



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

Article 35 Order No. 10 of 2015

2Connect's breach of Article 53 of the Telecommunications Law and of its Licence Terms

1. For the reasons set out in the reasoning of this Order, the Telecommunications Regulatory Authority (the "**Authority**") considers that 2Connect W.L.L. ("**2Connect**") has:
 - 1.1. failed to provide to the Authority the information in the detail it requested pursuant to an Article 53 Request for Information dated 18 November 2014 (ref: CSD/1114/002) (the "**Article 53 Request**") in breach of Article 53 of the Telecommunications Law, Articles 4.2 and 16 of the International Telecommunications Facilities Licence ("**IFL Licence**"), Article 12 of its Internet Service Provider License ("**ISP Licence**"), Articles 4.2 and 16 of its International Telecommunications Services Licence (its "**ISL Licence**"), Article 25 of its National Fixed Services Licence (its "**NFS Licence**") and Article 10 of its Value Added Services Licence (its "**VAS Licence**").
2. Therefore 2Connect is ordered to:
 - 2.1. Within 7 calendar days from the date of this Order provide **the complete, updated and detailed information** requested by the Authority in the Article 53 Request.
3. Fines
 - 3.1. 2Connect is also ordered to pay a fine of BD 37,500 within 30 calendar days from the date of this Order.



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- 3.2. In the event that 2Connect fails to comply with Article 2 of this Order, then 2Connect shall be liable to a daily penalty of BD 100 each day of delay or part thereof.
- 3.3. 2Connect shall pay the fines set out in Article 3 of this Order in the form of a certified cheque from one of the accredited local banks addressed to the Telecommunications Regulatory Authority.
4. Compliance
- 4.1. In terms of Article 35(d)(3), failure by 2Connect to abide by the Order (including the payment of the fine) may lead to the revocation of 2Connect's Telecommunications Licences including, for the avoidance of doubt, 2Connect's (i) ISP Licence; (ii) ISL Licence; (iii) VAS Licence (iv) NFS Licence and (v) IFL Licence.

Mohamed Hamad Bubashait

General Director

For and on behalf of the Telecommunications Regulatory Authority

04 March 2015



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REASONING

I Relevant Legal Provisions

5. Article 3(c)(2) of the Telecommunications Law empowers the Authority to monitor and ensure compliance with the provisions of the Telecommunications Law.
6. Article 3(c)(4) of the Telecommunications Law empowers the Authority to monitor and enforce compliance with Licence terms and conditions by Licensees.
7. Pursuant to Article 53(a) of the Telecommunications Law the Authority has the power to make information requests of Licensed Operators. In particular Article 53(a) states that:

“Licensed Operators shall provide the Authority upon its request with all such information... as is needed to enable the Authority to carry out its duties and exercise its powers as provided for in this Law... The Licensee shall furnish such information to the Authority without delay at such time and in such details as the Authority may specify...”

8. In addition 2Connect has been granted the following Licences (the “**Licences**”) by the Authority which are of relevance to the Authority’s legal analysis of the factual background set out below:
 - a. An Internet Services Provider Licence dated 1 September 2004 (“**ISP Licence**”),



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- b. An International Telecommunications Facilities Licence dated 16 January 2013 (“**IFL Licence**”),
- c. An International Telecommunications Services Licence dated 4 December 2004 (its “**ISL Licence**”);
- d. A National Fixed Services Licence (its “**NFS Licence**”) dated 1 August 2005; and
- e. A Value Added Services Licence (its “**VAS Licence**”) dated 4 December 2004.

II Factual Background

- 9. On 18 November 2014, the Authority sent to 2Connect an Article 53 request for information relating to compliance with National Security Requirements (the “**Article 53 Request**”). The Article 53 Request set out, in detail, the information requested by the Authority and the reasons for the request.
- 10. The Article 53 Request required 2Connect to reply by 01 December 2014.
- 11. 2Connect did not provide any of the information required by the Authority pursuant to the Article 53 Request, by the stipulated deadline.
- 12. On 23 December the Authority reiterated the Article 53 request to 2Connect and informed it of the likely terms of a draft order to be issued pursuant to Article 35 of the Telecommunications Law.



