هيئة تنظيم الاتصالات
TELECOMMUNICATIONS REGULATORY AUTHORITY
Kingdom of Bahrain - مملكة البحرين

DECISION NO. 4 OF 2020 IN RELATION TO THE COMPLAINTS FILED BY STC BAHRAIN AND ZAIN BAHRAIN AGAINST BAHRAIN TELECOMMUNICATIONS COMPANY B.S.C. FOR AN ALLEGED BREACH OF ARTICLE 65 OF THE TELECOMMUNICATIONS LAW INCLUDING A REQUEST FOR AN EMERGENCY ORDER

A. *The Complaints*

1. The Authority is in receipt of a number of complaints submitted by STC Bahrain ('STC') and Zain Bahrain (Zain') against Batelco. STC[1] submitted an initial complaint on the 29th May 2019[2] including a request for an Emergency Order. The Authority rejected the request on the basis that the requirements under paragraph 18 of the Emergency Order Guidelines[3] had not been satisfied.[4] Subsequently, a complaint was filed by Zain on the 3rd October 2019[5] while a fresh request for the issuance of an Emergency Order was submitted by STC on the 29th October 2019,[6] who then reiterated its request on the 13th November 2019[7]. Each of STC and Zain alleged that Batelco (by virtue of its below-the-line fibre-based internet broadband packages[8] ('the BTL Packages') and through the then newly introduced fibre-based internet broadband packages) was in breach of Article 65 of the Telecommunications Law specifically by engaging in predatory pricing. The STC complaint also included a request for the issuance of an emergency order whereas the Zain complaint requested the Authority's intervention "as a matter of urgency"[9]. Throughout this document the afore-mentioned STC and Zain complaints are collectively referred to as "the Complaints".

B. *Batelco's Submissions*

2. In line with its standard procedure, the Authority shared the Complaints with Batelco for its submissions.[10]

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[1] The complaint was filed by VIVA Bahrain which has since been restyled as STC Bahrain.
[2] Ref: 0519-Corp-Reg-Gen-044 which alleged that Batelco was engaging in predatory pricing.
[3] Guidelines issued by the Authority on the adoption of emergency orders (Ref: LAD/1015/145) on 8 October 2015.
[4] Letter dated 18 June 2019 (Ref: LAD 0619 191).
[5] Ref: LRC 1910 049.
[6] Ref: 1019-Corp-Reg-Gen-072.
[7] Ref: 1019-Corp-Reg-Gen-082.
[8] Below the Line packages refers to those packages that are not generally available through Batelco direct sales channels (including but not limited to retail stores) or websites but instead consist in niche advertising, aimed at specific group of potential consumers and is response driven. These packages are usually promoted via social media channels typically by sales representatives' accounts and/or broadcasts circulated via messaging applications.
[9] At page 3 of the Zain Complaint.
[10] Submissions dated 11 June 2019 (Ref: GCL/115/119), 17 October 2019 (Ref: GCL/184/19) and 11 November 2019 (Ref: GCL/194/19) in response to STC's and Zain's complaints.

3. In its rebuttal of STC's complaint, Batelco denied that it had engaged in any form of predatory pricing, that it had not been found to enjoy a position of dominance in any relevant market and that "even if Batelco did enjoy dominance (which it does not) and was pricing excessively in order to attract new customers and retain existing ones – it would still be far from established that such prices were an attempt to foreclose competition."[11]

4. In its submissions responding to the Zain complaint, Batelco reiterated that "not only does it not have significant market power in any market at issue but that its retail broadband packages, both old and new, were and are based on positive margins and forward-looking costs".[12]

5. In its responses, Batelco alludes to the fact that its retail prices have been matched by other operators in the market who are "competing aggressively both on price and monthly allowance" and that it considers "advertising through social media to be common practice".[13] The Authority is well aware that STC and Zain also offer BTL Packages which practices however, are not under the current scrutiny of the Authority.[14]

C. *The Events Leading to this Decision*

6. In May 2019, Batelco was separated into two legal entities: a wholesale-only fixed network business (BNET) and the remaining downstream (and mobile) business, which still operates under the brand name Batelco.

7. Subsequent to the separation, in order for Batelco to provide broadband services to its retail customers, it must purchase wholesale bitstream services from BNET on the terms and conditions set out in the BNET Reference Offer.

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[11] *Ibid.* 17 October 2019 submission at page 4.
[12] *Ibid.* 11 November 2019 submission at page 2.
[13] *Ibid.* at page 3.
[14] Article 65(b) of the Telecommunications Law, on which this Decision is mainly founded, is only applicable in respect of firms that enjoy a position of market power. See also discussion at para. 64 on page 23 of this Decision.

هيئة تنظيم الاتصالات
TELECOMMUNICATIONS REGULATORY AUTHORITY
Kingdom of Bahrain - مملكة البحرين

DECISION NO. 4 OF 2020 IN RELATION TO THE COMPLAINTS FILED BY STC BAHRAIN AND ZAIN BAHRAIN AGAINST BAHRAIN TELECOMMUNICATIONS COMPANY B.S.C. FOR AN ALLEGED BREACH OF ARTICLE 65 OF THE TELECOMMUNICATIONS LAW INCLUDING A REQUEST FOR AN EMERGENCY ORDER

8. The regulated tariffs covering the wholesale bitstream services, as at May 2019 were as follows:

Item	Chargeable Activity	Effective Date	Charge (BD)	Charge Basis
BS 7	Port Rental	12 June 2014 3 March 2014	**Residential:** 256kbit/s: 4.886 512kbit/s: 5.012 640kbit/s: 5.074 1.024Mbit/s: 4.050 2.048Mbit/s: 5.766 3.072Mbit/s: 6.268 4.096Mbit/s: 6.771 6.144Mbit/s: 7.776 8.192Mbit/s: 8.782 10.240Mbit/s: 9.787 12.288Mbit/s: 10.792	BD Per port/per month
			16.384Mbit/s: 12.803	

2-18 BITSRTEAM PLUS SERVICE – Residential – NR

	Bitstream Plus Service			
Item	**Chargeable activity: Speeds - Residential (Contention Ratio 1:15)**	**Effective Date**	**Charges (BD)**	**Charge Basis**
2-18.1	20Mbit/s downstream / 2.048Mbit/s upstream	21 June 2017	14	Per month
2-18.2	30Mbit/s downstream / 5.048Mbit/s upstream	21 June 2017	22.5	Per month
2-18.3	40Mbit/s downstream / 5.048Mbit/s upstream	21 June 2017	30	Per month
2-18.4	80Mbit/s downstream / 10.048Mbit/s upstream	21 June 2017	40	Per month
2-18.5	100Mbit/s downstream / 10.048Mbit/s upstream	21 June 2017	63.75	Per month
2-18.6	10 Gbit/s Bitstream Plus Aggregation Link	21 June 2017	500	Per month

DECISION NO. 4 OF 2020 IN RELATION TO THE COMPLAINTS FILED BY STC BAHRAIN AND ZAIN BAHRAIN AGAINST BAHRAIN TELECOMMUNICATIONS COMPANY B.S.C. FOR AN ALLEGED BREACH OF ARTICLE 65 OF THE TELECOMMUNICATIONS LAW INCLUDING A REQUEST FOR AN EMERGENCY ORDER

9. As at May 2019, Batelco's standard retail fibre-based internet broadband packages consisted of the following:

Superfast Fibre Packages Fast Packages Special Packages

Superfast Fibre Packages	Monthly BD 21	Monthly BD 31.5	Monthly BD 42	Monthly BD 52.5	Monthly BD 78.750	Monthly BD 157.5
Package Speed	20Mbps	30Mbps	40Mbps	80Mbps	100Mbps	500Mbps
Upload Speed	2Mbps	5Mbps	5Mbps	10Mbps	10Mbps	50Mbps
Threshold (GB)	200GB Unlimited	300GB Unlimited	400GB Unlimited	500GB Unlimited	600GB Unlimited	1TB Unlimited
Bahrain Wi-Fi access**	FREE	FREE	FREE	FREE	FREE	FREE
YouTube		Unlimited	Unlimited	Unlimited	Unlimited	Unlimited
Weekend Internet		Unlimited	Unlimited	Unlimited	Unlimited	Unlimited
Unlimited Usage	BD50 /month	BD50 /month	BD50 /month	BD50 /month	BD50 /month	BD50 /month
Unlimited Netflix	BD5 250 /month	BD5 250 /month	BD5 250 /month	BD5 250 /month	BD5 250 /month	BD5 250 /month
Registration Fees	BD5 250	BD5 250	BD5 250	BD5 250	BD5 250	BD5 250

Superfast Fibre Packages Fast Packages Special Packages

Fast Packages	Monthly BD 10.500*	Monthly BD 12.600	Monthly BD 15.750
Package Speed	10Mbps	10Mbps	14Mbps
Upload Speed	1.5Mbps	2Mbps	2Mbps
Threshold (GB)	70GB	100GB	140GB
Bahrain WiFi access**	FREE	FREE	FREE
Unlimited Netflix	BD5 250 /month	BD5 250 /month	BD5 250 /month
Registration Fees	BD5 250	BD5 250	BD5 250

Source: Batelco website at May 2019.

10. As of August 2019, following the issuance of its Reference Offer Order[15], the wholesale charges were reduced such that the tariffs for the wholesale bitstream services became (and currently remain at):

هيئة تنظيم الاتصالات
TELECOMMUNICATIONS REGULATORY AUTHORITY
Kingdom of Bahrain - مملكة البحرين

DECISION NO. 4 OF 2020 IN RELATION TO THE COMPLAINTS FILED BY STC BAHRAIN AND ZAIN BAHRAIN AGAINST BAHRAIN TELECOMMUNICATIONS COMPANY B.S.C. FOR AN ALLEGED BREACH OF ARTICLE 65 OF THE TELECOMMUNICATIONS LAW INCLUDING A REQUEST FOR AN EMERGENCY ORDER

Bandwidth (Contention ratio 15:1)	Monthly Recurring Charge (BD)
Voice only	0.928
1.024 Mbit/s downstream / 512 Kbit/s upstream	2.90
2.048 Mbit/s downstream / 1.024 Mbit/s upstream	4.14
3.072Mbit/s downstream / 1.024Mbit/s upstream	4.50
4.096Mbit/s downstream / 1.024Mbit/s upstream	4.86
6.144Mbit/s downstream / 1.024Mbit/s upstream	5.58
8.192Mbit/s downstream / 2.048Mbit/s upstream	6.30
10.240Mbit/s downstream / 2.048Mbit/s upstream	7.02
16.384Mbit/s downstream / 2.048Mbit/s upstream	9.18
20Mbit/s downstream / 2.048Mbit/s upstream	10.04
30Mbit/s downstream / 5.048Mbit/s upstream	16.14
40Mbit/s downstream / 5.048Mbit/s upstream	21.52
80Mbit/s downstream / 10.048Mbit/s upstream	28.69
100Mbit/s downstream / 10.048Mbit/s upstream	32.28
500 Mbits/s downstream/ 50 Mbit/s upstream	75.00
1 Gbit/s Bitstream Plus Aggregation Link	Included in MRC
10 Gbit/s Bitstream Plus Aggregation Link (on request)	358.50

[15] Published on 3 June 2019 (Ref: LAD/0619/178).

