

Article 35 Order No. 1 of 2010

**An Order issued by the Telecommunications Regulatory Authority (“TRA”) on the
blocking of websites by 2Connect Communications W.L.L. (“2Connect”)**

Date – 22 August 2010

Non-Confidential Version

Confidential information is marked with [X Redacted]



هيئة تنظيم الاتصالات
Telecommunications Regulatory Authority

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blocking of websites by 2Connect Communications W.L.L.**

Non-Confidential Version

ORDER

- 1 For the reasons set out in the Legal Basis and Reasoning to this Order and having considered the relevant facts and information, TRA hereby orders 2Connect to:
 - 1.1. continue to block websites as required and directed by the Ministry of Culture and Information in accordance with Resolution No.1 of 2009 regarding the Blocking of Websites
 - 1.2. pay a fine of BD 43,927.120 no later than 60 calendar days from the date of this Order.
- 2 The fine should be transferred to TRA’s account:

Account name: Telecommunications Regulatory Authority

Account number: 1-0000005433-4

Bank name: BBK
- 3 TRA is required by article 35(d)(3) of the Telecommunications Law to formally warn 2Connect that its licences may be revoked if it fails to comply with the directions of this Order by the date specified in paragraph 1.2 above.

For the Telecommunications Regulatory Authority

Dr. Mohammed Ahmed Al Amer

Chairman of Board of Directors

Acting General Director

22 August 2010

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Non-Confidential Version

LEGAL BASIS AND REASONING

WHEREAS:

1.1 2Connect Communications W.L.L, a company incorporated in the Kingdom of Bahrain with commercial registration number 53801 (“**2Connect**”) provides services pursuant to various licences granted to 2Connect by the Telecommunications Regulatory Authority of the Kingdom of Bahrain (“**TRA**”), including a class licence for internet services granted on 6 September 2004 (the “**Licence**”).

1.2 For the reasons set out below, TRA orders 2Connect to comply with Article 35 Order No. 1 of 2010 (“**Order**”).

2. FACTUAL BACKGROUND

2.1 On 8 January 2009, the Minister of Culture and Information (the “**MOCI**”) issued Ministerial Resolution 1 of 2009 regarding the Blocking of Websites (the ‘**Website Blocking Resolution**’) pursuant to Article 19 of the Press, Printing and Publications Law promulgated by Legislative Decree 47 of 2002 (the ‘**Press, Printing and Publications Law**’) and after perusal of Legislative Decree No. 48 of 2002 promulgating the Telecommunications Law (the ‘**Telecommunications Law**’).

2.2 The Website Blocking Resolution states:

“Article 1: All telecommunications companies and Internet service providers shall be committed to the blocking of websites on which a blocking resolution is issued by the Minister.

Article 2: All telecommunications companies and Internet service providers shall block pornographic websites that breach public morality.

Article 3: All telecommunications companies and Internet service providers shall prevent all the familiar ways to access blocked websites, either through Internet addresses - domain names - through the use of the proxy, or any other way”¹.

2.3 2Connect provides internet services in the Kingdom of Bahrain pursuant to the License.

¹ المادة الاولى: على كافة شركات الاتصالات ومزودي خدمات الانترنت الالتزام بحجب المواقع الالكترونية التي يصدر بشأن حجبها قرار من الوزير.
المادة الثانية: على شركات الاتصالات ومزودي خدمات الانترنت حجب المواقع الإلكترونية الإباحية والمخلة بالأداب العامة.
المادة الثالثة: على شركات الاتصالات ومزودي خدمات الانترنت منع جميع الطرق المتعارف عليها للنفاذ للمواقع المحجوبة سواء عن طريق عناوين الانترنت - أسماء النطاق - من خلال استخدام الخادم البديل proxy أو أي طريقة أخرى

An Order issued by the Telecommunications Regulatory Authority (“TRA”) on the blocking of websites by 2Connect Communications W.L.L.