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13. On 24 December 2014 2Connect provided information to the Authority that satisfied elements of the Article 53 Request, but did not, in the Authority's reasonable opinion, satisfy entirely the original Article 53 Request.
14. As such 2Connect's failure to respond to the Article 53 Request remains ongoing.
15. On 28 December 2014, the Authority issued a draft Article 35 order in substantially the same form as this Order and requested that 2Connect "provide the complete, updated and detailed information requested by the Authority in the Article 53 Request". To date 2Connect has still not fully satisfied this requirement.

III The Breach

16. 2Connect is required to provide to the Authority the information in the detail requested pursuant to the Article 53 Request.
17. By failing to comply with the Article 53 Request within the time limit set out therein the Authority believes that 2Connect is, non-exhaustively, in breach of:
 - a. Article 53 of the Telecommunications Law;
 - b. Article 12 of its ISP Licence;
 - c. Articles 4.2 and 16 of its IFL Licence;
 - d. Articles. 4.2 and 16 of its ISL Licence;
 - e. Article 25 of its NFS Licence; and
 - f. Article 10 of its VAS Licence.



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IV Effects of the Article 35 Order

18. This Order is issued without prejudice to further investigation by the Authority into 2Connect's alleged breaches of the terms of the Licences referred to above and the Telecommunications Law.
19. This Order and any further action taken by the Authority is without prejudice to the rights of any other entity to take relevant action as it may deem appropriate under the law of the Kingdom of Bahrain.
20. The issuance of this Order does not prejudice the Authority's right to:
 - a. expand the scope of its investigation into this matter;
 - b. issue further orders relating to other breaches arising out of the same set of facts;
 - c. find, develop or introduce new evidence relating to the alleged breach described herein.

V Article 35

21. Article 35 may be applied by the Authority in the event that a licensee has been or is in severe breach of any provision of the Telecommunications Law or any conditions of its licence. 2Connect has failed to provide to the Authority the information in detail as requested pursuant to the Article 53 Request, which was issued under a provision of the Telecommunications Law (Article 53). The term "Licence" under Article 1 of the Telecommunications Law is defined as either of a Telecommunications Licence or a Frequency Licence.



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This includes the ISP Licence, the IFL Licence, the ISL Licence, the NFS Licence, and the VAS Licence issued to 2Connect.

22. A “severe breach” is understood to mean a breach that is more than minor and/or transient. The Authority considers that 2Connect’s failure to effectively respond to the Article 53 Request is therefore a severe breach of Article 53 of the Telecommunications Law. Additionally in this regard, 2Connect’s failure to respond with the level of detail requested and required by the Authority breaches the terms of its Licences.
23. Both sets of breaches are severe in light of the important national security exercise in analysing threats that is intended to be served by the Article 53 Request.

VI Imposition of Financial Penalty

Fining principles

24. Article 35(d)(2) of the Telecommunications Law states that the Authority shall issue an order containing a suitable fine on the Licensee provided that such fine is objectively justified and non-discriminatory. The Telecommunications Law does not provide specific guidance on the setting of fines.
25. In setting an appropriate fine for 2Connect’s infringement in this case, the Authority has taken into consideration the relevant provisions of the Telecommunications Law and the Guidelines for the Setting of the Amount of a Fine for Violations of Article 35 and/or 65 of the Telecommunications Law (the “**Fining Guidelines**”).



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26. The Fining Guidelines reflect the Authority's fining practices to date, which in turn have been guided by international best practices, including the basic methodology used by Ofcom and other telecommunications regulatory authorities when establishing fines for licence breaches.

Procedure followed to determine the amount of the financial penalty

27. The Authority has followed the following steps in determining the quantum of the fine to be imposed on 2Connect for failure to respond to the Article 53 Request:

- (a) Firstly, a baseline figure is established by reference to a value that is germane or relevant to the infringement in question;
- (b) This baseline figure may then be adjusted upwards or downwards to take into consideration the following "aggravating" and "mitigating" factors at the Authority's discretion:
 - (i) the degree or severity of the breach in question;
 - (ii) any gain (financial or otherwise) accrued by the party perpetuating the breach;
 - (iii) the extent to which the infringement was perpetrated intentionally or recklessly, including the extent to which senior management knew, or ought to have known, that an infringement was occurring or would occur;



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- (iv) the extent to which any contravention was caused by a third party, or any relevant circumstances beyond the control of the licensee;
 - (v) whether in all the circumstances, appropriate steps had been taken by the perpetuating party to prevent or remedy the breach in question;
 - (vi) any steps taken by the perpetuating party to mitigate the consequences of the breach; and
 - (vii) any other factors that, in the Authority's view, constitute an aggravating or mitigating circumstance.
- (c) Consideration then will be given to whether the amount of the fine calculated on the basis of the considerations listed above has a sufficiently deterrent effect.
- (d) Finally, a proportionality review of the final amount of the fine is carried out.