DECISION NO. 4 OF 2020 IN RELATION TO THE COMPLAINTS FILED BY STC BAHRAIN AND ZAIN BAHRAIN AGAINST BAHRAIN TELECOMMUNICATIONS COMPANY B.S.C. FOR AN ALLEGED BREACH OF ARTICLE 65 OF THE TELECOMMUNICATIONS LAW INCLUDING A REQUEST FOR AN EMERGENCY ORDER

11. Batelco's official retail packages remained unchanged until September 2019, at which point in time Batelco streamlined its fibre packages, reduced its monthly charges, increased the applicable thresholds and varied some other characteristics, as better explained in the following table:

Superfast Fibre Packages   Fast Packages

Unlimited

Superfast Fibre Packages	Monthly BD 15.75	Monthly BD 21	Monthly BD 42	Monthly BD 157.5
Package Speed	20Mbps	30Mbps	100Mbps	500Mbps
Upload Speed	2Mbps	5Mbps	10Mbps	50Mbps
Threshold (2 Yr) (GB)	250GB / Unlimited	300GB / Unlimited	1TB / Unlimited	1.5TB / Unlimited
Throttling Speed*	2Mb	2Mb	5Mb	50Mb
Bahrain WiFi access**	FREE	FREE	FREE	FREE
YouTube	-	-	Unlimited	Unlimited
Weekend Internet	-	-	Unlimited	Unlimited
Unlimited Usage	[illegible]	[illegible]	[illegible]	[illegible]
Unlimited Netflix	[illegible]	[illegible]	[illegible]	[illegible]
Registration Fees	[illegible]	[illegible]	[illegible]	[illegible]

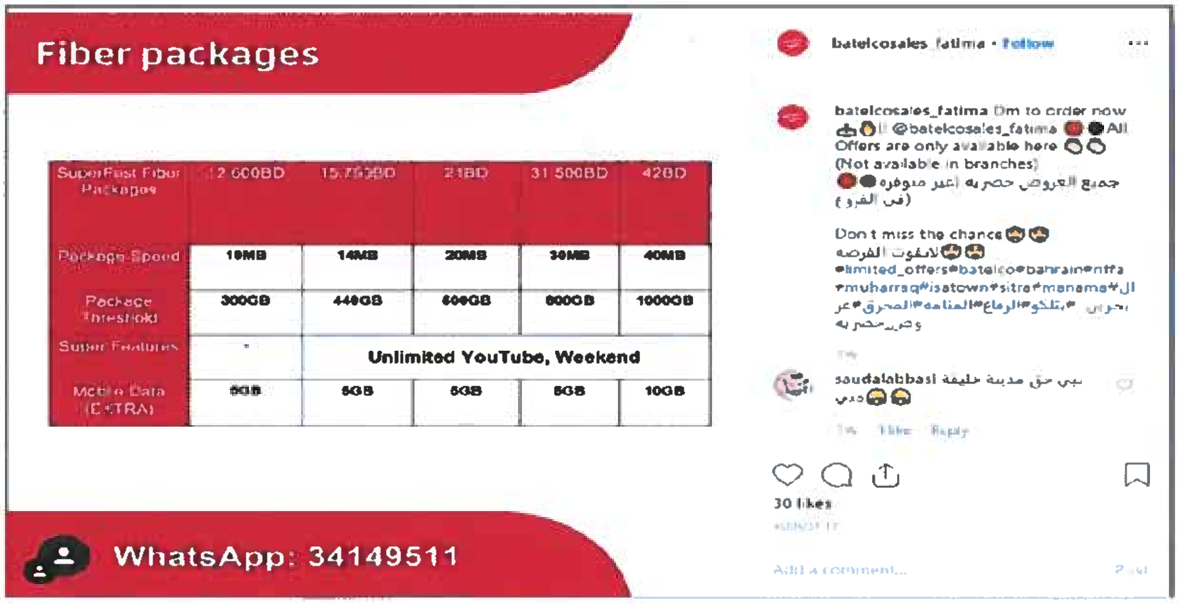
Sign up / Upgrade

Source: Batelco website at September 2019.

DECISION NO. 4 OF 2020 IN RELATION TO THE COMPLAINTS FILED BY STC BAHRAIN AND ZAIN BAHRAIN AGAINST BAHRAIN TELECOMMUNICATIONS COMPANY B.S.C. FOR AN ALLEGED BREACH OF ARTICLE 65 OF THE TELECOMMUNICATIONS LAW INCLUDING A REQUEST FOR AN EMERGENCY ORDER

12. In addition, Batelco periodically, directly or indirectly, launched BTL Packages for fibre-based internet broadband which offered more benefits than the standard packages advertised on Batelco's website.

13. The following are examples of the BTL Packages that were circulated via social media channels prior to September 2019:

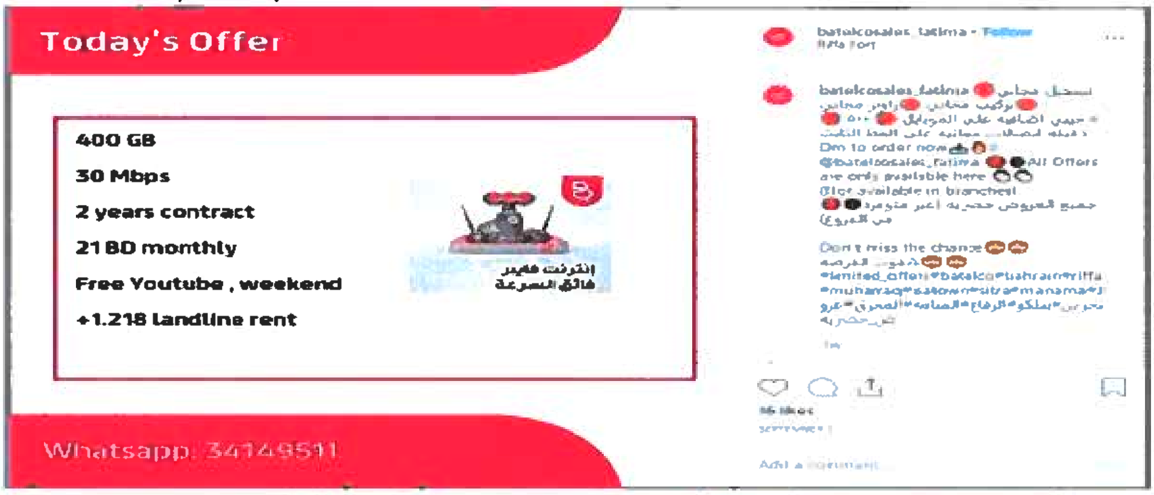


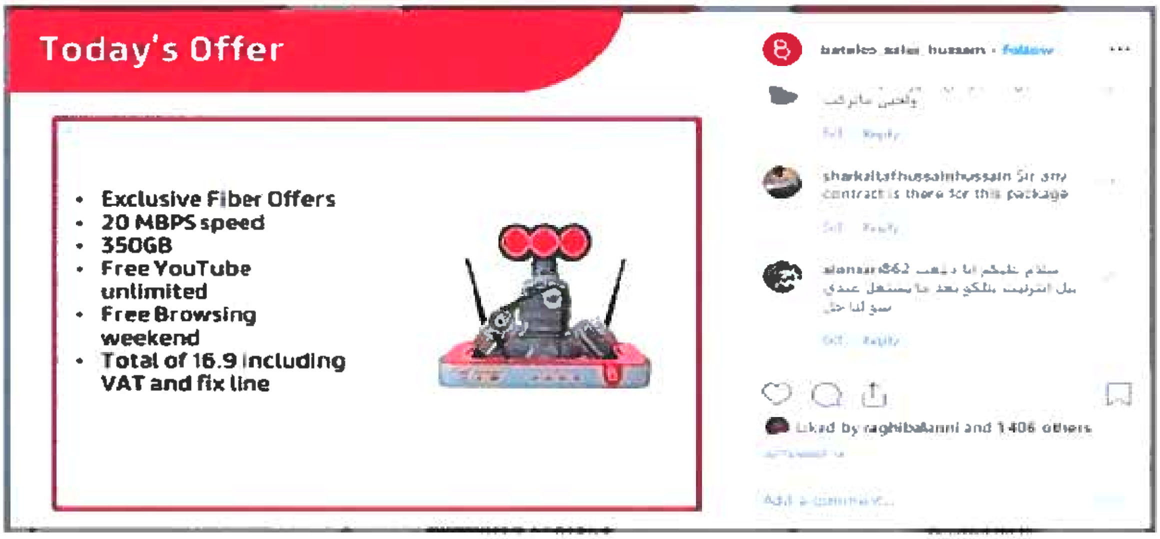
SuperFast Fiber Packages	12.600BD	15.750BD	21BD	31.500BD	42BD
Package Speed	10MB	14MB	20MB	30MB	40MB
Package Threshold	300GB	440GB	600GB	800GB	1000GB
Super Features	-	Unlimited YouTube, Weekend			
Mobile Data (EXTRA)	5GB	5GB	5GB	5GB	10GB

هيئة تنظيم الاتصالات
TELECOMMUNICATIONS REGULATORY AUTHORITY
Kingdom of Bahrain - مملكة البحرين

DECISION NO. 4 OF 2020 IN RELATION TO THE COMPLAINTS FILED BY STC BAHRAIN AND ZAIN BAHRAIN AGAINST BAHRAIN TELECOMMUNICATIONS COMPANY B.S.C. FOR AN ALLEGED BREACH OF ARTICLE 65 OF THE TELECOMMUNICATIONS LAW INCLUDING A REQUEST FOR AN EMERGENCY ORDER

14. The following are examples of the BTL Packages that were circulated via social media channels post September 2019:





15. Relying on its powers under Article 53 of the Telecommunications Law, the Authority has requested further information from all the parties to the Complaints. Submissions, including but not limited to detailed costing information, have been received as per the below:

Figure 1 Art 53 Correspondence

STC	13 November 2019	1119-Corp-Reg-Gen-082	Response to Art 53 request
STC	23 December 2019	1219-Corp-Reg-Gen-086	Response to Art 53 request
Zain	7 November 2019	email	Response to Art 53 request
Zain	24 December 2019	LRC-1912-061	Response to Art 53 request
Zain	4 February 2020	email	Response to Art 53 request
Batelco	22 August 2019	GCL/160/19	Response to Art 53 request
Batelco	22 September 2019	email	Response to Art 53 request
Batelco	17 October 2019	GCL/184/19	Response to Art 53 request
Batelco	6 November 2019	GCL/191/19	Response to Art 53 request
Batelco	11 February 2020	GCL/25/20	Response to Art 53 request

16. For the avoidance of doubt, the Authority's investigation covers Batelco's conduct spanning fifteen months of actual data as of November 2018 through to January 2020 and includes its BTL Packages and its official retail fixed broadband packages.

17. This Decision addresses both the request for the issuance of an emergency order and the actual merits of the Complaints regarding a possible breach of Article 65 of the Telecommunications Law. The first part of the Decision tackles the requirements for the issuance of an emergency order while the second part deals with the more substantive nature of the allegation(s) relating to a breach of Article 65 of the Telecommunications Law.

D. *Conditions for Issuing an Emergency Order*

18. The Authority's Competition Guidelines[16] stipulate that in exceptional circumstances, the Authority might take urgent action to prevent immediate harm to competition during an in-depth investigation into an alleged infringement of Article 65 of the Telecommunications Law.

[16] Competition Guidelines published on 18 February 2010 (ref: MCD/02/10/019) at para. 284.

19. The Authority proceeded with publishing its Guidelines on the Adoption of Emergency Orders (hereinafter 'the EO Guidelines'),[17] which EO Guidelines explain *inter alia* (i) the requirements for the adoption of emergency orders; (ii) the standard of proof that is necessary to establish whether urgent action is indeed justified; and (iii) the approach that the Authority is likely to adopt in assessing whether or not to issue an emergency order.

20. Consistent with international best practice,[18] the EO Guidelines require that two conditions are met in order to justify the issuance of an interim measure, namely (i) a severe breach of the Telecommunications Law and/or any applicable licence condition has likely occurred and (ii) that the breach has resulted in, or creates an immediate risk of substantial and irreparable damage to effective and fair competition.[19]

21. In respect of the first criterion, the EO Guidelines clarify that the Authority will carry out a "summary assessment"[20]. In so doing, the Authority would need to carry out a *prima facie* analysis.[21] European case law has established that the test of *prima facie* infringement requires showing the "probable existence" of an infringement. Jurisprudence on the matter has made it clear that the requirement of a finding of a *prima facie* infringement cannot be placed on the same footing as the requirement of certainty that a final decision must satisfy.[22] It is therefore not necessary, for the purposes of determining whether an Emergency Order is justified, for the Authority to make a definitive finding that an infringement has occurred.[23]

22. On the risk of serious and irreparable harm establishing the urgent need to grant interim measures, European courts have held that it was necessary to show that there was "damage which could no longer be remedied by the decision to be adopted [*omissis*] upon the conclusion of the administrative procedure."[24] In other words, the Authority must consider that absent the issuance of the Interim Order, competition in the sector will likely suffer serious and irreparable harm.

[17] N. 3 above.
[18] See for instance Joined Cases 228 and 229/82 Ford v. Commission [1991] ECR II-653 at para. 19 and Case T-44/90 La Cinq SA v. Commission [1992] ECR II-1 at para. 28.
[19] N. 3 above at para. 18.
[20] *Ibid.* at para. 21.
[21] In this context, the term *prima facie* does not serve to create a rebuttable presumption but rather implies that the conclusion is based on a summary assessment but subject to further evidence or information.
[22] Case T-23/90 Peugeot v. Commission [1991] ECR II-653 at para. 61.
[23] Nevertheless, the Authority in this Decision has not restricted its analysis to a *prima facie* assessment.
[24] N. 22 at para. 80.

