



Decision No. 11 of 2020

**Complaint against Batelco under Article 72 of the
Telecommunications Law
Comparative Advertisement**

Ref: LAD/0720/164

23 July 2020

Introduction

This Decision applies to Bahrain Telecommunications Company BSC ("Batelco"), a licensed telecommunications company registered in the Kingdom of Bahrain, providing mobile and fixed services in addition to other licensed services. This Decision:

1. establishes that Batelco has failed to meet the conditions set out in Article 8 of the Consumer Protection Regulation ("the Regulation") for the permitted use of comparative advertising practices;
2. establishes that the Advertisement (defined below) falls within the scope of Article 6(1) of the Regulation; and
3. orders Batelco to withdraw the Advertisement.

Unless the context otherwise requires, capitalised terms that are not otherwise defined in this Decision have the same meaning prescribed by the Telecommunications Law and / or the Consumer Protection Regulation (as applicable).

The Complaint

The Telecommunications Regulatory Authority ("the Authority") is in receipt of a complaint submitted by stc Bahrain BSC (closed) ("stc Bahrain") on 21 June 2020 against Batelco regarding a video advertisement of its 5G service posted on Batelco's Instagram page on 16 July 2020 ("the Advertisement"), alleging that it breaches Articles 6 and 8 of the Consumer Protection. stc Bahrain therefore invoked Article 72 of the Telecommunications Law. Screenshots of the Advertisement are attached to this Decision (Annex 1).

stc Bahrain claimed that the scene (Figure 2) in the Advertisement is an implicit reference to stc Bahrain because of the usage of colours similar to that of its own branding and colour scheme. stc Bahrain argued that an Advertisement does not have to explicitly mention the name of a competitor to be considered comparative, but that the insinuation of such was enough. stc Bahrain argued that the average reasonable consumer would understand from the Advertisement that Batelco is making reference to stc Bahrain by using its colour scheme. This is evidenced, according to stc Bahrain, in the following snapshots of comments left on Batelco's post of the Advertisement on its Instagram page:

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stc Bahrain submitted that:

- Batelco's claim that it is the "1st" in 5G services across the Kingdom is not verified or substantiated;
- By not substantiating the claims it is making, the Advertisement is considered misleading within the meaning of Article 6 of the Regulation; and
- Batelco is in breach of the Regulation as it failed to meet the conditions set out in Article 8 for the permitted use of comparative advertising practices.

Batelco's reply

The Authority informed Batelco of the Complaint by way of letter dated 22 June 2020 and requested the same to provide comments on stc Bahrain's submissions pursuant to the Authority's Dispute Resolution Guidelines published on 25 August 2014. The Complaint was attached to the Authority's letter.

On 26 June 2020 Batelco replied to the Authority's request by submitting a non-confidential version of its response ("the Reply"). In the Reply, Batelco refuted stc Bahrain's allegations and denied that it had engaged in any form of misleading advertising or unlawful comparative advertising, "or that it has otherwise breached any applicable statutory regulations or decisions in this regard".

Comparative Advertising

Batelco stressed that the Complaint "contains no substantive or objective evidence or reasoning but is almost entirely based upon stc Bahrain's own subjective opinions and inferences". Batelco stated that the Advertisement does not draw any comparison – directly or indirectly – between any Batelco product / service and any other Licensed Operator's product / service. Batelco argued that the purpose of the part of the Advertisement at issue was "merely to highlight, to the public, the importance of verifying any claim that might be made before acting upon it".

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Choice of colour

According to Batelco, the Advertisement makes no reference whatsoever to stc Bahrain in terms of brand, logo, or design, and that the shade of colour used was meant to create a contrast against Batelco's usual shade of red. Batelco further argued that using different colours in advertisements is an established and legitimate means of drawing distinctions between different points, and that the mere use of a shade other than red in this instance does not constitute Comparative Advertising as defined in the Regulation. Batelco referred to specific text in the Authority's Decision No 4 of 2015¹ and argued that the Authority's reasoning applies equally to the choices of colours (as it does apply to choices of words). Batelco concluded this argument by stating that it does not hold intellectual property rights for the colour red, and that stc Bahrain does not hold such rights for colours which it may choose to use from time to time.