Calculation of the baseline amount

28. The Fining Guidelines at PART II B: DETERMINING THE AMOUNT OF A FINE TO BE IMPOSED FOR A VIOLATION OF ART 35 OF THE TELECOMMUNICATIONS LAW THAT IS NOT ADDRESSED UNDER PART I sets out those factors that the Authority will have regard to when deciding upon an appropriate level of base fine for a breach of the terms of the Telecommunications Law and/or an Operator's Licences.



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29. Article 46 of the Fining Guidelines states that:

“to determine the amount of the fine to be imposed for a given infringement, a baseline figure will first be established by the Authority by reference to a value that is germane to the infringement in question...”

30. Article 46 then goes on to give some examples of how the Authority might seek to establish this value. The most relevant example to this case would appear to be any comparable penalties. However, it is noted that there has not been, since the Fining Guidelines have been introduced, a comparable fine set via an Article 35 Order for contravention of the terms of Article 53 of the Telecommunications Law and/or the Licence terms referred to at paragraph 18 above.

31. In the absence of any comparable fines, when setting the baseline fine, therefore, the Authority has had regard to the purpose behind the Article 53 Request, which was to gather information to enable the Authority to carry out a national security exercise.

32. National security is clearly a matter of national interest and importance to Bahrain. More generally, the Authority takes very seriously a failure by an Operator to respond to an information request, given the importance of up to date and accurate information in enabling the Authority to carry out its duties as a regulator.

33. When awarding Licences to operators pursuant to the terms of the Telecommunications Law, the Authority is cognisant of its responsibilities as



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regulator of the Telecommunications market of Bahrain with regard to national security.

34. Finally, the Authority itself has a responsibility to report and liaise with other agencies, ministries and organs of state with regards to national security; 2Connect's failure to respond to a reasonable and straightforward request for information (in breach of the requirements of the Telecommunications Law and its Licences) has impacted upon the Authority's ability to facilitate this information exchange.
35. In view of the severity of these issues, the Authority has decided to set a baseline figure of BD 15,000.

Aggravating factors

36. Having established a baseline figure of BD 15,000, the next step of the process is to consider the aggravating factors set out at Article 47 of the Fining Guidelines. Each of these factors is considered below in relation to 2Connect's current breaches.

Article 47(a): "the degree of severity of the breach or violation"

37. Self-evidently a breach of the requirement to provide information to the Authority is a severe breach of 2Connect's obligations under the Telecommunications Law and its Licences.
38. In addition the information requested was intended to serve a national security project which was commenced without a complete set of information due to



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2Connect's noncompliance with the Article 53 Request. As the project has commenced, the accuracy of the results may be significantly affected by the absence of this information.

39. Furthermore, 2Connect's failure to provide this information means that the Authority may have to conduct this exercise again to ensure that any national security threat is analysed completely. As such the Authority is minded to have regard to this factor when calculating the level of the fine.
40. There can be no doubt that the security aspect is of paramount importance. The Authority therefore considers that it is appropriate to apply to the baseline figure to take into account the seriousness of the breach (the "**Seriousness Factor**") a factor equating to fifty percent (50%) of the baseline figure, which should be added to the baseline figure.

Article 47(b): "the duration of the breach or violation"

41. The breach is not only serious, but ongoing in that the original request seems to have been completely disregarded and even at this stage, the information submitted is incomplete. As such the Authority is minded to have regard to this factor when calculating the level of the fine. The Authority therefore considers that the fact that the submissions were late and incomplete lead to the Authority to determine that a duration factor (the "**Duration Factor**") of fifty percent (50%) of the baseline figure should be added to the baseline figure.

Article 47(c): "whether the Licensed Operator has a history of infringement (recidivism may lead to significantly increased penalties) during the previous ten years"



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42. It is noted that 2Connect has not been investigated for failure to supply information before and as such the Authority has not taken this factor into account when calculating the aggravating factor.