23. Any measure that the Authority takes under this procedure must be of a temporary and restrictive nature, limited to what is required in the situation at hand. The Authority must also have regard to the legitimate interests of the firm which is the subject of the Interim Order. Naturally, the Interim Order may not extend beyond the framework of the Authority's powers to order the termination of an infringement in an eventual final decision.

24. This notwithstanding, the Authority's analysis in this Decision is not limited to a *prima facie* consideration that merely addresses the merits of the request for an emergency order. The decision has gone further than that and the Authority has undertaken a thorough analysis of the facts to determine on the subject matter of the Complaints themselves.

E. *The severe breach relates to a possible infringement of Article 65 of the Telecommunications Law and Section 11.1(b) of Batelco's Internet Services Provider Class Licence*

25. As has already been mentioned earlier[25] the alleged conduct relates to an alleged breach of Article 65 of the Telecommunications Law. It consequently implies a corresponding breach of Section 11.1(b) of Batelco's Internet Service Provider Class Licence (hereinafter 'the ISP Licence') which in itself prohibits Batelco from engaging in any anti-competitive practice in particular the abuse of any dominant position that it may enjoy.

26. Article 65 of the Telecommunications Law and Section 11.1(b) of Batelco's ISP Licence are, therefore, concerned with the possible abuse by a licensed operator of its dominant position. In this case, the point at issue is whether Batelco's retail broadband packages launched in September 2019 (and the ensuing BTL Packages) are predatory in nature.

27. Any assessment under Article 65 (and therefore Section 11.1(b) of the ISP Licence) is said to constitute an *ex post*[26] investigation since it is a retrospective analysis of the conduct of a licensed operator.

28. In accordance with the Competition Guidelines,[27] the process with regards to an *ex post* analysis involves the following steps:
    a. identifying the conduct which is considered to be potentially anti-competitive;

[25] At para. 17 of this Decision.
[26] *Ex post* (after the fact) refers to measures that arise *in reaction* to the decisions and activities of licensed operators.
[27] N. 16 above at paras. 16 and 140.

b. defining the associated market and other relevant market(s) where appropriate;

c. determining whether the conduct is (or was) anti-competitive and its effect on competition. If found anti-competitive, the Authority may determine any appropriate remedies and fines.

29. Essentially, three main elements are, therefore, required to establish a breach under Article 65:

    a. dominance in a relevant product and geographic market;

    b. anti-competitive conduct linked to the relevant market; and

    c. that the said conduct has had a material effect on competition.

F. *The Relevant Market*

30. In order to determine whether a firm enjoys a position of market power it is necessary to first identify the relevant market i.e. the area of competition in which the market power of the allegedly dominant firm (and of any actual or potential competitors) is to be judged.

31. In principle, the product market comprises all products that consumers regard as being reasonable substitutes by virtue of their characteristics, price or intended use.[28]

32. In determining which products form part of the product market in question, the Authority has followed the approach to market definition laid out in its Competition Guidelines. These Guidelines firstly require the Authority to identify the focal product against which it then assesses possible substitution, through the SSNIP[29] (or hypothetical monopolist) test.

33. Given the nature of the Complaints, the Authority considers it is appropriate, in this instance, to take, as the focal product, fibre broadband products. This is because the Complaints concern Batelco's "Superfast Fibre Packages". Although broadband services can be provided over other technologies as well, including broadband provided over those other technologies

[28] Case 27/76 United Brands v. Commission [1978] ECR 207.
[29] Small but Significant Non-transitory Increase in Price test.

as part of the focal product, rather than assessing the degree of possible substitution between broadband services, may risk the market being defined too broadly.[30]

34. In determining the appropriate boundaries of the product market, the Authority has considered whether the market should also include (i) mobile services (i.e., those broadband services provided using a mobile technology such as LTE), and (ii) fixed wireless broadband services (i.e., those broadband services provided using Wi-Max technology).[31] In so doing, and in line with its 2014 *ex ante* review of the fixed broadband market, the Authority has taken into account:
    a. the evolution of customer numbers on different broadband services and the extent to which this may have indicated whether consumers were switching between services;
    b. service price levels;
    c. speeds and service quality;
    d. usage patterns (i.e., whether customers used different broadband services for similar purposes); and
    e. taking into account all of the above, the likelihood of consumers switching away from fibre broadband to other broadband services, following a SSNIP in fibre broadband products.

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[30] In a previous market review (Ref: MCD/03/14/018, para. 205), the Authority defined a relevant market for mass market fixed broadband services as including, "*Mass market broadband services from a fixed location in the Kingdom of Bahrain, excluding Amwaj Island and Durrat Al Bahrain, which comprises DSL, Wimax, fibre and mobile broadband technologies.*" Para. 31 of the Competition Guidelines recognises the differences between market definition in an ex ante and an ex post context. Nevertheless, the Competition Guidelines (in para. 31) state that, "if a relevant ex-ante market had already been defined, TRA would expect that this would represent the starting point for determining the market definition in an ex-post context". Despite this, the Authority considers that in the context of this investigation, the focal product should be defined as the specific fibre broadband products that are the subject of the investigation. This is because, starting with a wider focal product would risk defining too wide a product market.

[31] In undertaking its analysis under this Decision, the Authority has not examined whether DSL services form part of the same relevant market. This is because Batelco's share of DSL customers (as at Q4 2018) was 81%, meaning (as described further, below) that even if this service was considered to be part of the same relevant market, it would not impact the subsequent dominance assessment.

Whether mobile services form part of the relevant market

35. In examining whether mobile broadband forms part of the relevant market, the Authority focuses first on whether dedicated mobile broadband services form part of the same market. This is because dedicated mobile broadband services are likely to be a closer substitute to fixed broadband than confined connectivity offered over smart phones, given they typically include greater data allowances and are focused purely on data, whilst also allowing consumers to access the internet on a broader range of devices.[32] Only if the Authority concludes that dedicated mobile broadband services do form part of the relevant market would it then need to assess whether confined connectivity services also form part of this market.[33]

36. With regards to potential demand side substitution from fibre broadband to mobile broadband, the Authority notes that, at a high level, fibre broadband and dedicated mobile broadband offer people the same functionality – namely an "always on" connection to the internet, for example, allowing people to browse, stream and, to a certain degree, download content, as well as use email and "over the top" (OTT) content and communications services. Whilst dedicated mobile broadband has some additional functionality over fibre broadband (most notably, the ability, in some instances, for it to be used outside the home), this does not prevent it being used within the home, either instead of, or as well as, fibre broadband.

37. Despite this, however, the Authority concludes that there are a number of factors which may limit the degree of substitution between fibre broadband and mobile offers, which means that significant numbers of fibre broadband customers may not be willing to switch to using a dedicated mobile broadband service, following a SSNIP. In particular:

    a. the pricing of the products differs;

    b. the usage of fibre and mobile broadband services differs (particularly in terms of the amount of data used); and

[32] The Authority does, however, note that a smartphone can be used to "tether" to another device, effectively turning the smartphone into a wifi hotspot.

[33] The Authority notes that mobile broadband can variously be branded as "Home Broadband" – for example, when a customer is provided with an indoor router that uses mobile technology to connect to the internet, or as "mobile broadband" – for example, when a customer is provided with a "MiFi device". For the avoidance of doubt, its consideration of mobile broadband takes into account both of these classifications. This is due to the similarity in the pricing and other characteristics of these services.

c. the speeds typically accessed over the services differ, meaning (when taken in combination with the pricing) that consumers may be more restricted in how they use mobile services compared to fibre.

38. Indeed, the Authority notes that there is a clear trend of growth in the number of fibre broadband subscriptions and mobile broadband users. Whilst this is indicative of broader market demand trends and growth in broadband services more generally, it certainly does not demonstrate switching between fibre and mobile broadband services. This is in contrast to the situation set out in the 2014 market review, where the volume of fixed broadband users (in this case, taking DSL services) had declined significantly over a number of years.

39. Taking into account all of these factors, therefore, the Authority concludes that mobile broadband does not constitute a sufficient demand-side substitute for fibre broadband to include it in the same economic market.

The pricing of home broadband vs. dedicated mobile broadband products

40. According to its website, Batelco offered, as at December 2019, fibre broadband customers four different packages. These varied in price, from BD15.75 per month, for a package with a 20Mbps download speed, to a price of BD157.5 per month, for a package with a 500Mbps download speed.[34]

41. In contrast, Batelco (and other mobile operators) offered a broader range of mobile broadband plans, sold on both a pre-pay and a post-pay basis. For example, Batelco's plans, first for post-pay and then for pre-pay, are set out below:

[34] See page 6 at para. 11.

Figure 2 Batelco, post-pay mobile broadband offers[35]

Package price (BD/month)	10.5	15.75	21	31.5	47.25
Data allowance (12 month contract)	20GB	40GB	80GB	130GB	300GB
Data allowance (24 month contract)	40GB	140GB	200GB	300GB	400GB
Speed (up to)	10Mbps	15Mbps	20Mbps	30Mbps	Max 4G
Netflix streaming		3 months unlimited	3 months unlimited	3 months unlimited	3 months unlimited

Source: Batelco website, accessed 26/11/19

42. Post-pay, Zain offers similar plans to Batelco, though with a greater number of plans, including a plan for BD105 per month, which provides a data allowance of 500GB or 1TB (dependent on contract length). STC's product range, as at December 2019, was also similar, though it only offered plans up to BD30 per month, with a data allowance of 300GB (under its "Mobile Broadband" offering) and up to BD32 per month,[36] also with a data allowance of 300GB, under its "4G Home Broadband" offering.[37]

[35] In addition to these specific packages, Batelco also offers a range of top-up vouchers, ranging from BD1.050 for 1GB to BD10.5 for 20GB.
[36] The Authority notes that STC's website refers to this as a promotional price available for a limited time only.
[37] On pre-pay, Zain and STC offer a similar range of mobile broadband products to Batelco.

Figure 3 **Batelco, pre-pay data starter packs**[38]

Package price (BD/month)	4.2	7.35	10.5
Data allowance (12 month contract)	3GB	10GB	20GB
Speed (up to)	4G LTE	4G LTE	4G LTE
Validity	7 days	30 days	30 days

Source: Batelco website, accessed 26/11/19

43. Given the range of pricing plans set out above, it is clear that consumers have a wide range of possible broadband plans from which they can choose, depending in particular on the amount of data they wish to (or expect to) consume and the data speeds they expect. However, in general, fibre broadband packages contain higher data allowances than mobile packages, and higher data speeds. For example, some mobile broadband packages are throttled at relatively low speeds, in some cases below the lowest speeds available over fibre packages. Other mobile broadband packages allow speeds up to the theoretical maximum available over LTE. The Authority recognises that such speeds can be in line with, or potentially even above, the speeds Batelco offers on its fibre broadband products. However, it is also the case that speeds on mobile broadband networks cannot be guaranteed and are dependent on the number of users in a given cell, so making broadband speeds on mobile networks more uncertain than those over fixed networks.

44. Furthermore, many customers looking to switch between fixed broadband and mobile will be unlikely to find it economic to do so. For example, a customer with demand for 200GB of data a month purchasing a post-pay mobile broadband offer would likely purchase (from Batelco) the BD21 a month package, which offers, in exchange for a two-year commitment, a 200GB data allowance per month and maximum download speeds of 20Mbps.[39] In contrast, that customer could purchase a fixed broadband plan from Batelco offering the same maximum download speed and a 250GB monthly allowance (again, for a two-year commitment) for

[38] In addition to these specific starter packages, Batelco also offers a range of mobile internet pre-pay vouchers, varying from BD1 for 1GB (valid for 3 days) to BD30 for 60GB (valid for 30 days).
[39] As well as purchasing that service from Batelco, a consumer could also purchase a similar (200GB) mobile broadband product from STC for BD22 a month or from Zain for BD21 a month.

BD15.75.[40] Even if this price were to increase by a SSNIP (i.e., up to 10%), it would still be significantly below the price of the equivalent mobile product, thus potentially limiting the extent of demand side substitution from fibre to mobile, for customers currently using a fibre package.

