

IN EXERCISE of the powers conferred by sections 84R and 84W of the Kenya Communications Act, the Minister for Information and Communication in consultation with the Communications Commission of Kenya makes the following Regulations:—

**THE KENYA INFORMATION AND COMMUNICATIONS (FAIR  
COMPETITION AND EQUALITY OF TREATMENT) REGULATIONS,  
2010**

1. Citation

These Regulations may be cited as the Kenya Information and Communications (Fair Competition and Equality of Treatment) Regulations, 2010.

2. Interpretation.

In these Regulations unless the context otherwise requires—

“communications services” means all services provided for under the Act;

“licensee” means a person licensed under the Act;

“service agreement” means any agreement between a licensee and a subscriber relating to provision and use of a telecommunications service;

“subscriber” means a person who has entered into a service agreement with a licensee and who is responsible for payment of all charges and rentals.

3. Purpose and object.

(1) The purpose of these Regulations is to—

(a) provide a regulatory framework for the promotion of fair competition and equal treatment in the communications sector; and

(b) protect against the abuse of market power or other anticompetitive practices within the communications sector.

(2) Without prejudice to the generality of paragraph (1), these Regulations seek to—

(a) provide for the standards and procedures to be applied by the Commission in determining whether particular conduct is anti-competitive;

(b) clarify the agreements, conduct or practices that the Commission shall consider to be anti-competitive, and prohibited under the Act; and

(c) provide for the standards and processes that the Commission shall apply when determining whether a telecommunication service provider is dominant in a given market.

#### 4. Mandate of the Commission over competition matters.

(1) The Commission shall have the power to determine, pronounce upon, administer and enforce compliance of all its licensees with competition laws and regulations, that it relate to commercial activities in the communications sector.

(2) In so far as such matters fall concurrently under the jurisdiction of another statutory agency responsible for competition matters, the Commission shall cooperate with the said agency in matters related to fair competition.

#### 5. Determination of breach.

(1) The Commission shall, in order to determine whether a particular agreement or conduct breaches these Regulations-

(a) evaluate the relevant market or market segment that the agreement, conduct in question or practice relates;

(b) determine whether the market or market segment is competitive; or

(c) establish whether a licensee is engaging in anti-competitive practices.

#### 6. Determination of market.

The Commission may, when evaluating or designating the relevant market, consider—

(a) the communications products that makeup a specific market

(b) the geographic scope of that market for a given group of consumers;

(c) demand-side substitutability in order to measure the extent to which consumers are prepared or able to substitute other communications products or services for the communications products or services subject to consideration at low cost;

(d) supply-side substitutability to determine the extent to which suppliers are able to supply other communications products or services in place of the communications products or services subject to consideration at low cost;

(e) any other factor or issues which is in the opinion of the Commission relevant.

7. Dominant market position.

(1) The Commission may from time to time develop and publish, in the Kenya Gazette, guidelines to be followed when determining whether a licensee in a dominant market position in a specific communications market.

(2) The criteria shall among others include—

(a) the degree of market concentration or the market share of the licensee, determined by reference to revenues, numbers of subscribers or volumes of sales;

(b) the degree to which a licensee's prices vary over time;

(c) the ability of the licensee to maintain or erect barriers to entry to the market, including, by means of control of essential facilities, access to superior technology, privileged access to resources or capital markets or superior buying or negotiating position, amongst others;

(d) the ability of the licensee to earn supernormal profits;

(e) the global technology and commercial trends affecting market power;

(f) the licensee's power to make independent rate setting decisions;

(g) the degree of product or service differentiation and sales promotion in the market; and

(h) any other matters which the Commission may consider relevant.

(3) A licensee shall be in a dominant market position if

(a) it has the ability to materially raise prices without suffering a commensurate loss in service demand to other licensees;

(b) it has the ability to erect or benefit from barriers to market entry;

(c) the Commission has so determined a dominant market power report, after considering the circumstances and criteria set in these Regulations.