Article 47 (d): “the extent to which the infringement was perpetrated intentionally or recklessly, including the extent to which senior management knew, or ought to have known that an infringement was occurring or would occur”

43. It is noted that Mr. Liam Hunt, CEO of 2Connect, acknowledged receipt of the Article 53 Request on the day it was sent to 2Connect. Given the content of the request it is averred that the severity and the need to respond was self-evident and as senior management were clearly aware of the request the Authority is minded to have regard to this factor when calculating the level of the fine.

44. It is therefore evident that knowledge of 2Connect's failure to provide the requested information is known to 2Connect's executive team at the highest level. The Authority therefore considers that a senior management factor (the “**Management Factor**”) of fifty percent (50%) of the baseline figure should be added to the baseline figure.

Article 47 (e): “any other factor that in the Authority's view constitutes an aggravating circumstance”

45. In addition to the points set out above it is noteworthy that 2Connect is the only Licensed Operator not to have responded to the request. As such it is clear from the actions of other operators that the Authority's request was clear, easily understandable and easy to satisfy. However, in spite of 2Connect ignoring the



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relative simplicity of the request, the Authority has not taken this factor into account when calculating the aggravating factor.

Mitigating factors

46. The next step in the process is to consider whether there are any mitigating factors that should be taken into account.
47. The Authority has carefully reviewed 2Connect's submissions made on 28 January 2015 regarding the terms of the previous draft Order.
48. The mitigating factors raised by 2Connect do not, in the Authority's judgment, present sufficient rationale for a reduction of the base level of the fine.
49. In particular the Authority does not accept the argument advanced in the penultimate paragraph of 2Connect's Reply that "*2Connect is no longer in breach of the Article 53 Request.*"
50. As such the Authority does not consider that any of the mitigating factors set out at Article 48 of the Fining Guidelines are relevant.

Need to ensure deterrence

51. The Authority's fining practice under Article 35 of the Telecommunications Law acknowledges the importance of deterrence when determining the amount of a financial penalty.



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52. The Authority considers that the amount of the fine imposed on 2Connect for failure to respond to the Article 53 Request should act as a sufficient deterrent against:

- (i) any further breaches by 2Connect of Article 53 of the Telecommunications law and the relevant provisions of 2Connect's licences (specific deterrence); and
- (ii) any severe breaches of Article 53 and any licence held by other licensed operators (general deterrence).

53. The Authority does not, therefore, consider that there is any need in this case to make any adjustments for deterrence.

Proportionality

54. The Authority considers that the payment by 2Connect of a fine of BD 37,500 is proportionate, considering all the circumstance of this case. In particular, the amount in question is sufficient to reflect the important national security issues at stake in this case.

Conclusion – Final amount of financial penalty

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



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

$$\begin{aligned} \text{Fine} &= \text{Basic Amount} + \\ &\quad \text{Basic Amount} \times \text{Seriousness Factor} + \\ &\quad \text{Basic Amount} \times \text{Duration Factor} + \\ &\quad \text{Basic Amount} \times \text{Management Factor} \\ &= \text{BD } 15,000 + \text{BD } 7,500 + \text{BD } 7,500 + \text{BD } 7,500 \\ &= \text{BD } 37,500 \end{aligned}$$

57. The Authority notes that there is no maximum fine defined in Article 35 of the Telecommunications Law. Without prejudice to its right to impose any fine under Article 35 that it considers appropriate and proportionate, the Authority believes that a fine in the sum of BD 37,500 is appropriate and proportionate in this case.

58. In coming to this decision the Authority has had special regard to the national security implications explicit and implicit in the Article 53 Request and the importance of such issues in relation to the operation of all Licensed Operators.

Variable Fine for each day of Delay

59. The Authority notes that 2Connect's failure to comply with the Article 53 Request is ongoing which in turn constitutes an ongoing breach of the Telecommunications Law and the Licences.



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60. In view of the ongoing nature of 2Connect's breaches, in the event that 2Connect fails to comply with Article 2 of this Order, the Authority considers it is reasonable and proportionate for 2Connect to be subject to a daily fine of BHD 100 for each day of delay until the requested information is provided in a manner that the Authority believes satisfies the requests made in the Article 53 Request.