45. Given the range of packages and pricing available, including across operators, however, it can be challenging to compare headline prices. The Authority has, therefore, also examined average effective prices per GB of data, for fixed (including DSL and fibre) and mobile broadband services.

46. This shows that, over time, both fixed and mobile broadband prices have declined, with the average effective price per GB for fixed broadband being significantly below that for mobile broadband. This means that a SSNIP in the average effective price of fixed broadband would still leave it priced substantially below the current average effective price of mobile broadband (and dedicated mobile broadband).

47. These overall declines in effective broadband prices are likely to have been driven by increases in the quantity of data consumed. However, whilst the absolute price difference narrowed between 2014 and the end of 2016, since the start of 2017 the price difference has become more marked, with the fixed broadband effective price per GB continuing to fall, while the effective price of mobile broadband has remained relatively stable. This means that a SSNIP in the average effective price of fixed broadband would still leave it priced substantially below the current average effective price of mobile broadband (and dedicated mobile broadband).

48. The Authority also notes that, since it started investigating the Complaints, STC has launched a 5G Home Broadband Product. On the face of it, this could be a closer substitute to fibre broadband services. For example, compared to existing mobile broadband products, it offers much higher data allowances (with the entry product, priced at BD21, providing a monthly data allowance of 600GB per month and the most expensive product, priced at BD36.75, providing users with a monthly data allowance of 1.3TB). Despite this, the Authority does not consider that this alone is sufficient to conclude that either 5G Home Broadband services, or all mobile broadband services, provide a competitive constraint on fibre broadband. Given the average usage figures quoted below, an average fixed broadband user could still purchase a fibre broadband product with sufficient data allowance for the average customer, for BD15.75, significantly below the entry price for 5G Home Broadband. Furthermore, although 5G may be able to offer higher speeds than other mobile broadband services, there is currently no

[40] The consumer could also buy a fibre package from Zain for BD15.75 a month, offering 20Mbps download speed and 300GB of data (and, currently, an additional 200GB of data as part of Zain's launch offer).

evidence to show that the user experience of a 5G Home Broadband customer would be similar to that of a fibre broadband customer.

The usage of fibre and mobile broadband services differs

49. It also appears to be the case that consumers use fibre and mobile broadband services differently. In particular, the Authority's Q3 2019 Market Indicators Report shows that the average volume of data traffic consumed per month on a dedicated mobile broadband connection is 19GB. In contrast, the average for fixed (again including copper and fibre) is 189GB.[41]

50. This suggests that customers are very likely to use fixed (and in particular, fibre) broadband services differently to mobile, with fibre broadband used for larger downloads, streaming and so on, and with mobile broadband used more for social media and browsing. As set out in the previous section, a consumer who uses the average amount of data on a fibre broadband connection could purchase that amount of data for BD15.75 per month, by buying Batelco's 20Mbps product. However, to purchase that much data on a (post-pay) dedicated mobile broadband package (including those offered over 5G) would cost at least BD21 a month.

Supply side substitution

51. The Authority does not believe that mobile broadband acts as an effective supply-side substitute for fibre broadband. Although a retail mobile operator looking to become a provider of fibre broadband services could use BNET services in order to do so, developing the core network required to use BNET services, and interconnection to BNET wholesale services, will still require some additional investment by the provider, meaning that it may not choose to divert capacity from the supply of mobile to fibre broadband services, following a SSNIP in fibre broadband services. Indeed, this is particularly likely to be the case given that BNET does not yet offer its bitstream services on an "equivalence of inputs" basis, so, in effect, increasing the costs of new entrant access seekers looking to use that bitstream service. Furthermore, in the context of assessing supply side substitution, it is important to assess whether a mobile provider would switch capacity from offering mobile to fixed broadband services. The Authority considers this is unlikely, given the sunk investment that the mobile provider is likely to have made in its services and the fact that switching capacity to offer fixed broadband services will

[41] TRA, Quarterly Market Indicators, Q3 2019. The Authority notes the figure for average fixed usage includes copper and fibre services. It is possible that average usage on fibre broadband connections will be higher than that on copper, although there is no evidence available on whether this is indeed the case.

involve stranding some of these sunk costs, with the operator instead incurring additional variable costs.

Whether fixed wireless services form part of the relevant market

52. On the basis that dedicated mobile broadband does not provide a sufficient competitive constraint with fibre broadband to place it within the same market, the Authority also concludes that fixed wireless broadband is, for similar reasons, also unlikely to be part of the same market.

53. In particular, the Authority notes that the demand for fixed wireless broadband (measured through the number of active connections) has, since 2013, declined steadily – from around 130,000 connections in 2013 to 80,000 currently. This is in contrast to the demand for both fibre and mobile broadband and appears to suggest that consumers are switching away from fixed wireless services, as a result of the characteristics of those services – in particular, the speeds available over fixed wireless broadband are similar to those over mobile broadband and so do not offer the speeds available over fibre. For example, TRA's Broadband QoS Report for Q3 2018 suggests that the average download speed on Mena's FWA network is only around 10-12Mbps – below the average speed of Batelco's slowest fibre package for new customers.

Price terms of fixed wireless access

54. The Authority notes that Mena telecom (owned by STC) offers a number of fixed wireless broadband plans, as summarised below.

Figure 4 Mena telecom fixed wireless residential broadband plans

Plan name	Monthly rental (BD)	Monthly data allowance (GB) – no contract	Monthly data allowance (GB) – 12 mth contract	Monthly data allowance (GB) – 18 mth contract
Broadband 7	7	10	20	45
Broadband 9	9	10	20	45
Broadband 11	11	15	35	70
Broadband 15	15	45	90	180
Broadband 18	18	55	110	220
Broadband 21	21	75	150	300
Broadband 31	31	100	200	400
Broadband 37	37	125	250	500

Source: *Mena telecom website, accessed 02/12/19*

Note: *All plans apart from "Broadband 7" include a Jawwy TV box. Plans from BD18 a month upwards also include free data between 12am and 12pm.*

55. Taking into account these plans suggests that a fibre broadband user with average levels of usage (189GB per month) could also purchase that amount of usage with a Mena telecom fixed wireless plan (under an 18-month contract) for BD15, a similar amount to the required expenditure on fibre. However, in so doing, that customer would be likely to be accepting a lower quality of service with, as set out above, average download speeds on Mena telecom's residential network being significantly below average speeds on fibre and mobile networks, and the "ping" (round trip) time higher on Mena's network.[42]

56. However, it is also clear that for heavy users of data, fixed wireless is unlikely to be an effective substitute – whereas Mena telecom plans only go up to 500GB a month, two of Batelco's fibre broadband plans have usage allowances significantly in excess of this. This is likely to limit substitution for these heavier users – for example, a customer could purchase 500GB of data on Mena telecom for BD37 a month (on an 18-month contract) or 1TB of data with a Batelco fibre broadband connection for BD42 (though with a minimum contract term of two years). As

[42] Ping time measures the time it takes to send a number of bytes to a destination host and have them acknowledged. Higher ping time represents higher latency with a lower ping time denoting a better customer experience. (Source, TRA's Broadband QoS Report for Q3 2018.)

such, it is likely that customers who use fixed wireless services are more likely to be low usage customers, compared to those who purchase fibre broadband. Indeed, this is suggested by an analysis of average revenue per month for both services. In particular, information available to the Authority suggests an average revenue per user per month for fixed (copper and fibre) broadband is significantly above that for fixed wireless broadband.[43]

Supply side substitution

57. For the same reasons as set out above in connection with mobile broadband, the Authority does not consider that fixed wireless is likely to act an effective supply-side substitute for fibre broadband.

58. For these reasons, the relevant product market in this case is considered to be the market for fixed (wired) broadband products offered in the Kingdom of Bahrain. This market includes fibre broadband products and may also include DSL broadband.[44] However, for the purposes of this Decision, the Authority does not consider it necessary to conclude definitively on whether DSL products form part of the relevant market. This is because, as set out below, including DSL products within the market does not impact the dominance assessment.

Geographic Market

59. As regards the geographic market, the Competition Guidelines call for "a two-stage process for defining relevant geographic markets: a preliminary analysis to determine if geographic segmentation may be required and then, if necessary, a more detailed assessment of geographic market boundaries."[45]

For the purposes of this process, the Authority does not believe that undertaking the two-stage process to determine the relevant geographic market is necessary. This is because the conditions of competition in the defined product market are very likely to be similar across the whole of the Kingdom, with the exception of Amwaj Islands. This is due to the fact that all

[43] All data from Q4 2018.
[44] The Authority notes that in its previous *ex ante* market review (MCD/03/14/018) it defined distinct product markets for mass market and business products. Given the nature of the complaints received, in this Decision the Authority has focused on residential (i.e. mass market) products. It considers this as appropriate and, given that business products have not been the subject of the Complaints, the Authority does not believe that including such products in its analysis would change its conclusions. However, the Authority is not taking a definitive position in this Decision on whether business and mass market products are in distinct markets.
[45] N. 16 above at para. 56.

providers who are active in the defined market are licensed to offer services on a nationwide basis and, to do so, all providers rely, again with the exception of Amwaj Islands, on the infrastructure of BNET.

60. Therefore, the relevant geographic market is considered to be the entirety of the Kingdom of Bahrain, bar Amwaj Islands. The Authority notes this is consistent with how it has defined the geographic market for other domestic fixed network connectivity services, including how it defined the geographic market in its 2014 fixed broadband market review.[46]

61. In conclusion, the relevant market is the provision of fixed broadband products in the Kingdom of Bahrain bar Amwaj Islands. As set out above, this includes fibre broadband products and may also include DSL products.

G. *Dominant Position*

62. A dominant position has been defined as "a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers".[47]

63. It is not an offence for a firm to have a dominant position. Indeed, consistent with comparative competition law principles in other jurisdictions, Article 65 of the Law does not prohibit dominance but only its abuse. The Law places no restraint on the reasonable conduct of a dominant undertaking. However, the conduct by a dominant firm which seriously and unjustifiably prevents, restricts or distorts competition within a defined market is prohibited as abusive. As such, "the concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition."[48]

[46] Ref: MCD/03/14/018, para. 203.
[47] Case 85/76 Hoffmann-La Roche [1979] ECR 461 and also adopted in the Authority's Competition Guidelines at para. 73.
[48] Case 85/76 *Hoffmann-La Roche v. Commission* [1979] ECR 461 at para. 91.

64. This does not mean that an abuse must comprise conduct peculiar to dominant firms or capable of being indulged in only by reason of dominance. Conduct which may be permissible in a normal competitive situation may amount to an abuse if carried out by dominant firms because such firms have a "special responsibility not to allow [their] conduct to impair undistorted competition"[49] on account of the prejudice that their activities may cause to competition in general and to the interests of competitors, suppliers, customers and consumers. It follows that firms enjoying a position of dominance may be deprived of the right to adopt a course of action or to take measures which are not in themselves abusive and which would be unobjectionable if adopted or undertaken by a firm that does not enjoy a position of economic power.[50]

65. In determining whether there is evidence that Batelco may hold a dominant position in the defined market, the Authority considers two of the three factors set out in the Competition Guidelines for assessing dominance (market shares and other competitive constraints). The third factor, on conduct and performance, is assessed when examining Batelco's actual pricing practices.

Market shares in the defined market

66. According to data held by the Authority, Batelco's retail market share in the provision of fibre broadband (measured on the number of connections) at the end of Q4 2018 was 98%. Its share of DSL connections was 81%. This would mean that, even if a wider market was defined to include copper (DSL) and fibre services, Batelco's overall market share (given the take up of fibre and DSL services) would still have been around 95%.[51] As such, this is clearly, whether measured on the basis of a broad (DSL and fibre) or narrow (fibre only) market, above the thresholds for dominance, as applied from case law in jurisdictions such as the EU. Furthermore, Batelco's high share in this market has been sustained, with other broadband service providers in Bahrain having relied historically on mobile and fixed wireless connections.

Analysis of other competitive constraints

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[49] Case 322/81 *Michelin v. Commission* [1983] ECR 3451 at para. 57.
[50] See Bellamy & Child, *European Community Law of Competition*, 5th ed. at para. 9-065 et seq.
[51] Although the Authority does not have market share data for 2019, it understands that these shares are unlikely to have changed significantly since Q4 2018. Furthermore, the allegations of anti-competitive pricing first arose during 2018.

67. The Authority does not believe that there is sufficient evidence of other competitive constraints being present in the market such as to "overturn" any presumption of dominance arising from Batelco's high and sustained market share in the defined market.

