in the relevant product and geographic market(s) affected by the infringement during another financial year during which the infringement took place or use an average of each financial year during which the infringement took place.

[9] This approach for determining the starting point or baseline amount for calculating the ultimate amount of the fine is common practice followed by various jurisdictions including the UK, France and the European Union.

26 The rationale for using this approach to set the baseline amount as a starting point for calculating the ultimate amount of the fine is to ensure that the baseline figure relates to the size of the Licensed Operator's share of the affected market in terms of sales or revenues, using a percentage that reflects the seriousness or severity of the type of infringement at issue.

27 The Relevant Annual Revenue may, in the interests of allowing for the calculation of a reasonable baseline amount, be calculated on the basis of robust inputs including any (or a combination of any) of the following: the Licensed Operator's audited regulatory accounts, the annual Licence Fee Declaration submitted for the Licence with respect to which the infringement occurs, or any disaggregated data provided by the infringing Licensed Operator to the Authority pursuant to a request for information under Art. 53 of the Telecommunications Law. If these accounts are not available, or if it is unclear from the accounts provided by the Licensed Operator what the Relevant Annual Revenue is, the Authority may determine, on the basis of information available to it, a figure that it considers adequately reflects the true scale of a Licensed Operator's activities in the relevant market.

Step 2 - Upward/downward adjustment of the amount of the fine for aggravating/mitigating factors

28 The baseline amount established under Step 1 above may be increased where there are aggravating factors, or decreased where there are mitigating factors.

29 Aggravating factors may include, at the Authority's discretion:

(a) recidivism or repeat offender in the case that:

(i) the conduct is the same or similar in nature to Anti-competitive Conduct in which the Licensed Operator has previously engaged and for which it has been fined within the previous ten-year period, irrespective of the relevant markets affected; and/or

(ii) the Licensed Operator has engaged in a pattern of Anti-competitive Conduct of different types affecting the same relevant market or markets, and the infringements have been subject to fines imposed during the previous ten-year period.

(b) refusal by the infringing Licensed Operator to co-operate with any investigation, including acting disingenuously or inconsistently or, at worst, deliberately misleading the Authority or concealing evidence/information;

See, e.g. European Commission Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (2006/C 210/02); available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52006XC0901(01):EN:NOT

UK Office of Fair Trading's guidance as to the appropriate amount of a penalty, OFT423, September 2012; available at: http://www.oft.gov.uk/shared_oft/business_leaflets/ca98_guidelines/oft423.pdf

French Authorité de la concurrence Notice of 16 May 2011 on the Method Relating to the Setting of Financial Penalties; available at: http://www.autoritedelaconcurrence.fr/doc/notice_antitrust_penalties_16may2011_en.pdf

(c) failure to desist from the Anti-competitive Conduct after commencement of the investigation;

(d) the specific role played by the Licensed Operator in an infringement (e.g. as leader in a cartel);

(e) evidence of retaliatory/coercive measures taken by the infringing Licensed Operator against other undertakings (e.g. in order to prevent deviation from a cartel or concerted practice on a market);

(f) intentional rather than negligent behaviour;

(g) evidence of involvement/knowledge of senior management;

(h) the absence, ineffectiveness or repeated failure of internal mechanisms or procedures intended to prevent the infringement concerned; and

(i) any other factor that in the Authority's view constitutes an aggravating circumstance.

30 **Mitigating** factors may include, at the Authority's discretion:

(a) clear evidence of substantive co-operation on the part of the infringing Licensed Operator enabling the enforcement process to be conducted more speedily/effectively;

(b) the extent and timeliness of any steps taken by the infringing Licensed Operator to ensure compliance with Art. 65 of the Telecommunications Law, remedy the infringement in question and/or any steps taken to remedy the consequences of such infringement;

(c) evidence that the infringing Licensed Operator was subject to severe pressure or coercion;

(d) evidence that the infringement was committed negligently rather than intentionally or where evidence of genuine uncertainty on the part of the infringing Licensed Operator as to whether the agreement or behaviour constituted an infringement can be established;

(e) the extent (if any) to which the infringement was caused in part by a third party or by any relevant circumstances beyond the control of the infringing Licensed Operator;

(f) the immediate termination of the infringement following commencement of the investigation; and

(g) any other factor that in the Authority's view constitutes a mitigating circumstance.

Step 3 - Upward adjustment of the amount of the fine for deterrence

31 Under Step 3, the Authority may consider whether any adjustments should be made in order to ensure that the ultimate quantum of the fine will have a

sufficiently deterrent effect. In this respect, account may be taken of the need to ensure both general and specific deterrence.