Non-Confidential Version

- 2.4 On 10 September 2009, the Assistant Undersecretary for Publications and Press notified TRA that 2Connect has breached the Website Blocking Resolution and requested that the TRA takes necessary legal action under the Telecommunications Law (Annex A) [Redacted].
- 2.5 On 10 September 2009, the General Director Alan Horne sent an email to Fahad Al Sharawi, Chief Executive Officer at 2Connect, forwarding the abovementioned letter to 2Connect requesting ‘feedback and confirmation that 2Connect is fully compliant with the respective Laws and Resolutions’ (Annex B) [Redacted].
- 2.6 On the same day, Fahad Al Sharawi sent positive confirmation that 2Connect has installed all required systems and specifications as required by the Website Blocking Resolution (Annex B) [Redacted].
- 2.7 On 10 February 2010, TRA received a complaint from a student at the British School of Bahrain complaining that students at the British School of Bahrain were able to access a pornographic websites. The student attached screen shots of the website www.redtube.com, which contained pornographic material.
- 2.8 Nick Truman, ICT Advisor at TRA, initiated an investigation to determine the ISP providing the internet services in the British School of Bahrain. Nick Truman requested that the student runs a command on his computer “tracert www.tra.org.bh > tra.txt. This command traces the route internet traffic takes from the school to the TRA’s website. The results of the trace was as follows:
- [Redacted]
- 2.9 The third IP address in the trace is 2Connect’s IP address. This determined that the ISP supplying internet services to the school is 2Connect. TRA checked the web address on its own ISP from its premises and noted that the website was blocked.
- 2.10 TRA immediately liaised with 2Connect on this issue and specifically why the website was available on the internet service provided to the school. On 10 February 2010, Nick Truman spoke to Hilson, Vice President Customer operation at 2connect, who confirmed that he knew that the internet service provided to the British School of Bahrain was not filtered and that he will address the issue. Rick Hilson explained that they were opposed to filtering of any kind. However, due to the Website Blocking Resolution, 2Connect had implemented the Website Blocking Resolution exactly as mandated in written instruction from the MOCI. He also said they had been provided with step by step instructions which they had followed and that they knew that the filter would not be effective.

An Order issued by the Telecommunications Regulatory Authority (“TRA”) on the blocking of websites by 2Connect Communications W.L.L.

Non-Confidential Version

- 2.11 2Connect has therefore verbally stated to TRA that it followed the Ministry’s directions however this did not block the website at that school. As a result, minors were allowed access to pornographic material.
- 2.12 On 5 April 2010, TRA issued an Article 35 Notice of intention to issue Order 1 of 2010 on the blocking of websites against 2Connect (LAU/0410/056). On 3 May 2010, TRA received 2Connects response to the Article 35 Notice. TRA considered 2Connect’s responses and the points raised therein (see Annex C [Redacted]).

3 LEGAL ANALYSIS

- 3.1 Section 25(b) of the Telecommunications Law states: “*The granting of a Licence in accordance with the provisions of this Law shall not prejudice any other conditions, licenses, permits or obligations provided for in any other law*”.
- 3.2 As such, the 2Connect is bound by the provisions of all other Laws in the Kingdom of Bahrain including the Website Blocking Resolution
- 3.3 Clause 9.3 of the Licence states that, “*The licensee shall not use or allow to be used any apparatus which is capable of recording, monitoring, or intruding into calls unless it complies with applicable law*”².
- 3.4 TRA understands from the Arabic version of that clause that the word “it” in the English version refers to “using the apparatus”.
- 3.5 There are two components to be assessed when considering 2Connect’s compliance or non-compliance with Article 25(b) of the Telecommunications Law and clause 9.3 of the Licence. First, did 2Connect’s actions relate to “calls”? Second, did 2Connect breach any applicable law?

Did 2Connect’s actions relate to “calls”?

- 3.6 Clause 2.1 of the Licence states that the term, Call, “*includes communications conveying voice and data*”. For the avoidance of doubt, TRA considers internet browsing to be a

² Clause 9.3 of the Arabic language version of the Licence states:

أ- يحظر على المرخص له استخدام أو السماح باستخدام أي جهاز من الأجهزة يكون قادراً على التسجيل أو المراقبة أو التدخل في المكالمات التي تتم من خلاله إلا وفقاً للإجراءات المقررة قانوناً في هذا الشأن.

An Order issued by the Telecommunications Regulatory Authority (“TRA”) on the blocking of websites by 2Connect Communications W.L.L.