68. The Authority notes that barriers to entry in the retail market are less significant than those in upstream infrastructure markets, with service providers being able to use BNET's regulated wholesale services in order to offer fixed (wired) broadband to retail customers. Despite this, entry into the retail market still requires some investment in network infrastructure and / or a retail distribution network. Furthermore, BNET's wholesale products are currently not provided on a fully equivalent basis, meaning that access seekers other than Batelco are not able to access BNET products using exactly the same procedures and systems as Batelco. As such, this may limit the ability of other providers to compete with Batelco on an equal footing.

69. Finally, the Authority also notes that countervailing buyer power is unlikely to be relevant in this market. This is because the services subject to the Complaints are provided to residential customers. As such, no one customer is likely to have the ability to exert countervailing power on Batelco.

70. For the reasons set out above, the Authority considers that Batelco is dominant in the relevant market.

H. *Abuse of a dominant position*

71. The Complaints relate to the alleged practice adopted by Batelco of "selling below costs"[52] requiring the Authority to order Batelco to "[cease] all Batelco predatory broadband offerings"[53].

The definition of predatory behaviour

72. The Competition Guidelines classifies predatory pricing as exclusionary conduct that could be tantamount to a possible form of abuse of a dominant position.[54] The Competition Guidelines explain that, "[p]redatory pricing is a short-term strategy of lowering prices below costs in order to weaken a rival and potentially force them to exit the market or to prevent new entry into the

[52] STC submission dated 13 November 2019 (Ref: 1119-Corp-Reg-Gen-082).
[53] *Ibid.*
[54] N. 16 above at paras. 157 *et seq.*

market. Prices are then subsequently increased in order to recoup losses. Over the longer term, if effective, predatory pricing can lead to a reduction of competition in the relevant market. Therefore, it can result in a loss of consumer welfare as prices, which were temporarily lowered, can then be increased above the competitive level."[55] This explanation is in line with European doctrine. For example, Bellamy & Child describe predation as the "setting of prices by a dominant undertaking at a level which has, as a principal objective, the elimination or serious weakening of a competitor rather than the generation of profit."[56] Similarly, Whish comments that "[t]he idea of predatory price cutting is simple enough: that a dominant firm deliberately reduces prices to a loss-making level when faced with competition from an existing competitor or a new entrant to the market; the existing competitor having been disciplined, or the new entrant having been foreclosed, the dominant firm then raises its prices again, thereby causing consumer harm."[57]

73. The Authority, in its Competition Guidelines, has set out its approach to assess a predatory pricing as follows:

> "*TRA would need to assess whether prices were below costs. This could be done in two stages, firstly by checking whether price was below LRIC. If it is then the company engaging in such behaviour would need to provide a justification to rebut a presumption of predatory pricing. If the price was above a LRIC-based cost measure but below a measure of cost which included a contribution for joint and common costs, then further evidence would be required on the intended and/or actual impact of such pricing on rivals before a conclusion could be reached.*"[58]

74. Such approach is consistent with the US and European case-law which has had recourse to the so-called Areeda-Turner test in order to identify predatory pricing.[59] [60] For a case of predation to subsist, it is necessary to show that the alleged predator is (i) selling below average total costs and (ii) with the intention of eliminating a competitor. Where prices are set at price points which are not only below average total costs but also below average

[55] *Ibid.* at para. 172.
[56] N. 50 above at para. 9-076.
[57] R. Whish & D. Bailey, *Competition Law*, 8th ed. at page 781 *et seq.*
[58] N. 16 above at para. 184.
[59] P. Areeda and D. Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act* (1975) 88 Harvard LR 697.
[60] Case C-62/86 *Akzo v Commission*; Case C-333/94 *P Tetra Pak International SA v Commission*, Case T-340/03 France Telecom SA, formerly *Wanadoo Interactive SA v Commission*.

variable costs, then that creates a presumption that there is no economic purpose other than the elimination of a competitor.[61]

75. The details of the Authority's analysis and methodology to carry the predatory pricing assessment are explained in the annex to this Decision – Annex 1.

76. The starting point of the Authority is to adopt the relevant cost standard for the analysis, this is discussed in the following paragraph.

The costs standard

77. Depending on the context of an *ex ante* or *ex post* analysis, there are various ways to measure costs although certain notions always apply. As indicated in the Competition Guidelines, there are two levels of distinctions commonly applied when measuring the costs:

<u>The distinctions between variable and fixed costs:</u>

a. Fixed costs are those that do not vary with the level of output; and
b. Variable costs are those which vary with the level of output.

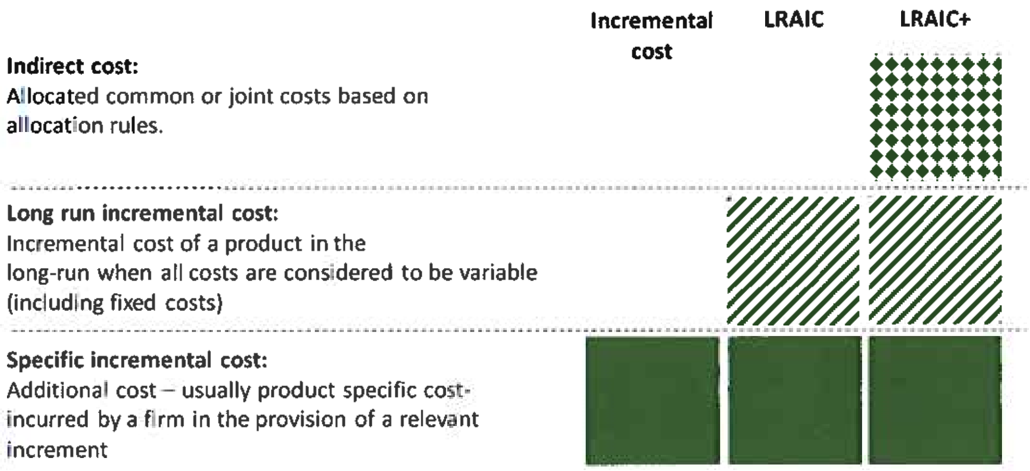
<u>The distinction between direct/ joint and common costs:</u>

a. Direct costs are those costs that are directly attributable to the provision of a specific service; and
b. Common costs are costs that cannot be directly attributed to any specific services and joint costs refer to costs incurred when the production of one product simultaneously involves the production of one or more other products.

In line with its Competition Guidelines, the Authority has considered three relevant cost standards that are illustrated in **Figure 5** below:

[61] Case C-333/94P *Tetra Pak v. Commission* [1996] ECR I-5951.

Figure 5 Overview of the considered cost standards



Source: TRA analysis

78. **Incremental (or avoidable) cost**: the incremental cost of a product is the additional cost incurred by a firm in the provision of a relevant increment (typically the total volume of output of the relevant product). Thus, it refers to product-specific costs. Formally, the incremental cost of a product is the difference between the total cost incurred by the firm when producing all products, including the product under analysis, and the total costs of the firm when the output of the individual product is set to zero.

79. **Long-run average incremental cost (LRAIC[62])**: the per unit version of the Long-run incremental cost (LRIC): the incremental cost of a product in the long-run when all costs are considered to be variable (i.e., both fixed and variable costs). Joint and common costs are not included because they are not considered incremental to the production of any one service. The incremental cost of producing the current output of a particular product is calculated and then the LRAIC is determined by dividing by the volume of output.

[62] The Authority notes that in certain cases LRIC is defined as a unitary cost specific to a product while the LRAIC corresponds to a unitary cost for a wider scope of products. The Authority has considered in its analysis the LRAIC as the unitary version of the LRIC, in line with its Competition Guidelines.

80. **LRAIC+ (also referred to as LRAIC EPMU)**: the LRAIC+ of a specific service is the average incremental cost of that service plus a proportion of the relevant common and joint costs. EPMU stands for "equi-proportional mark-up" and is normally determined based on the relative size of the LRIC of the service relative to other services to which the common and joint costs must be allocated.

81. When determining the relevant costs to consider in this case, the Authority has identified the following elements as being those cost items incurred by Batelco for the provision of its home broadband fibre-based products:
    a. The network costs that include access, core and transmission network and international connectivity;
    b. The cost of goods sold (below 'COGS') that includes the Customer Premise Equipment (below 'CPE') and its installation;
    c. The retail costs that include the acquisition and retention cost, the marketing cost, the distribution cost, the provision for bad debt, the billing and system costs; and
    d. The overheads which include the shared functions and assets between the provision of broadband and other services.

The Authority has reviewed the nature of these costs for the purpose of assessing whether each should be classified as a direct or indirect cost. This review is summarized in **Table 1** below:

Table 1 List of relevant costs

Type	Cost stack	Main Driver	Variable	Fixed	Direct	Indirect
Network cost	*Access network*	Number of FttH connection	X	X	X	
Network cost	*Transmission and core network*	Number of Point of Presence and overall volume of traffic		X	X	X
Network cost	*Inet Platform*	International Data Traffic	X	X	X	X
Network cost	*International uplink cable*	International Data Traffic	X		X	
Cost of good sold	*Customer Premise Equipment*	Number of FttH connection	X		X	
Retail cost	*Acquisition and retention cost*	Number of FttH subscribers	X		X	
Retail cost	*Marketing cost*	Number of FttH subscribers	X	X	X	X
Retail cost	*Distribution cost*	Number of FttH subscribers	X	X	X	X
Retail cost	*Provision for bad debt*	Number of FttH subscribers	X		X	
Retail cost	*Billing and system cost*	Number of subscribers – incl other services	X	X	X	X
Overhead	*General functions, office and other common cost*					X

Source: TRA analysis

82. Due to the nature of the relevant costs, the Authority determines it is appropriate to use two cost standards when assessing whether Batelco's pricing might be predatory: the LRAIC[63] which is comprised of all the direct costs (both variable and fixed) and the LRAIC + which corresponds to the LRAIC with in addition the relevant indirect costs. The Authority is satisfied that such approach is consistent with its Competition Guidelines[64].

83. The purpose of using two cost standards is to conduct two tests:

a. In its first test, the Authority therefore compares Batelco's pricing with the LRAIC. If the pricing is below LRAIC, then "the company engaging in such behaviour would need to provide a justification to rebut a presumption of predatory pricing."[65]

b. In its second test, the Authority compares Batelco's pricing with the LRAIC +. If the pricing is below the LRAIC+ but above the LRAIC then "further evidence would be required on the intended and/or actual impact of such pricing on rivals before a conclusion could be reached"[66].

The methodology and the underlying principles that have guided the Authority's predatory pricing analysis are described in the Annex to this Decision (Annex 1).

84. From its analysis, the Authority concludes that Batelco is not engaging in predatory pricing. Accordingly, the Authority considers that this case does not meet the requirements for the establishment of abuse under Article 65 of the Telecommunications Law and Section 11.1 of the ISP Licence.

I. *Meet the Competition Defence*

85. In its letter of 17 October 2019,[67] Batelco refers to an undocumented passage from Professor Whish's book 'Competition Law' by which it seems to infer that its conduct should be

[63] For the avoidance of doubt, the Authority clarifies that it has calculated the LRAIC as the unitary version of the LRIC.
[64] N. 16 above at para. 184.
[65] *Ibid.*
[66] *Ibid.*
[67] N. 10 above.

excusable on the basis that it sought to compete on price by "pricing aggressively in order to attract new customers and retain existing ones".[68]

86. While the Authority recognises that even dominant firms should be able to 'meet the competition', that defence has its limitations if meeting the competition means that the dominant firm has to cut prices below the relevant cost benchmark.[69] As was stated by the General Court in France Telecom SA v. Commission:

> "It must be pointed out first of all that the Commission is in no way disputing the right of an operator to align its prices on those previously charged by a competitor. It states in recital 315 of the decision that '[w]hilst it is true that the dominant operator is not strictly speaking prohibited from aligning its prices on those of competitors, *this option is not open to it where it would result in its not recovering the costs of the service in question*
>
> *omissis*
>
> [Wanadoo interactive] cannot therefore rely on an absolute right to align its prices on those of its competitors in order to justify its conduct. Even if alignment of prices by a dominant undertaking on those of its competitors is not in itself abusive or objectionable, it might become so where it is aimed not only at protecting its interests but also at strengthening and abusing its dominant position."[70]

87. It is therefore important to point out that Batelco's right to protect itself is not an absolute one but one that is curtailed by the special responsibility that dominant firms are tasked with.