32 Specific deterrence refers to the need to deter the Licensed Operator that is found to have engaged in Anti-competitive Conduct from engaging in future Anti-competitive Conduct. General deterrence refers to the need to deter other Licensed Operators from engaging in Anti-competitive Conduct.

33 Any decision by the Authority to increase the ultimate quantum of a fine in order to achieve effective deterrence may take account of the relevant circumstances of each case. In this regard, the Authority may give due consideration to the appropriateness of deterrence in light of the size and financial position of the infringing Licensed Operator, or where there is evidence to show that the Licensed Operator has made a significant gain (including economic gain or increased market share) from the infringement.

Step 4 - Proportionality review

34 A general proportionality review of the amount determined on the basis of Steps 1 to 3 will be undertaken in order to ensure that the resulting fine is not disproportionate or excessive.

35 Specific consideration may be taken of whether a lower fine might be expected to produce the same result in terms of:

(a) ensuring that the Anti-competitive Conduct is subject to appropriate punishment (the fine should, where possible, reflect the actual or potential degree of unlawful gain or harm); and

(b) ensuring a deterrent effect, where considered necessary (for example, a previous fine imposed on a Licensed Operator for the same or similar Anti-competitive Conduct may be considered insufficient if it has failed to deter that operator or another Licensed Operator from carrying out the same or similar Anti-competitive Conduct).

Step 5 - Downward adjustment of the amount of the fine (if relevant) in order to ensure compliance with Art. 65(f)(2) of the Telecommunications Law

36 The Authority will check to ensure that the amount calculated in Steps 1 to 4 does not exceed the 10% annual revenue cap established under Art. 65(f)(2) of the Telecommunications Law and will, if necessary, make a downward adjustment to the ultimate amount of the fine to be imposed to ensure that it does not exceed this cap.

Step 6 - Financial hardship

37 In exceptional circumstances, the Authority may, upon request, take account of an infringing Licensed Operator's inability to pay the full amount of the fine imposed on it pursuant to a finding of Anti-competitive Conduct. Any such reduction will only be granted on the basis of objective evidence that the imposition of the fine in question would irreversibly jeopardise the economic viability of the infringing Licensed Operator.

C. DETERMINING THE AMOUNT OF A FINE TO BE IMPOSED FOR A VIOLATION OF ART. 35 OF THE TELECOMMUNICATIONS LAW INVOLVING BREACH OF A LICENCE CONDITION THAT PROHIBITS ANTI-COMPETITIVE CONDUCT

38 The methodology set out below will ordinarily be followed by the Authority to determine the amount of a fine to be imposed on a Licensed Operator for breaching a Licence condition that prohibits Anti-competitive Conduct in violation of Art. 35 of the Telecommunications Law. Art. 35(d) of the Telecommunications Law requires that the amount of any fine imposed under this provision must be objectively justified and, further, that the principle of justice and equality amongst the Licensees should also be considered. A methodology similar to that set out above for calculating the amount of a fine to be imposed under Art. 65 of the Telecommunications Law satisfies these requirements as well as those of Art. 3(a) of the Telecommunications Law.

39 Examples of conduct that could lead to a breach of a Licence condition that prohibits Anti-competitive Conduct which would be covered by this section could include, by way of example, a breach of the conditions of an individual Licence mandating the provision of access, interconnection or services for resale.

40 Pursuant to Art. 35(d) of the Telecommunications Law, this methodology will also be employed to set the amount of a prospective fine in cases where the Authority has determined that there are serious indications or evidence that a Licensee is likely to commit a Licence breach (in this case involving potential Anti-competitive Conduct), and the Licensed Operator does not refrain from carrying out the conduct in question.

C.1 Methodology for determining the amount of a fine to be imposed for breach of a Licence condition that prohibits Anti-competitive Conduct

41 As noted above, Art. 65(f)(2) of the Telecommunications Law limits the ultimate quantum of a fine imposed for a breach of Art. 65 to 10% of the annual revenue of the infringing Licensed Operator. Although Art. 35 of the Telecommunications Law establishes no cap on the amount of the fine to be imposed for violations of its provisions, this same upper limit should ordinarily apply if the Authority elects to impose a fine for a violation of Art. 35 that involves breach of a Licence condition that prohibits Anti-competitive Conduct consistent with the provisions of Art. 3(a), Art. 35(d)(2) and Art. 65(d) of the Telecommunications Law.

42 The Authority will ordinarily follow the same six-step methodology as that set out under Part 1.B.2 above when determining the quantum of a fine for a violation of Art. 35 of the Telecommunications Law involving breach of a Licence condition that prohibits Anti-competitive Conduct, and the severity of the breach will be taken into account when setting the baseline figure under Step 1.

