

LEGAL NOTICE NO. 149

THE KENYA INFORMATION AND COMMUNICATIONS
ACT, 1998

(No. 2 of 1998)

IN EXERCISE of the power conferred by sections 27, 38, 46K and 66 of the Kenya Information and Communications Act, 1998, the Minister for Information and Communications in consultation with the Communications Commission of Kenya, makes the following Regulations:—

THE KENYA INFORMATION AND COMMUNICATIONS
(TARRIF) (AMENDMENT) REGULATIONS, 2010

1. These Regulations may be cited as The Kenya Information and Communications (Tariff) (Amendment) Regulations, 2010.

2. Regulation 2 of the Kenya Information and Communications (Tariff) Regulations, 2010, in these Regulations referred to as the “principal Regulations”, is amended in the definition of “regulated service”, by deleting paragraph (b) and substituting therefor the following new paragraph—

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(b) subject to price controls by the Commission on the basis that the provider of the service has been found to be dominant in the relevant market and the Commission has judged that the price control is appropriate, pursuant to both the Kenya Information and Communications (Fair Competition and Equality of Treatment) Regulations, 2010 and regulation 4 of these Regulations.

3. Regulation 3 of the principal Regulations is amended—

(a) in paragraph (2)—

(i) by deleting paragraph (d) and substituting therefor the following new paragraph—

(d) promote efficient and fair competition within the framework for a free market economy;

(ii) by adding the following new paragraph immediately after paragraph (d)—

(e) ensure compliance with all competition laws.

(b) by inserting the following new paragraph immediately after paragraph (2)—

(3) In the exercise of its powers, the Commission shall ensure that decisions made pursuant to the provisions of these Regulations are consistent with the objectives outlined in paragraph (2).

4. The principal Regulations are amended by inserting the following new regulation immediately after regulation 3—

Commission to
declare regulated
services.

3A. (1) The Commission may declare services in specific markets to be regulated services.

(2) The Commission shall, prior to making a declaration under paragraph (1)—

- (a) identify the relevant specific market;
- (b) notify all affected licensees and issue a consultation, allowing sufficient time for stakeholder comments;

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(c) demonstrate that there is a competition concern as specified in regulation 8A(2) of the Kenya Information and Communication (Fair Competition and Equality of Treatment) Regulations, 2010, or that a licensee who has been declared to be in a dominant market position has been found to have abused the dominant market position, and where there is a competition concern, the Commission shall, in satisfying itself, demonstrate pursuant to a report prepared by the Commission that—

- (i) effective competition amongst existing licensees cannot develop;
- (ii) there exists strong and non-transitory barriers to entry in the identified market segment;
- (iii) there is no other competition law that is sufficient to deal with the competition concern;
- (iv) in the case of a retail service, no wholesale remedies are available to address the competition concern in the identified market segment; and
- (v) such other circumstances that the Commission may consider necessary from time to time;
- (d) follow the guidelines contained in the Schedule to these Regulations to prepare the report mentioned in paragraph (2) (c);
- (e) show that declaring the relevant service to be a regulated service would prevent a potential abuse; and
- (f) show that the declaration would be consistent with the objectives of these Regulations.

5. Regulation 4 of the principal Regulations is amended—

- (a) in paragraph (1), by deleting subparagraph (c);

- (b) by inserting the following new paragraphs immediately after paragraph (4) as follows—

(5) The tariff of a licensee shall be non-discriminatory and shall guarantee equality of treatment.

(6) A tariff shall not be in breach of this regulation if it is shown that there are legitimate commercial reasons for the tariff, such as different costs of providing the service and different identifiable market segments that have different ability to pay and different levels of usage and customer preference.

6. The principal Regulations are amended in regulation 6—

- (a) by inserting the words “subject to regulation 7” immediately before the words “all applications” appearing in paragraph (3);
- (b) by deleting paragraph (5);
- (c) by deleting paragraph (8).

7. Regulation 7 of the principal Regulations is amended—

- (a) in paragraph (1)—

- (i) by deleting the word “review” wherever it occurs and substituting therefore the word “increase”;
- (ii) by deleting the word “ninety” and substituting therefor the word “forty-five”;

- (b) by deleting paragraph (2) and substituting therefor the following new paragraph—

(2) The obligations that relate to the provision of a regulated service shall cease when the Commission determines that tariff regulation is no longer necessary in view of market developments.