#### 8. Dominant market power reports.

(1) The Commission may on its own motion or on the application of an interested person, prepare a dominant market power report to determine whether a licensee is dominant in a service or geographic communications market.

(2) The Commission may, among other factors, use the criteria in regulation 7(2) when assessing or designating a communications market.

(3) The Commission shall, where it determines that a licensee has the ability to materially raise prices in such market without suffering a commensurate loss in service demand to other licensees or the ability to erect, or to benefit from, barriers to market entry that will materially affect the decision of other operators to enter such market, in its dominant power report determine that a licensee is dominant in a specific communications market.

(4) Subject to any other determination of the Commission, or to the demonstration by a licensee in the specific circumstances that the determination as dominant should not apply, the Commission may presume that a licensee is a dominant service provider in a communications market where the licensee's gross revenues exceeds twenty five per cent of the total revenues of all licensees in the relevant market.

(5) The Commission may direct dominant service provider to cease a conduct in that market which has or may have the effect of substantially reducing competition in any communications market or to implement appropriate remedies.

#### 9. Interconnection obligations of a dominant telecommunications service provider.

(1) Where the Commission has declared a licensee to be a dominant telecommunications service provider, the licensee shall—

(a) meet all reasonable requests for access to its public telecommunications network, in particular access at any technically feasible point on its telecommunications network;

(b) adhere to the principle of non-discrimination with regard to interconnection offered to other interconnecting licensees, particularly-

(i) apply similar conditions in similar circumstances to interconnecting licensees providing similar services and

(ii) provide interconnection facilities and information to other telecommunications licensees under the same conditions and of the same quality as it provides for its own services or those of its affiliates or subsidiaries;

(c) make available, on request, to other interconnecting licensees considering interconnection with its public telecommunications network, all information and specifications reasonably necessary, in order to facilitate conclusion of an agreement for interconnection, including information on changes planned for implementation within the next six months, unless provided otherwise by the Commission;

(d) submit to the Commission for approval and publish a Reference Interconnection Offer, sufficiently unbundled, giving the description of the interconnection offerings broken down into components according to the market needs and the associated terms and conditions including tariffs; and

(e) provide access to the technical standards and specifications of its telecommunications network with which another interconnecting licensee shall be interconnected.

(2) Where a dominant telecommunications service provider abuses its position when negotiating interconnection agreements, the Commission shall—

(a) require the dominant telecommunications service provider to desist, change its conduct or adopt a particular conduct; or

(b) declare the interconnection agreement wholly or partially invalid.

(3) The Commission shall, before taking the action in paragraph (2) (b) of this Regulation, request the dominant telecommunications service provider to refrain from the conduct that is inconsistent with these regulations.

(4) A dominant telecommunications service provider shall set charges for interconnection based on an objective criterion, observe the principles of transparency and cost orientation as set out in Regulation 11.

(5) The Commission may request the dominant telecommunications service provider to prove that its interconnection charges are based on actual cost and, where necessary request an adjustment of the charges or impose default interconnection charges in the event the proposed adjustment is not implemented by the dominant telecommunications service provider.

(6) A dominant service provider shall—

(a) notify the Commission in writing of any proposal to change interconnection charges in the form and manner as prescribed by the Commission from time to time;

(b) sufficiently unbundle charges for interconnection, so that the telecommunications licensee requesting the interconnection is not required to pay for any item that is not related to the service requested;

(c) maintain a cost accounting system that—

(i) complies with the cost accounting guidelines that may be published by the Commission from time to time;

(ii) demonstrates that its charges for interconnection have been fairly and properly calculated;

(d) avail to the Commission, on request, a description of its cost accounting system showing the main categories under which costs are grouped and the guidelines for allocation of costs to interconnection and the Commission's, or any other competent body; regulations or guidelines have been adhered to.

(7) A dominant telecommunications service provider shall promptly, on request supply financial information to the Commission to the level of detail specified by the Commission.