Comments on Instagram

Batelco claimed that the only evidence other than stc Bahrain's "own opinion" which it does purport to submit are a total of six unsubstantiated comments posted on Instagram, which, in Batelco's opinion, is not evidence of anything and does not constitute as proof of some general public perception as to the meaning of the Advertisement. Batelco argued that the fact that stc Bahrain was only able to compile six comments only actually points to the exact opposite of what is claimed i.e. it indicates that the wider public did not form an association between the segment of the Advertisement and stc Bahrain.

Batelco therefore refuted all claims made by stc Bahrain and stated that the Advertisement is not a Comparative Advertisement as defined under the Regulation, and consequently is not subject to the conditional criteria laid down by Article 8 of the Regulation.

5G claim

Batelco argued that the statement "1st + 5G = Batelco" refers to the fact that Batelco was the first Licensed Operator to launch a 5G network in the Kingdom on 3 June 2019. Because of this, Batelco argued that there is a "certain prestige" in being the first to do something, and that Batelco – having been the first in 5G – is entitled to promote itself on that basis.

¹ The circumstance that other Licensed Operators use a similar wording to promote their products and services in their respective advertisements does not really affect the legal assessment of the Advertisement and, as such, has to be regarded as irrelevant.

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Legal Analysis

The Authority considered whether the clips in the Advertisement fall within the meaning of "Comparative Advertising" as defined in the Regulation, and if so, whether it satisfies the conditions set out in Article 8 of the Regulation.

Comparative Advertising

Comparative advertising is, as its name suggests, advertising that compares a product or service with the equivalent offering of a competing Licensed Operator. This is usually done to highlight limitations of the competing offering and demonstrates the promoted offering's superiority. Indeed, the Regulation defines Comparative Advertising as *"Advertising in which one Advertiser draws a comparison between an Applicable Product or Service and that of another Licensed Operator"*.

A Licensed Operator may draw comparison with the competing offering:

- a. directly – by explicitly naming a competitor, or displaying a competitor's offering e.g. use of images of a rival product; and / or
- b. indirectly or by implication – without naming a competitor but making inferences to the same, making it clear to the audience who or what the comparison is with (irrespective of whether they are explicitly identified).

The Authority now turns to the question of whether or not the Advertisement is considered a Comparative Advertisement within the meaning provided for in the Regulation.

Is the Advertisement a Comparative Advertisement?

Batelco argued that the Advertisement cannot be considered a Comparative Advertisement within the definition provided for in the Regulation because it does not draw any comparison, directly or indirectly, between any Batelco product / service and any product / service of another Licensed Operator. With respect, the Authority disagrees with Batelco's interpretation of the definition of Comparative Advertisement. Advertisers do not need to explicitly identify another Licensed Operator or the product that they are comparing with to be subject to the conditions of Article 8 of the Regulation. Whether a Licensed Operator or its products are identifiable (either directly or indirectly) will depend on the advertisement, claims, audience, and the context. Contrary to Batelco's argument that the Advertisement *"makes no references whatsoever to [stc Bahrain] in terms of brand, logo, or design"* the Authority does find references (and striking similarities) between the clips in question and stc Bahrain's own branding. While the Authority agrees with Batelco that stc Bahrain does not own intellectual property rights over such colours (and vice

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versa), the Authority understands that colours used in branding create associations with businesses in the minds of consumers, therefore creating an impact in terms of meaning and perception both consciously and subconsciously. The Authority would argue that Batelco could have opted for any other colour so that it could *"draw distinctions between different points"* as it claimed. Instead, Batelco's marketing team opted for the colours which stc Bahrain regularly uses for its own branding and advertising purposes. The Authority does not believe that Batelco's marketing team coincidentally opted for the exact colours that stc Bahrain uses for its own branding and advertising purposes.

Further to this, Batelco argues that stc Bahrain was only able to provide six comments posted under the Advertisement, and that *"six unsubstantiated comments, out of hundreds, is not evidence of anything and certainly does not constitute proof of some general public perception as to the meaning of the Advertisement"*. Batelco also argued that the fact that stc Bahrain was only able to produce six comments indicates *"that the wider public did not form an association between the segment of the Advertisement and [stc Bahrain]"*. The Authority cannot disagree more with this logic. Advertisements which do not directly identify a specific competitor can still do so implicitly. In markets where competitors are few, it can be clear to consumers who or what the comparison is with, irrespective of whether they are explicitly identified. If it is possible to name at least one competitor, whether or not they are stated in the Advertisement, then the claim will be considered a comparison with an identifiable competitor(s)².