Non-Confidential Version

communication conveying data and, as such, is a “Call” for the purposes of clause 9.3 of the Licence.

Did 2Connect breach any applicable law?

- 3.7 Under Article 25(b), the granting of a Licence does not prejudice any other conditions, licenses, permits or obligations provided for in any other law.
- 3.8 2Connect will be in breach of clause 9.3 of the Licence, if it uses apparatus to monitor or intrude into a call, unless it complies with the applicable law. The corollary of these clauses is that an ISP licence is also obliged to adhere to any applicable law regarding utilising apparatus to monitor or intrude into a call, when clause 9.3 of the Licence is read in conjunction with Article 25(b) of the Telecommunications Law
- 3.9 The Blocking of Website Resolution has been issued pursuant to Article 19 of the Press, Printing and Publications Law.
- 3.10 The Blocking of Websites Resolution states:
- “Article 1: All telecommunications companies and Internet service providers shall be committed to the blocking of websites on which a blocking resolution is issued by the Minister.*
- Article 2: All telecommunications companies and Internet service providers shall block pornographic websites that breach public morality.*
- Article 3: All telecommunications companies and Internet service providers shall prevent all the familiar ways to access blocked websites, either through Internet addresses - domain names - through the use of the proxy, or any other way”*
- 3.11 TRA is satisfied the Website Blocking Resolution is applicable law.
- 3.12 It is also evident from the fact that the website www.redtube.com was not blocked by 2Connect to the school in question that 2Connect is in breach of the Website Blocking Resolution and as a result, is in breach of article 25(b) of the Telecommunications Law and clause 9.3 of the Licence.

4 2CONNECT’S JUSTIFICATION

- 4.1 On his email of 10 September 2009, Fahad Al Sherawi stated: *“We have installed the system as per the order and associated specification. Whether or not it is blocking the sites they want it to block, I cannot say as we have no visibility or control with respect to that. They control that. As to the attached letter, it is quite vague. If there is a failure that they believe we have committed, they need to highlight it’s nature and provide evidence so we can investigate”.*

An Order issued by the Telecommunications Regulatory Authority ("TRA") on the blocking of websites by 2Connect Communications W.L.L.

Non-Confidential Version

- 4.2 With respect to the incident of 10 February 2010, 2Connect has verbally acknowledged that the website www.redtube.com was not properly filtered and was available to the school as stated in paragraph 2.10 of this Order.

5 RECTIFICATION

- 5.1 TRA appreciates that 2Connect has rectified the abovementioned breaches on the same day of the incident.
- 5.2 All Licensed Operators are required to comply with their licences and the law generally. It is therefore 2Connect's responsibility to ensure that its activities comply not only with its Licence but with the laws of the Kingdom of Bahrain.
- 5.3 TRA therefore requires that 2Connect continue to block websites as required and directed by the Ministry of Culture and Information in accordance Website Blocking Resolution.
- 5.4 For the reasons cited above TRA considers that an ISPs failure to do so will be a breach of its Licence.

6 FINE

Imposition of the Fine

- 6.1 The breach that is the subject of this Order is a breach of clause 9.3 of its ISP Licence. TRA considers that the breach is material and therefore subject to regulatory action under Article 35 of the Telecommunications Law.
- 6.2 Article 35(d)(2) and (3) of the Telecommunications Law requires that when TRA issue an Article 35 Order it;
- (a) Impose an appropriate fine on the Licensee, provided that such fine is objectively justified and when assessing the fine the principle of justice and equality amongst the Licensees shall be considered.
- (b) Warn the Licensee that the Licence may be revoked if the Licensee fails to comply with such direction or to pay the fine.

Purpose of the Fine

- 6.3 TRA considers that a fine has two functions. Firstly it must be a punishment for a licensee's breach of its legal obligations. Secondly, it must also act as a deterrent to the licensee in

An Order issued by the Telecommunications Regulatory Authority ("TRA") on the blocking of websites by 2Connect Communications W.L.L.

Non-Confidential Version

question and other licensees from repeating or continuing the breach. This is consistent with article 35(d)(2) of the Telecommunications Law.