88. This notwithstanding, the Authority's investigation did not yield any evidence of Batelco's intent of a plan to eliminate or weaken competition in the market. In other words, the Authority has not uncovered any evidence purporting to show any predatory objective by Batelco.

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[68] *Ibid.*
[69] G. Niels. H. Jenkins & J. Kavanagh, *Economics for Competition Law*, 1st ed. at page 211.
[70] Case T-340/03 at paras. 176 and 187, emphasis added.

J. Conclusion

89. The overall conclusion here is therefore that, on the evidence available, and on the basis of its own analysis, the Authority concludes as follows:

    a. Batelco, from an *ex post* perspective, enjoys a position of dominance in the relevant product market for fixed (wired) broadband products offered in the Kingdom of Bahrain (bar Amwaj);

    b. Batelco's level of charges for its fibre broadband portfolio, including its BTL Packages and its new retail offers introduced in September 2019 would appear to allow it to recover the costs it incurs in providing these services, at least over the current period. While the Authority's analysis shows that these margins could, all else the same, become negative towards the end of the period considered, this is not sufficient to conclude that Batelco's pricing is currently anti-competitive;

    c. Consequently, Batelco did not abuse its position of market power contrary to the provisions of Article 65(b)(1) and Section 11(1)(b) of the ISP Licence;

    d. Accordingly, it does not result to the Authority that Batelco's conduct constitutes a severe breach of the law and/or the licence;

    e. It therefore follows that the first condition for the issuance of an Emergency Order has not been satisfied and as such there is no compelling reason: (i) to consider whether the second limb (serious and irreparable harm) is satisfied; and (ii) for the issuance of an Emergency Order against Batelco;

    f. As such the Complaints are hereby rejected.

DECISION NO. 4 OF 2020 IN RELATION TO THE COMPLAINTS FILED BY STC BAHRAIN AND ZAIN BAHRAIN AGAINST BAHRAIN TELECOMMUNICATIONS COMPANY B.S.C. FOR AN ALLEGED BREACH OF ARTICLE 65 OF THE TELECOMMUNICATIONS LAW INCLUDING A REQUEST FOR AN EMERGENCY ORDER

ANNEX 1

This Annex sets out the principles of the Authority's methodology to assess whether Batelco's pricing is predatory.

The data sources

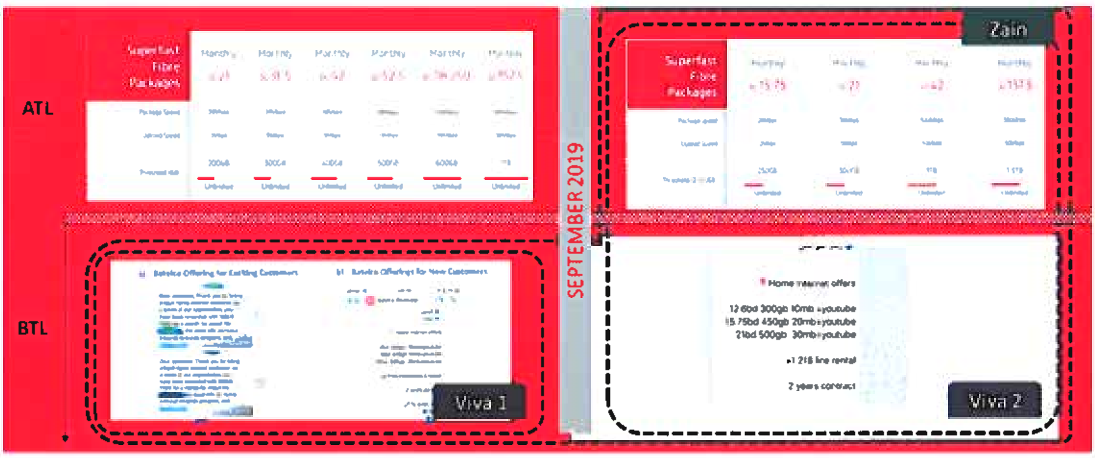
The Authority's analysis is mostly based on the data provided by the Complainants and Batelco.

1. The Authority's analysis relies most critically on three elements:
    a. The scope of the relevant test (i.e., the products across which the price – cost test is carried out);
    b. The relevant timeline over which the test is conducted; and
    c. The expected evolution in customer numbers and data usage on the relevant products.
2. These elements are first discussed in the next paragraphs, before elaborating the rest of the analysis.

The scope of the relevant products

3. STC and Zain's complaints cover both of Batelco's BTL and ATL home broadband fibre based packages as illustrated in the Figure 6 below.

Figure 6 The scope of affected products covered in STC and Zain's complaints



Source: TRA analysis

4. The scope of relevant products includes all the Batelco's fibre-based home broadband packages advertised as of the date of the first STC complaint – i.e. as of the 29th of May 2019. Batelco has provided the Authority with the list of these package, with this being replicated in Table 2, below (hereafter known as the "P – Packages"):

Table 2 List of P - Packages based on Batelco's 22nd of August submission

		P1[71]	P2	P3	P4	P5	P6	P7	P8	P9
Monthly charge	*BD/month*	10	12	15	20	30	40	50	75	150
Speed	*Mbps*	10	10	14	20	30	40	80	100	500
Capacity	*GB*	70	100	140	200	300	400	500	600	1000
Launch	*date*	Mar-17	Mar-17	Jun-17	Jun-15	Aug-16	Mar-16	Aug-16	Mar-16	Aug-16

Source: Batelco submission ref GCL/160/19

5. As highlighted in Zain's complaint and as set out in Par 1, the Authority also notes that Batelco, in September 2019, updated its existing packages. These updated packages are therefore also included in the scope of the analysis and listed in Table 4, below (hereafter known as the "P* -Packages"). The Authority considers it is reasonable to include all these packages in its analysis, as the complaints have referred to the totality of Batelco's residential fibre broadband offers available to customers as at the date of the complaints.

[71] The Authority notes that according to Batelco, the P1 Package may also be provided over copper. The Authority has excluded the contribution of copper-based subscribers from its analysis.

Table 3 List of P* - Packages Based on Batelco's website as of September 2019

		P*3	P*4	P*6	P*9
Monthly charge	*BD/month*	15	20	40	150
Speed	*Mbps*	20	30	100	500
Capacity	*GB*	250	300	1000	1500
Launch	*Date*	Sep-19	Sep-19	Sep-19	Sep-19

Source: Batelco website

6. The Authority notes that since updating its packages in September 2019, Batelco has migrated approximately ✂ subscribers towards the new packages.

7. It is also noted that the scope of the analysis is limited to the provision of the broadband services, therefore additional services such as Netflix or PSTN line rental are not included.

8. The relevant products included in the Authority's analysis therefore include both ATL and BTL products. Estimating the impact of the BTL offers on the profitability of Batelco's product set is challenging, because these offers focus on offering consumers greater data availability (such as free usage of OTT platforms), rather than on offering consumers lower prices for Batelco's standard products. As such, the impact of these offers on the profitability of the product set will depend on how much extra usage is created as a result of a consumer purchasing a BTL offer. Given this, the Authority has assumed that the main effect of the BTL practice is to increase the costs Batelco faces for international connectivity. The Authority has used average usage of data that reflects the usage of both ATL and BTL subscribers to capture the effect of the BTL offers in its analysis.

9. In its analysis, the Authority has assessed whether Batelco's pricing is above cost across a full-service portfolio that includes both P and P*-Packages.

The relevant timeline

10. In determining predation, one of the key elements to consider is the 'short term' aspect of the practice. In its first complaint of May 2019, STC indicated that Batelco started engaging in predatory conduct through its BTL offers from November 2018. In their subsequent

complaints, STC and Zain alleged that Batelco continued to engage in such practices, not only on the BTL offers but also on its ATL offers.

11. The Authority has, therefore, in assessing whether Batelco has engaged in predatory pricing for both its ATL and BTL offers, analysed Batelco's pricing over the 12-month period from November 2018 until October 2019. In so doing, the Authority recognises that Batelco's ATL offers available prior to September 2019 (i.e., the P Packages) were not the subject of Zain and STC's complaints. However, the Authority considers that they should be included in the scope of the analysis. This is because as omitting certain range of packages could lead to misleading conclusion. Indeed, it could be the case, for example, of an operator adopting low cost pricing strategy on the most popular range of packages and cross subsidising its costs with premium packages that fall into the same product markets. As such, the Authority in its analysis has assessed whether Batelco's pricing is above costs over a portfolio of packages rather over individual package.

12. Moreover, as indicated in various submissions, Batelco's products are advertised for a 12-month duration. Therefore, examining its pricing over a 12-month timeframe is consistent with Batelco's contractual practices for its home broadband products.

13. Nonetheless, some of Batelco's subscribers commit to a ✂ contract, with these contracts allowing consumers to benefit from an extra data allowance - Batelco refers to such subscription as 'Smart Saver'.

14. Therefore, while it is clear that the period from November 2018 to October 2019 should be included in the scope of the analysis, the Authority has also considered whether analysing pricing only over this timeframe is sufficient to establish predatory behaviour. This is because in assessing whether Batelco's pricing is predatory, it is important to consider whether Batelco is able to recover its incurred costs across the average lifetime of its subscribers.

15. European case law shows that in a similar context, i.e. predatory or margin squeeze cases[72] relating to the fixed Internet market, the relevant timeline considered was set to the average lifetime of a subscriber, which has been found to be between 3 and 4 years. In considering whether that is an appropriate timeframe over which to conduct its analysis, the Authority acknowledges, that the churn rate on fibre-based products is expected to be

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[72] Case COMP/38.784 – *España vs. Telefónica*, Case T-340/03 *France Telecom SA, formerly Wanadoo Interactive SA v Commission*.

lower than that observed for copper-based products. This is because the performance of fibre-based products is typically assumed to be better, thus resulting in lower churn. It is also noted that other parameters should be taken into account such as the stability of the subscribers' basis.

16. To determine the appropriate average customer lifetime to apply in its analysis, the Authority has further studied churn data for broadband services in Bahrain.

17. In so doing, the Authority notes that Batelco launched its fibre-based products in 2013 and has benefited, as the sole provider of such products, from a significant customer acquisition growth. This is shown in Figure 7 below:

Figure 7 Batelco fiber-based subscribers

✂

Source: Batelco APM 2013-2018

18. Based on the periodic data submitted by Batelco, the Authority has assessed the monthly churn rate for its copper and fibre based broadband products.

19. The following graph shows the evolution of the average churn rate, while taking into account the migration of subscribers taking copper (DSL) services to fibre products:

Figure 8 Monthly churn and share of copper vs fibre-based subscription

✂

Source: Batelco periodic data and APM

20. From this data, the Authority notes that the churn of copper-based subscribers was, on average, ✂% between 2010 and 2013 – a period during which fibre products were not yet available. After 2013, the churn rate increased as customers began to migrate to fibre products.[73] As a result, the Authority considers that the churn rate shown in the figure above for the period between 2013 and 2017 is not representative of either copper or fibre based products. However, in 2018, most of the copper-based subscriptions had been

[73] Any migrated account is considered as a net addition, and not a gross addition. As the churn is based on the difference between gross and net addition, then the migrated accounts artificially increase the churn rate.

migrated, and churn was consequentially much lower, at ✂%. This was composed of churn on fibre products of ✂% and churn on copper products of ✂%.

21. Nonetheless, the Authority notes that the 2018 subscriber base may still not be considered stable enough to determine the relevant churn rate and, therefore, the average lifetime of a subscriber. This is because the migration of the copper-based subscriptions is still not complete. Indeed, as was noted in the Telefonica case,[74] only the churn observed among a stable customer base is useful for the calculation of a subscriber's average lifetime.

22. Given this, the Authority has used, in its analysis, the churn rate calculated from a stable base of copper-based subscribers, even though this may not fully reflect the lower churn expected for fibre-based products. It considers this approach is preferable because the customer base of fibre-based subscribers is still not stable, while Batelco's recent price reductions may also lead to abnormal growth in fibre customers during the coming months.

23. As a consequence of the above the Authority proposes to assume that the customer average lifetime is equivalent to 24 to 40 months (for confidentiality reasons the Authority discloses in this public version a range of values of the average lifetime of a customer) (based on ✂% monthly churn rate observed for copper-based products). The Authority is satisfied that this approach is in line with previous European case precedent for similar matters.