In the context of comparative advertising, the Authority also considers "leading" claims to be, by nature, seen as a comparison with other competitors in the market. This means that competitors are likely to be identifiable to consumers through claims such as "Bahrain's first...", "the fastest..." or in this case "1st + 5G". This is especially the case if a market is small and dominated by few players. If so, the intended competitor(s) is likely to be very clear despite not being named. At the time the Advertisement was posted, stc Bahrain was the only other Licensed Operator providing 5G services to consumers in the market. It is only reasonable therefore to deduce that any comparison (whether made directly or indirectly) would be made with stc Bahrain's 5G offerings. All these factors combined together strongly suggest that, in this circumstance and in relation to the Advertisement, Batelco has adopted the practice of comparative advertising. The Authority therefore considers the Advertisement to fall within the meaning of Comparative Advertisement in the Regulation.

² The test employed by the Authority in this regard is consistent with that of the Advertising Standards Authority of the United Kingdom: <https://www.asa.org.uk/advice-online/comparisons-verifiability.html>

Does the Advertisement meet the conditions set out in Article 8 of the Regulation?

Having established that the Advertisement does indeed fall within the meaning of Comparative Advertisement as defined in the Regulation, the Authority sees it fit to give central focus to Article 8 of the Regulation. Article 8 sets out all the conditions which must be met by an Advertiser for the permitted use of comparative advertising practices, and they are that:

- a. the Advertisement is not a Misleading Advertisement;
- b. the Advertiser distinguishes its offerings by highlighting real benefits, innovations, and genuine distinguishing factors;
- c. the Advertisement does not unfairly criticize, discredit, or disparage a competitor or its products and / or services in the Advertisement; and
- d. the Advertiser does not issue Advertisements that unfairly denigrate a competitor's quality of service, so as to reduce public confidence in the products and / or services offered by that other competitor.

a. the Advertisement is not a Misleading Advertisement

Article 6(1) of the Regulation requires Advertisers to ensure that their Advertisements are *"fair, truthful and accurate, and shall not, directly or by implication, mislead or confuse any Consumer"*. The Authority notes that there appears to be no apparent reliable source from which Batelco concluded in the Advertisement that its subscribers will benefit from it being "the first" in the following categories: 1. 5G, 2. reliability, 3. service, 4. coverage, 5. Fibre users, and 6. Internet. The only justification Batelco provides is the claim that *"chronologically, Batelco was the first Licensed Operator to launch a 5G network in the Kingdom, on 3 June 2019"*. Batelco, however, did not provide the Authority with any evidence to substantiate this claim, nor did it justify this claim in the Advertisement itself. The Authority believes that in making such claims the Advertisement could be capable of leading a significant portion of consumers to believe that Batelco's 5G network performs better than others in certain aspects – when this might not be the case. Such claims are considered, to the very least, inaccurate and unsubstantiated. In order to make a comparison verifiable, advertisements must include or direct a consumer to sufficient information to allow them to understand the comparison. Batelco has not provided the Authority with any evidence which justifies that it is indeed considered "the first in reliability", "the first in 5G service" or the like. The Authority will generally uphold complaints if seemingly objective comparative claims, including superiority claims, are not supported by comprehensive documentary evidence. The Authority finds that, because reasonable consumers would

understand Batelco's claims in the Advertisement to be based on objective measures (which have not been substantiated), the claim as it would be understood is likely to mislead.