Level of Fine

- 6.4 Article 35(d)(2) of the Telecommunications Law states that TRA shall issue an order containing an appropriate fine on the Licensee provided that such fine is objectively justified. The following criteria used to develop an appropriate fine upon 2Connect for this specific infringement are without prejudice to TRA's right to develop and publish fining guidelines or to apply different criteria in assessment of fines in other cases.
- 6.5 Article 35 of the Telecommunications Law does not provide a limit for a fine for material breach of the Telecommunications Law or a License. However TRA notes that article 65 of the Telecommunications Law limits the fine to 10% of the annual revenues of the operator where the licensed operator has been deemed to be acting anti-competitively. As such TRA in this specific instance considers it reasonable that it limit the ultimate amount of fine under article 35 to 10% of the gross annual revenues of 2Connect. As such, for the purposes of this Order, the ultimate level of fine the TRA considers it could issue upon 2Connect is BD [X Redacted] which constitutes 10% of 2Connect's Annual Revenue in the Kingdom of Bahrain for the year ending 31 December 2009³.
- 6.6 TRA notes Article 75(1) of the Telecommunications Law which makes punishable by a fine of up to BD10,000 any Person that uses Telecommunications Equipment or Telecommunications Network intending to send any message in the knowledge that the contents of the message are false, misleading, offensive to public policy or morals, endanger the safety of third parties or prejudice the efficiency of any service.
- 6.7 TRA makes no judgement as to whether or not the same facts may constitute a breach of article 75(1) of the Telecommunications Law. However, TRA is guided by the penalty stipulated in this Article in the determination of the fine to be imposed on 2Connect as both offenses relate to public morality
- 6.8 TRA notes that that the maximum monetary fine for a breach of article 75(1) is BD10,000 without prejudice to any other stricter penalty in the Law of Penalties or any other law.
- 6.9 TRA considers that article 75(1) is criminal in nature as they refer to the penalties as being without prejudice to the Law of Penalties.

³ 2Connects 2009 Annual Report, page 36

An Order issued by the Telecommunications Regulatory Authority (“TRA”) on the blocking of websites by 2Connect Communications W.L.L.

Non-Confidential Version

- 6.10 However TRA considers that a breach of clause 9.3 of the Licence is not a criminal breach, and does not carry with it the threat of criminal conviction. TRA’s regulatory action under article 35 of the Telecommunications Law is therefore a separate regulatory enforcement action and does not carry with it the threat of criminal conviction or imprisonment. TRA’s regulatory action under article 35 of the Telecommunications Law is therefore a separate regulatory enforcement action and therefore not subject to limitation by the monetary penalties in article 75(1) of the Telecommunications Law.
- 6.11 TRA considers that based on the factual background detailed in paragraphs 2.1 to 2.11 of this Order, 2Connect’s actions have allowed minors at a learning institution access to pornographic material. As such, the gravity of 2Connect’s breach is even greater than the gravity of sending messages described in article 75(1). TRA considers this to be an aggravating factor in its consideration of the fine to be imposed on 2Connect.
- 6.12 Therefore in determining whether a fine should be issued TRA has considered:
- 6.12.1 that TRA considers that the breach was material, significant and serious;
- 6.12.2 this is the first article 35 Order TRA has issued against 2Connect.
- 6.12.3 2Connect’s failure to implement the Website Blocking Resolution although it was fully aware of its requirements;
- 6.12.4 2Connect’s breach allowed minors access to pornographic materials.
- 6.13 TRA considers that on balance a fine should be issued, however the fine should reflect the factors in paragraphs 6.12
- 6.14 Having considered the issues raised in paragraphs 6.1 to 6.11 above TRA considers that an appropriate fine in this instance is BD43,927.120, TRA notes that this is approximately only [Redacted] percent of the ultimate level of fine TRA could issue and is also approximately only [Redacted] percent of 2Connect’s Annual Revenue for the Kingdom of Bahrain for the year ending 31 December 2009.

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ANNEX A

[ Redacted]



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Non-Confidential Version

ANNEX B

[Redacted]

Article 35 Order No. 1 of 2010

An Order issued by the Telecommunications Regulatory Authority (“TRA”) on the
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Non-Confidential Version

Annex C

[✂ Redacted]