24. It is noted that the 24 – 40 month timeline starts in November 2018. This means that the Authority's analysis relies on actual data for 15 months (i.e., from November 2018 to January 2020). This also means that 15 months of this period relate to the time during which Batelco was marketing its P – Packages and 5 months cover the period in which it has had customers on its P and P* - Packages. Post January 2020 analysis relies on forecasts of the demand, cost and revenues. These forecasts are discussed in the following paragraphs.

The evolution of demand in terms of subscribers and data usage

25. The Authority has derived a forecast for Batelco's fibre based broadband subscribers by using the following assumptions:
    a. Actual Volumes reported by Batelco between November 2018 and January 2020;

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[74] Case COMP/38.784 –*España vs. Telefónica,*

b. Thereafter, forecasts derived from a long-term diffusion regression based on 2013-2019 actual volumes;
c. A progressive migration of P- package subscribers towards P* packages, at a rate of ✂% per month. This migration rate is based on observed values between September and November 2019, taking into account that in September 2019 the P*Packages represented ✂% of the existing packages in terms of subscribers.

26. The diffusion model is described as follows:

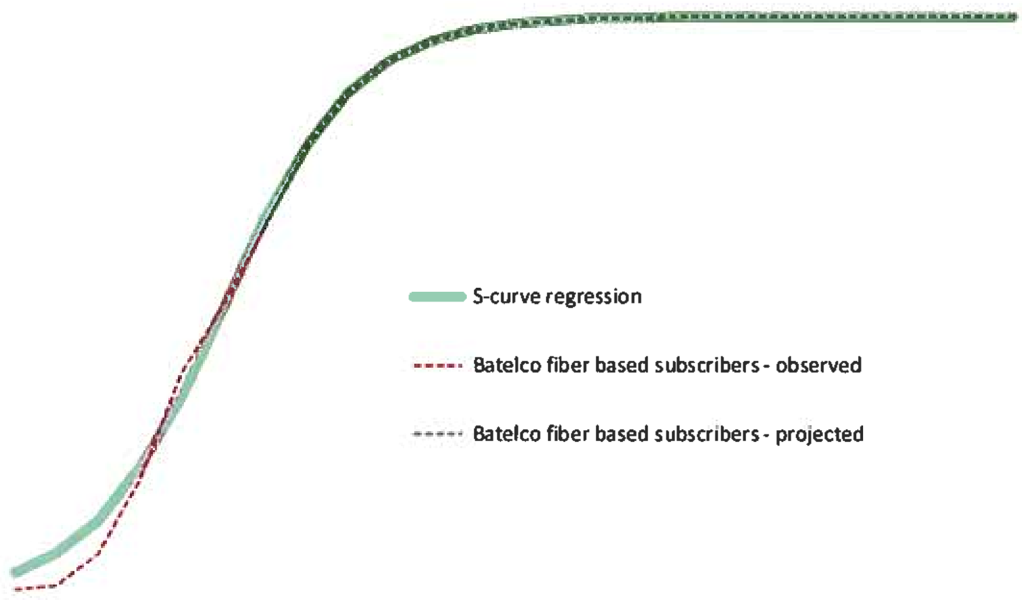
$$n_{it} = \frac{K_{it}}{1 + e^{-(p_{it} + q_{it} t)}}$$

$$\ln\left(\frac{n_{it}}{K_{it} - n_{it}}\right) \equiv y_{it} = p_{it} + q_{it} t$$

27. With:
n(it) = subscribers at time t
p(it) = timing variable
q(it) = growth of diffusion
p(it) and q(it) shift the diffusion function forwards or backwards
K(it) = maximum subscribers = This has been estimated using long term estimate of the addressable market

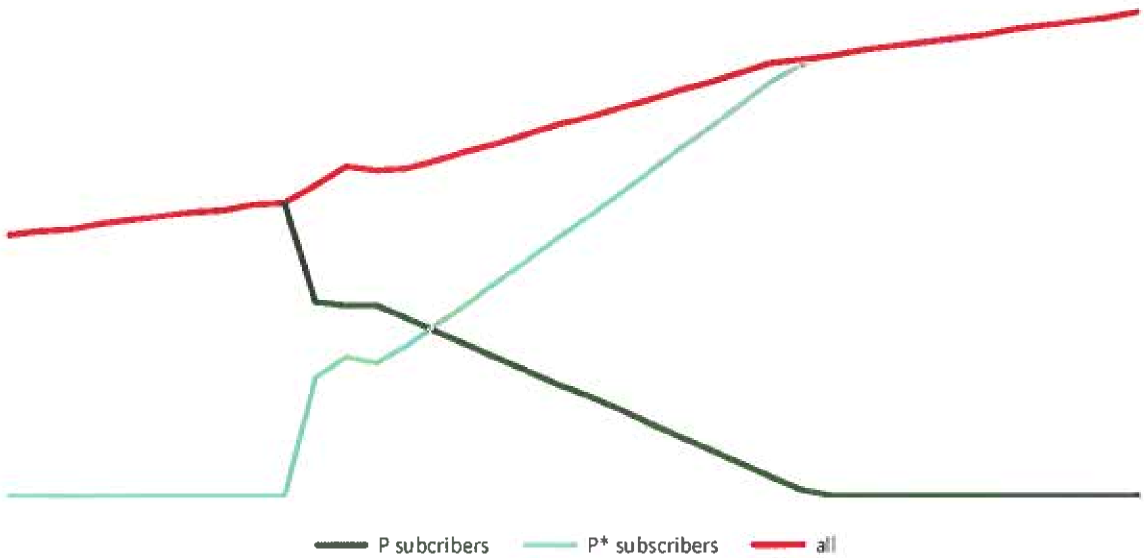
28. The results of the regression are presented below:

Figure 9 Batelco fibre-based subscribers' regression 2013-2037 - Results



29. The Authority has then combined the long-term subscribers' projection with the progressive migration of customers from the P-Packages towards the P*-Packages, to estimate the number of customers on both the P and P* Packages between 2018 and ✂. This is illustrated in Figure 10.

Figure 10 Subscribers forecasts over ✂ months



Source: TRA analysis

30. The Authority has also estimated the average data usage per subscriber. This is because data usage drives some of the costs Batelco will incur. The Authority's forecasts of capacity usage are based on:

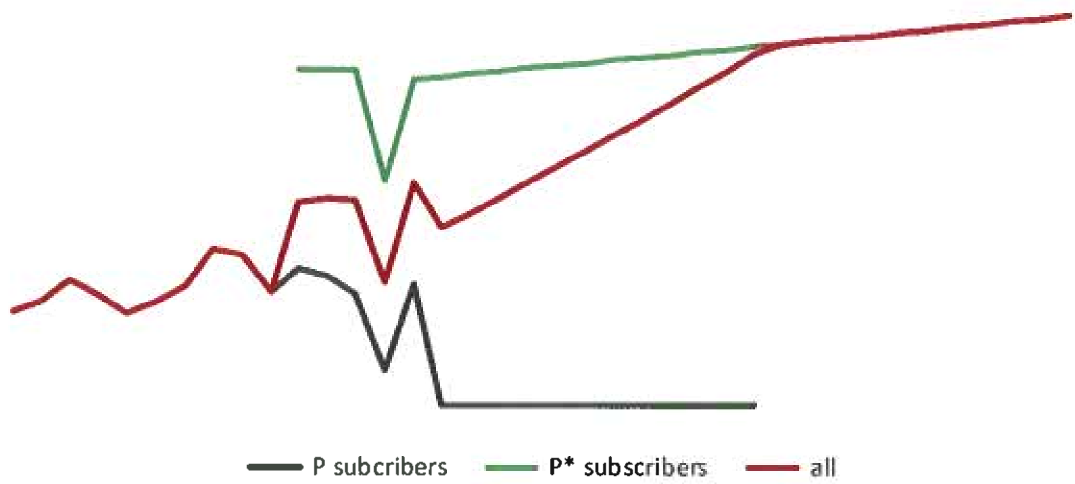
31.

   a. Observed values between November 2018 and January 2020;
   b. An overall monthly increase of ✂% per month – based on the growth observed between November 2018 and January 2020;

c. Product mix[75] invariant within P and P* packages during the period.

32. The Authority's resulting forecasts of capacity usage per subscriber are shown in Figure 11, below:

Figure 11 Average capacity usage[76] per subscriber (GB/sub/month)



Source: TRA analysis

The calculation of the costs incurred by Batelco in offering its fibre broadband packages

33. The following paragraphs describe the Authority's approach to calculate the LRAIC and LRAIC+ of the elements listed in par 81.

[75] The product mix corresponds to the distribution of subscribers across the packages.
[76] The Authority notes seasonal variations between November 2018 and January 2020 that are due to the granularity of the actual data. In the forecasts (post January 2020) such seasonal effect is smoothed out.

The access costs

34. The access network cost covers all the operation and capital expenditures for the network from the customer premise to Batelco's central office. It is considered as a direct cost and is included in both the LRAIC and the LRAIC + calculated by the Authority. Before the separation of Batelco in June 2019, this cost was fully incurred by Batelco as a vertically integrated operator. Following the separation and the implementation of the BNET RO[77] in August 2019, Batelco has instead incurred a cost equivalent to the WBS charges that are listed in the BNET RO.

35. For the period between November 2018 and July 2019, the Authority has estimated the cost of the access network to be equivalent to the WBS charges minus BNET's margin. This approach takes into account the underlying principles applied by the Authority when it determined the appropriate WBS charges to be included in the approved BNET RO. Specifically, it reflects the fact that the Authority acknowledged, in the BNET RO Order, that such charges give BNET the opportunity to earn a return in excess of its cost of capital.[78]

The core and transmission costs

36. According to the 2014 fixed core network bottom-up cost model documentation,[79] Batelco's MPLS network supports the provision of the following services:
    a. broadband (including Inet Broadband, WDSL and bitstream);
    b. voice (PSTN or voice over broadband);
    c. ISDN;
    d. Ethernet-based leased lines (Local MPLS, Global MPLs, NGN CAT/LLCO);
    e. IPTV and VoD;
    f. SDSL/SHDSL lines; and
    g. Batelco's 3G mobile transmission (from the RAN to the media gateway).

[77] Reference Offer of the BNET BSC dated 03 June 2020, Ref: LAD 0619/178
[78] Par 33, Annex 4 of the Reference Offer of the BNET BSC dated 03 June 2020, Ref: LAD 0619/178
[79] Fixed access network bottom-up cost model, Model documentation, Ref: MCD/05/14/051

37. The Authority estimates that the ratio of access to core costs attributed broadband services (including Inet Broadband, WDSL and bitstream) is ✂%.[80] It therefore applies this ratio to the total wholesale access charges / access costs incurred by Batelco during the period November 2018 to October 2019 (i.e. the equivalent of access costs in the BU model) to estimate Batelco's own core network costs (i.e., the costs of network elements not covered by the wholesale service BNET provides to Batelco). The total own network costs are divided by the average number of subscribers during that period to estimate a per subscriber own network cost. This unit cost is then applied to all subscribers for the whole period of the predation test.

38. This does not include international connectivity costs that are discussed in the next section.

<u>The international connectivity costs</u>

39. In providing its fibre broadband services, Batelco also incurs some cost for international connectivity. The Authority understands from Batelco that this cost is made of two elements:
    a. The Inet platform. This is a platform shared between all services that require a connection to the Internet. Batelco has provided the share attributable to the provision of the fibre-based home broadband services. The Authority understands that Batelco's allocation is based on the ✂, with this representing approximatively ✂% of the total IP transit bandwidth as per Batelco's 2017 and 2018 regulatory accounts. The Authority notes that this cost comprises a direct cost component and an indirect cost component. As such the Authority has calculated both the LRAIC and the LRAIC+ of the Inet platform cost. The difference between the two costs is the inclusion of the indirect (shared) cost in the LRAIC+.
    b. The cost of international uplink cable. This is also shared between all the services that require a connection to Internet. Batelco has also provided the share of the cost of this cable attributable to the provision of the fibre-based home broadband service, with this attribution being based on the same allocation rule used for the Inet Platform. Unlike the Inet platform cost, the Authority considers that this cost is mostly a direct cost.

[80] This mark-up is based on the costs calculated with the Access and Core network BULRIC developed by the Authority in 2014.

Finally, the Authority has cross checked these cost estimates against cost information included in Batelco's regulatory accounts and believes these are consistent. The yearly costs provided by Batelco are based on CCA asset values and inclusive of operating costs, depreciation and cost of capital.