Finally, the Authority strongly discourages service providers from designing advertisements that are capable of misleading consumers by attracting them not based on the actual merits of a particular product / service, but rather on unfounded claims against a competitor the advertisement is suggesting.

b. the Advertiser distinguishes its offerings by highlighting real benefits, innovations, and genuine distinguishing factors

Comparisons, whether they are made directly or indirectly, should be between products meeting the same need or intended for the same purpose. This is allowed as long as the practice is based on objective criteria³, is presented in a manner that is unlikely to mislead, and does not discredit or denigrate another Licensed Operator. Comparisons must be fair and not give rise to a likelihood of a consumer being misled. A claim that any product is superior to others can only be made if there is clear evidence to support the claim. Advertisers are encouraged to compete fairly and distinguish their offerings by highlighting real benefits, innovations, and genuine distinguishing factors without discrediting or unfairly criticising competitors. Furthermore, any comparison should be fair, accurate and address either comparable offers or comparable services. The Authority does not believe that Batelco distinguished its 5G offering fairly or accurately, in the sense that it pointed out "differences" (which, as mentioned above, have not been substantiated) and then proceeded to disparage stc Bahrain in the process. The Authority therefore does not believe that Batelco has satisfied this condition.

c. the Advertisement does not unfairly criticise, discredit, or disparage a competitor or its products and / or services in the Advertisement

Although the Regulation permits comparative advertising, advertisements must not unfairly criticise, discredit or denigrate another product / service of a competing Licensed Operator, or the Licensed Operator itself. The conduct of Advertisers towards each other should be of the highest professional standard of fair competition and respect. The Authority finds that Batelco expressed an opinion which alluded to stc Bahrain's supposed dishonesty in the Advertisement, which was ultimately meant to discredit and disparage stc Bahrain. The Authority therefore does not believe that Batelco has satisfied this condition with respect to the Advertisement.

³ Objective criteria relates to one or more material, relevant, verifiable and representative feature of a product or service, which may include price.

Not

d. the Advertiser does not issue Advertisements that unfairly denigrate a competitor's quality of service, so as to reduce public confidence in the products and / or services offered by that other competitor

Advertisers should not denigrate another Licensed Operator's quality of service for example, so as to reduce public confidence in the products / services offered by said Licensed Operator. Claims that go beyond a robust and objective comparison of products / services will in most cases be considered denigratory. By making the hostile statement *"don't trust everything you see... even salt looks like sugar"* Batelco was clearly criticising stc Bahrain and / or its products / services in a manner that went beyond the robust and objective comparison allowed for by the Regulation, so as to reduce public confidence in the quality of stc Bahrain's products and services. Batelco has therefore failed to satisfy this condition under Article 8 of the Regulation.

Conclusion

After reviewing the Complaint and the information available to it, the Authority believes that the Complaint is justified and that:

- a. the Advertisement falls within the definition of Comparative Advertisement;
- b. the claims made in the Advertisement fall within the scope of Misleading Advertisement and therefore in breach of Article 6(1) of the Regulation; and
- c. Batelco has not satisfied the conditions set out in Article 8 of the Regulation.

The Authority believes that the Advertisement falls within the definition of Comparative Advertisement because, contrary to Batelco's arguments, it does draw comparisons and striking similarities between itself and that of stc Bahrain and its own 5G offering. The Authority believes that the claims Batelco makes in the Advertisement are not supported by or substantiated in any reliable source, and are therefore capable of misleading a significant portion of consumers to believe that Batelco is indeed "the 1st" in several categories, as it claims. Further to this, the Authority does not believe that Batelco satisfied any of the conditions set out in Article 8 of the Regulation for the permitted use of Comparative Advertising practices.

Decision

In light of the above, the Authority requires Batelco to withdraw the Advertisement from all media outlets within one (1) working day from the date of this Decision.

In addition, Batelco is forewarned against making judgments and opinions about a competitor (or its products or services) in its advertisements, unless those assertions are objective and are based on facts that can be substantiated and have not been unfairly selected.

Batelco is required to provide the Authority with written confirmation of the withdrawal of the Advertisement within one (1) working day from the date of this Decision.

The Authority reserves all its rights in respect of the matter including but not limited to its right to take further action pursuant to Article 35 of the Telecommunications Law.



Nasser bin Mohamed Al-Khalifa

Acting General Director

For the Telecommunications Regulatory Authority

23 July 2020

Annex 1

1ST + 5G
= BATELCO

5G + RELIABILITY
= BATELCO

5G + SERVICE
= BATELCO

5G + COVERAGE
= BATELCO

100K + FIBER USERS
= BATELCO

BAHRAIN + INTERNET
= BATELCO

DON'T TRUST
EVERYTHING
YOU SEE.

EVEN SALT LOOKS
LIKE SUGAR.