8. Regulation 8 of the principal Regulations is amended by deleting paragraph (1) and substituting therefor the following new paragraph—

(1) The Commission shall, within seven days after receiving an application to increase the tariff of a regulated service under these Regulations, place a notice in the Gazette and in such other manner as it considers necessary.

9. Regulation 9 of the principal Regulations is amended by deleting paragraph (1) and substituting therefor the following new paragraph—

(1) The Commission shall, within thirty days of notification under regulation 8 (1), approve or reject such application.

10. Regulation 10 of the principal Regulations is amended—

- (a) in paragraph (1), by adding the words “where the tariff is anti-competitive immediately after the word “licensee”;
- (b) by deleting paragraph (3) and substituting therefor the following new paragraph—

(3) Where after investigations under regulation 10 (1), the Commission is of the view that the tariff is anti-competitive and should be adjusted, it may recommend to the licensee to make the necessary adjustments on the tariffs.

11. Regulation 11 of the principal Regulations is amended—

- (a) by deleting paragraph (2) and substituting therefor the following new paragraph—

(2) A licensee shall apply for approval, at least four days before the date of the implementation of a promotion or special offer, and shall file all details of the promotion or special offer with the Commission for approval provided that if no objection is made by the Commission within four days the licensee shall proceed with the promotion or special offer.

- (b) in paragraph (4)—

- (i) by inserting the words “ prior to the launch of a promotion or a special offer,” immediately before the words “ a licensee”;
- (ii) by deleting the words “compliance to” and substituting therefor the words “compliance with”.

12. The principal Regulations are amended by inserting a new Schedule immediately after regulation 13 as follows:

SCHEDULE (r. 3A (2) (d))
GUIDELINES

Guidelines to Address Regulation 3A (2) (c) (i)—

When considering whether competition cannot develop with existing players under Regulation 3A(c)(i) of these Regulations, the Commission shall consider the following factors—

- (a) Current market shares and their evolution over time;
- (b) Price trends and pricing behaviour for the services under analysis;
- (c) Control of an infrastructure non easily duplicated;
- (d) Barriers to expansion;
- (e) Product or service diversification; or
- (f) such other factors as the Commission may consider from time to time.

Guidelines to Address Regulation 3A (2)(c) (ii) –

The Commission shall consider all the factors indicated below in order to assess the existence of high and non-transitory barriers to entry under Regulation 3A(c) (ii) of the Regulations:

- (a) Existence of sunk costs;
- (b) Scale and scope economies;
- (c) Control of an infrastructure not easily duplicated;
- (d) Technological advantages;
- (e) Easy or privileged access to capital or financial resources;
- (f) Barriers to development of distribution and sales network;
- (g) Switching costs and product diversification;
- (h) Vertical integration;
- (i) Requirement for an administrative authorization or licence in order to operate in the market and conditions for obtaining such an authorization;
- (j) Limits and conditions attached to the use of spectrum;
- (k) Effects of general regulation over new entrants.

Guidelines to Address Regulation 3A (2) (c) (iii)—

The commission shall consider all the factors indicated below in order to assess the insufficiency of competition law to address the competition concern identified in sub-regulations 4 (c), condition 3A (2) (c) of these Regulations.

- (a) Degree of generalization of non-competitive behaviour associated to the competition concern;
- (b) Degree of difficulty to address the competition concern;
- (c) Expected damaged created by non-competitive behaviour associated to the competition concern;
- (d) Need of regulatory intervention to ensure the accomplishment of the objectives stated in Regulation 3(2).

Guidelines to address Regulation 3A(2)(c) (iv)

When considering a retail service, the Commission shall consider whether the identified competition concern can be addressed with—

- (a) existing remedies imposed in related wholesale markets; or
- (b) alternative wholesale remedies.

The analysis of the alternative measures shall consider the costs and benefits associated with each option and the impact for the different undertakings, following a Regulatory Impact Assessment (RIA).

Dated the 3rd September, 2010.

SAMUEL POGHISIO,
Minister for Information and Communications.