The cost of goods sold (COGS)

40. The Authority understands that the COGS are made of two elements:
    - The CPE
    - The installation of the CPE

41. The second item is regulated as it is provided by BNET and amounts to BD20 per installation. Regarding the CPE itself, the Authority acknowledges that the Complainants have assumed the same cost per equipment in their analyses submitted to the Authority. The Authority notes that this assumption is also broadly in line with its 2014 Bottom-Up Cost model.

    The Authority has assumed that it is reasonable to expect that in such context Batelco should incur the same cost for the CPE equipment.

42. The COGS are considered as direct costs; therefore, they are included in both the LRAIC and the LRAIC+ estimates.

The retail costs

43. In response to the Authority's information requests, Batelco has provided a lumpsum cost that covers, as per the Authority's understanding, all relevant retail costs. However, Batelco was only able to provide retail costs for 2017 and so the Authority has calculated an average cost per subscriber, based on the 2016 and 2017 volume of subscribers.

44. The Authority has assumed that this average cost is not likely to substantially vary between 2017 and 2019, and therefore has not proceeded to any make any adjustment to this average for the purpose of this analysis[81].

[81] In addition, sensitivity analyses performed by the Authority have showed that the overall results would not substantially change if the retail cost varies during the considered period

DECISION NO. 4 OF 2020 IN RELATION TO THE COMPLAINTS FILED BY STC BAHRAIN AND ZAIN BAHRAIN AGAINST BAHRAIN TELECOMMUNICATIONS COMPANY B.S.C. FOR AN ALLEGED BREACH OF ARTICLE 65 OF THE TELECOMMUNICATIONS LAW INCLUDING A REQUEST FOR AN EMERGENCY ORDER

45. However, as a cross check, the Authority has compared Batelco's average retail cost with Zain and STC costs. From this cross check, it considers that the amounts provided by each operator are consistent.

46. Although the retail costs are comprised of both direct and indirect cost, the Authority, as a conservative assumption, assumed that all retail costs are direct and therefore has included all such costs in its calculation of both LRAIC and LRAIC+.

The common costs

47. In a similar fashion as the approach adopted in the 2014 Fixed Access Bottom-Up cost Model, the Authority has used a mark-up applied on all the preceding costs to derive Batelco's common cost. The common costs are included in the LRAIC+ estimate only.

The revenues

48. The Authority understands that for each package, Batelco collects a Monthly Recurring Charge (below "MRC") and a Non-Recurring Charge (below "NRC"). These charges are shown below in Table 4 and Table 5 (based on Batelco's 22nd of August submission and website as of September 2019):

Table 4 MRC and NRC per Package Based on Batelco's 22nd of August submission

		P1	P2	P3	P4	P5	P6	P7	P8	P9
MRC	*BD/month*	10	12	15	20	30	40	50	75	150
NRC	*BD*	10	10	10	10	10	10	10	10	10

Source: Batelco, TRA analysis

Table 5 MRC and NRC Package Based on Batelco's website as of September 2019

			P*3	P*4	P*6	P*9
MRC	*BD/month*		15	20	40	150
NRC	*BD*		10	10	10	10

Source: Batelco, TRA analysis

49. In addition to the MRC and NRC, Batelco may collect additional revenues from PSTN line rental or Value Added Services such as Netflix. The Authority has excluded those from the scope of this analysis. For the avoidance of the doubt, the Authority considers that the relevant revenues are the sum of MRC and NRC only.

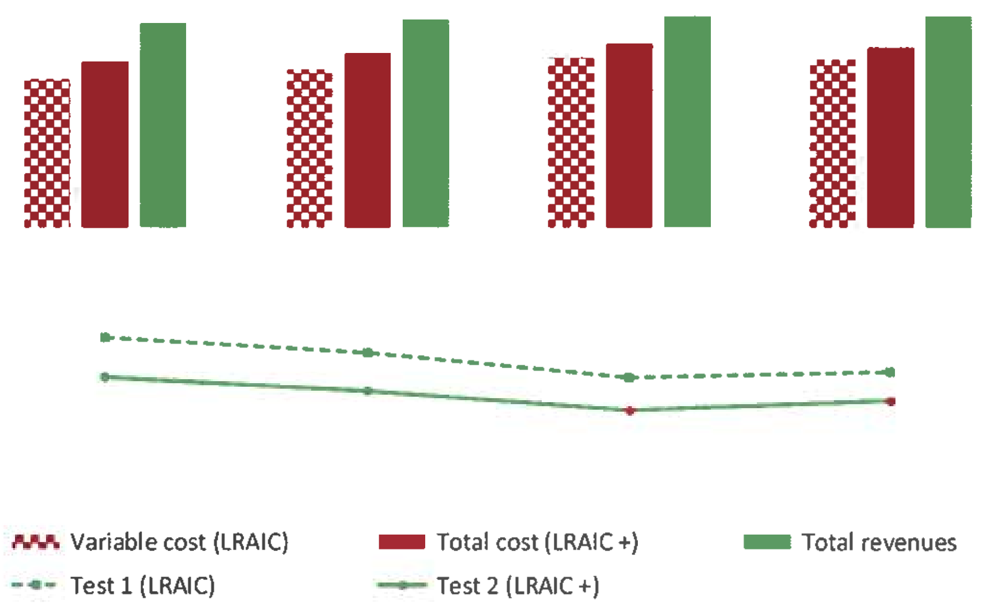
50. The Authority has then assumed that these prices will remain constant over time. This is consistent with the purpose of the Authority's analysis being to determine whether Batelco is able to recover its incurred costs over the course of a customer lifetime.

The results

51. The results of the Authority's analysis are presented below with a breakdown between P and P*- Packages. and then both P and P*- Packages together.

P – Packages results

Figure 12 Results for P- Packages (BD/sub/month)

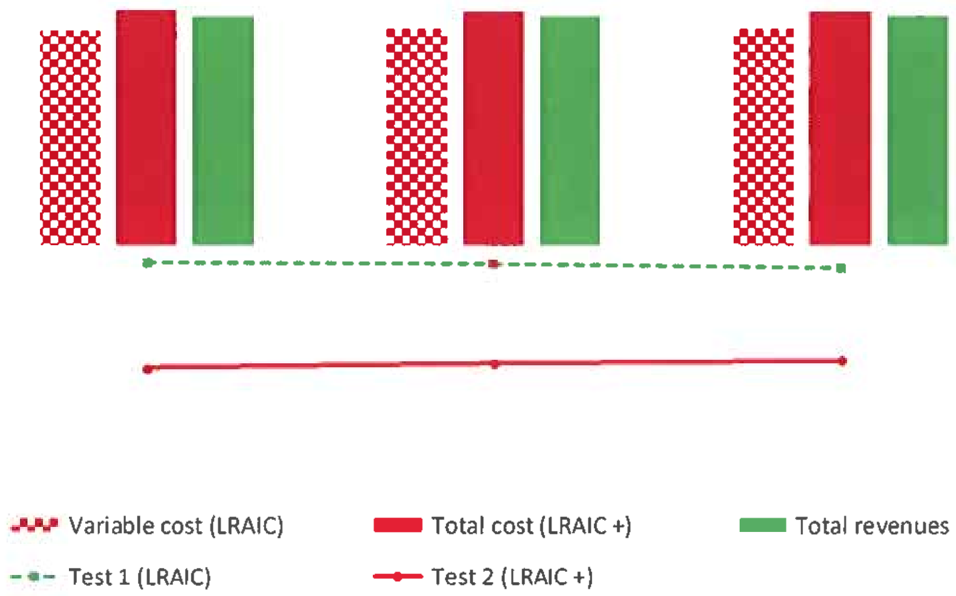


Source: TRA analysis

52. The Authority notes that all the margins are found to be positive across the relevant timeline (comparison with LRAIC and with LRAIC +) for the P – Packages.

P*- Packages results

Figure 13 Results for P*- Packages (BD/sub/month)



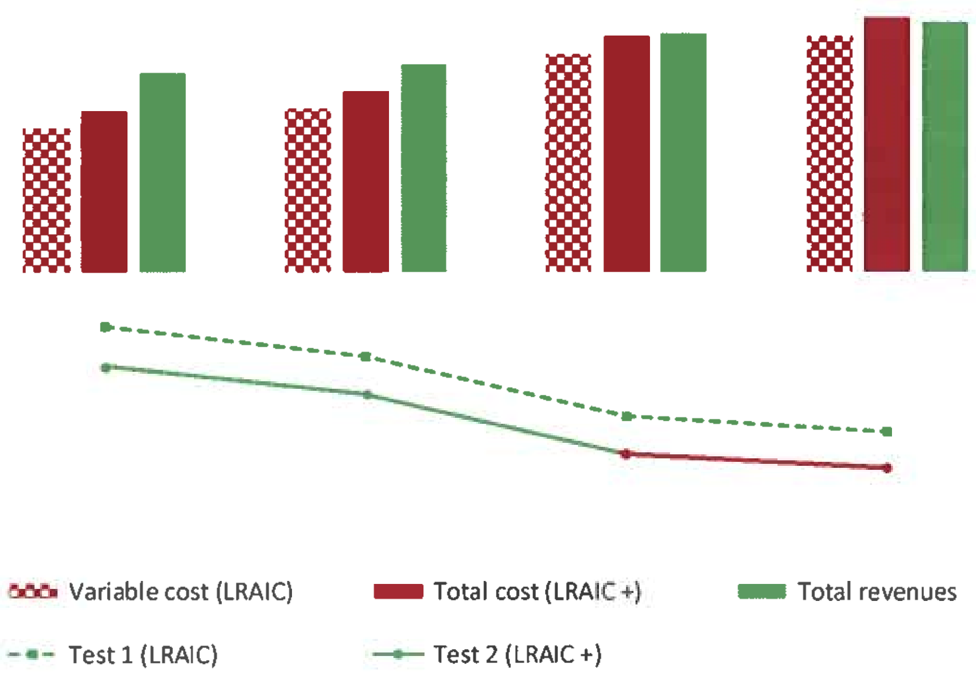
Source: TRA analysis

53. The Authority notes that:
    a. The P*-Packages pricing is above the LRAIC;
    b. The P*-Packages pricing is below the LRAIC+ with an average margin of ✂%

DECISION NO. 4 OF 2020 IN RELATION TO THE COMPLAINTS FILED BY STC BAHRAIN AND ZAIN BAHRAIN AGAINST BAHRAIN TELECOMMUNICATIONS COMPANY B.S.C. FOR AN ALLEGED BREACH OF ARTICLE 65 OF THE TELECOMMUNICATIONS LAW INCLUDING A REQUEST FOR AN EMERGENCY ORDER

P and P*- Packages results

Figure 14 Results for P and P*- Packages (BD/sub/month)



Source: TRA analysis

54. The Authority notes that the results for the P-Packages and P*-Packages are added together, then the margins are positive throughout except the margin on total costs in the final year. The Authority also observes that the introduction of the P*- Packages results in lower margins overall.

55. Nevertheless, when drawing its conclusion, the Authority is of the view that more weight should be placed on actual data (2018 until beginning of 2020) – although margins may narrow towards the end of the period based on the Authority's forecast (2021).

Conclusion on whether Batelco has priced its fibre broadband packages below cost

56. In light of the results, the Authority determines that, on the basis of the evidence available to it and the analysis it has undertaken, that Batelco does not appear to have engaged in pricing below cost. As such, this is not consistent with a case of predatory pricing.

57. When analysing the results, the Authority has performed various scenarios and sensitivity analyses on assumptions such as the average usage per subscriber. The findings of such analyses have not led to a change in its conclusion.

58. The Authority observes that the pricing Batelco adopted between November 2018 and January 2020, if unchanged, should allow Batelco to recover its variable (LRAIC) costs between November 2018 and December 2021, with a ✂% margin and its total (LRAIC+) costs, during the same timeframe, with a ✂% margin.

59. The Authority notes that the new pricing (P* Packages) seems to not allow Batelco to recover its total cost over the considered timeframe since the observed margin is negative (✂%). Nevertheless, Batelco does still appear able to recover its variable costs. However, on its own, the Authority does not consider that this is sufficient to sustain a case of predatory pricing against Batelco given that its overall margins, across its full-service portfolio, are positive.

60. Thus, whilst Batelco's margins have strongly decreased since September 2019, this does not suffice to establish a case that it has engaged in predatory behaviour.