PART II: DETERMINING THE AMOUNT OF A FINE TO BE IMPOSED FOR ANY VIOLATION OF ART. 35 OF THE TELECOMMUNICATIONS LAW NOT COVERED BY PART I

A. SCOPE

43 Part II of these Guidelines sets out the methodology that will ordinarily be followed by the Authority when determining the amount of a fine to be imposed for a violation of Art. 35 of the Telecommunications Law that is not covered by Part I. Part II therefore covers any severe breach of a Licence condition or provision of the Telecommunications Law that is not covered under Part I. For this purpose, a violation of the provisions of a regulation or other applicable legal instrument issued by the Authority may constitute a severe breach of a Licence condition and therefore be subject to a fine, the amount of which will be determined hereunder.[10] Also covered in this Part is the amount of a prospective fine to be imposed in cases where the Authority has determined that there are serious indications or evidence that a Licensee is likely to commit a Licence breach, and the Licensed Operator does not refrain from carrying out the potential breach.

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

44 For a violation of Art. 35 of the Telecommunications Law that is covered by this Part, the maximum amount of the fine and the methodology to be applied when calculating the actual amount of the fine to be imposed for each type of infringement will be governed by the relevant provisions of the applicable Licence or relevant legal instrument issued by the Authority, to the extent that the relevant fining principles are set forth therein.

45 In the event that the maximum amount of the fine or the basis for calculating the actual amount of the fine for a particular type of infringement is not stipulated in either the applicable Licence or relevant legal instrument, the methodology set out below for determining the amount of a fine will ordinarily be followed by the Authority.

46 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. This may include, for example, a percentage of the total revenue generated by a product or service in the case of activities that are harmful to consumers; the amount of harm caused or unfair gain achieved as a result of the infringement; the relevant Licence fees that would otherwise apply in cases where services are provided or spectrum is used in a manner that is beyond the scope of the applicable Licence; any comparable penalty set out under the Telecommunications Law, regulation and/or the applicable Licence; or any previous fines imposed by the Authority for comparable unlawful conduct.

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[10] For example, Condition 1.3 of the Individual Mobile Telecommunications Licences states that the Licensee shall be subject to the provisions stated therein, the Telecommunications Law, and any applicable legal instruments issued thereunder by the Authority.

47 The baseline figure thus established may then be adjusted upward to take into consideration the following factors, at the Authority's discretion:

(a) the degree of severity of the breach or violation;

(b) the duration of the breach or violation;

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

(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; and

(e) any other factor that in the Authority's view constitutes an aggravating circumstance.

48 The baseline figure may then be reduced to take into consideration the following factors, at the Authority's discretion:

(a) any steps taken by the Licenced Operator to remedy or mitigate the consequences of the infringement;

(b) whether the infringement continued once the Licensed Operator became aware of it, or whether timely and effective steps were taken to end it;

(c) clear evidence of substantive co-operation on the part of the infringing Licensed Operator enabling the enforcement process to be conducted more speedily/effectively;

(d) the extent (if any) to which the infringement was caused in part by a third party or by any relevant circumstances beyond the control of the infringing Licensed Operator;

(e) the extent to which the level of penalty is appropriate, taking into account the severity of the infringement and the size, market share and annual revenue of the Licensed Operator; and

(f) any other factor that in the Authority's view constitutes a mitigating circumstance.

49 The Authority may also consider whether any adjustments should be made in order to ensure that the ultimate quantum of the fine will have a sufficiently deterrent effect. In this respect, account may be taken of the need to ensure both general and specific deterrence as explained under Par. 32 above.

50 Any decision by the Authority to increase the ultimate quantum of a fine in order to achieve effective deterrence may take account of the relevant circumstances of each case. In this regard, the Authority may give due consideration to the appropriateness of deterrence in light of the size and

financial position of the infringing Licensed Operator, or where there is evidence to show that the Licensed Operator has made a significant gain (including economic gain or increased market share) from the infringement.

51 Following the above assessment and prior to determining the ultimate quantum of the fine to be imposed, a proportionality review will be undertaken by the Authority to ensure that the amount of the fine is not disproportionate or excessive considering all of the circumstances. At the same time, and in compliance with Art. 35(d)(2) of the Telecommunications Law, the Authority will ensure that the amount of any fine imposed is objectively justified and assess whether the principle of justice and equality amongst Licensees has been duly considered.

52 In exceptional circumstances, the Authority may, upon request, take account of the inability of an infringing Licensed Operator to pay the full amount of the fine imposed on it pursuant to a finding of a breach of Art. 35 addressed in this Part II. Any such reduction will only be granted on the basis of objective evidence that the imposition of the fine in question would irreversibly jeopardise the economic viability of the infringing Licensed Operator.