(8) The Commission shall upon satisfying that the dominant telecommunications service provider has fully complied with these regulations together with any other guidelines that it may have prescribed, publish a compliance report.

(9) In addition, the Commission while taking account of considerations of commercial confidentiality may publish such financial information in order to

contribute to an open and competitive telecommunications market.

#### 10. Accounts.

(1) A licensee shall maintain separate books of account for each service as may be prescribed by the Commission from time to time and shall not cross-subsidize the prices for any service it offers in the market with revenue from the sale of communication systems and services.

(2) A licensee shall maintain accounting separation techniques to be focused on the separation of revenues, costs and capital employed into categories in order to ensure that there is no discrimination between internal and external pricing in all services provided by the licensee.

(3) Where the interconnection services are not provided through a structurally separated subsidiary, a dominant telecommunications service provider shall keep separate accounts as if the telecommunications activities in question were in fact carried out by legally independent companies, to identify all elements of cost and revenue together with the basis of their calculation and the detailed attribution methods used.

(4) A dominant telecommunications service provider shall maintain separate accounts in respect of interconnection services and its core telecommunications services and the accounts shall be submitted for independent audit and thereafter published.

(5) The Commission shall from time to time develop guidelines providing for the system of transfer charges to be applied to services and products provided from one licensee to another and for the implementation of this regulation.

#### 11. Obligations of licensees.

(1) All licensees shall provide uniform, non-preferential service on a first-come-first-served basis to all persons within a covered geographical area or a given class who request for such service.

(2) A licensee shall not violate the principle of equal access and non preferential treatment if it—

(a) considers the ability of a person to pay for a service when deciding whether to provide a service to the person; or,

(b) makes other rational classifications among subscribers, such as business and residential, and to provide service on the basis of the classification.

## 12. Guidance.

(1) Where a licensee intends to enter into an agreement or take any action that may affect another licensee in the same market segment, it may seek guidance from the Commission at least thirty days prior to the entering into the agreement or taking of such action.

(2) The Commission's shall respond within thirty days of receiving the request under paragraph (1) stating whether the agreement or conduct is likely to contravene these Regulations;

(3) Notwithstanding the provision of these Regulations, a licensee shall ensure that all its agreements and conduct are lawful.

## 13. Investigations into complaints of unfair competition and discrimination.

(1) The Commission may, on its own motion or upon a complaint, investigate a licensee whom it has reason to believe has committed an act or omission, or is alleged to have committed an act or omission, or to have engaged in a practice, breaching the requirement for fair competition or equality of treatment.

(2) When conducting an investigation under section 84S and 84T of the Act, the Commission may—

(a) require the production of any document or information that is specified or that falls within a specified category, which it considers relates to any matter relevant to the investigation, at a time and place, and in the manner or form specified;

(b) take copies of, or extracts from any document produced;

(c) require an explanation of any such document; and

(d) where a document is not produced, require a statement specifying where it can be found;

(e) enter any premises with a warrant and require the production of any document appearing to be the kind in respect of which the warrant was granted or relevant to the investigation and require any relevant information held in computer to be produced in a form in which it can be read and taken away;

(f) enter premises with a warrant search the premises and take copies of, or extracts from, any documents appearing to be the kind in respect of which the warrant was granted and require any relevant information held in a computer to be produced in a form in which it can be read and taken away.

#### 14. Exemptions.

(1) These Regulations shall not apply to conduct which is necessary—

(a) for a licensee entrusted with the operation of essential communications services that relate to, among others, health, national security and any other circumstance that the Commission may prescribe, insofar as the application of the Regulations would obstruct the performance of the tasks assigned to the licensee;

(b) to comply with a legal requirement; or

(c) to avoid conflict with international obligations.

#### 5. Revocation of Part IV of L.N 68 of 2001

Part IV of the Kenya Communications Regulations, 2001 is revoked.

Made on the 23rd March, 2010

*Samuel Poghiso,  
Minister for Information and Communications.*