

COMMUNICATIONS (TARIFF) REGULATIONS, 2021

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FIRST SCHEDULE

INFORMATION TO BE SUBMITTED BY A LICENSEE FOR
APPLICATION FOR TARIFF APPROVAL

SECOND SCHEDULE

POTENTIAL FORMS OF ANTI-COMPETITIVE BEHAVIOUR
BY DOMINANT LICENSEES

COMMUNICATIONS ACT

(Cap. 68:01)

COMMUNICATIONS (TARIFF) REGULATIONS, 2020

IN EXERCISE of the powers conferred by section 200 of the Communications Act, I, GOSPEL KAZAKO, Minister of Information, make the following Regulations—

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| Citation | 1. These Regulations may be cited as the Communications (Tariff) Regulations, 2021. |
| Interpretation | 2. In these Regulations, unless the context otherwise provides—

“dominant licensee” means a licensee who has a status of a dominant market player as defined under section 3 of the Act;
“framed tariff” means a tariff that is determined by The Authority and imposed on a dominant licensee for a wholesale or retail electronic communications service, and may include a price caps in terms of section 78 of the Act;
“licensee” means a person holding an electronic communication licence, as defined under the Act;
“postpaid” means the method of payment for services by a subscriber which enables that subscriber to pay in arrears for services used, on the terms and conditions set out in that subscriber’s contract with a licensee;
“prepaid” means the method of payment for services by a subscriber which requires the subscriber to pay in advance, and which enables a subscriber to top up or recharge using vouchers or cash, or as specified by a licensee;
”promotional offer” means a tariff that operates only for a limited maximum period specified in its terms of time, subject to regulation 16;
“relevant market” means a discrete electronic communications service market that has been formally determined by the Authority for the purpose of these Regulations or otherwise under Part IV of the Act; |

“tariff” means any or all prices, rates, or charges whether prepaid or postpaid and applied in relation to any electronic communications service; and

“zero-rate”, in relation to an electronic communications service, means the use of the service whose provision does not entitle the service provider to impose a charge on anyone, and “zero rating” shall be construed accordingly.

Tariff approval

3.— (1) Unless specifically exempted in writing by the Authority under regulation 14, no tariff may be charged or payment sought from a subscriber unless the tariff has first been approved by the Authority.

(2) A tariff submitted to the Authority for approval shall adhere to the conditions prescribed under section 74 of the Act.

(3) For the purposes of section 74 of the Act, a setting or revision of a tariff shall be deemed “discriminatory” if the revision results in —

(a) treating similar classes of subscribers or similar services differently unless any such difference can be justified with reference to the type of class; or

(b) different treatment of wholesale subscribers or retail businesses of the licensee as compared to the affiliates of the licensee.

(4) For the purpose of this regulation, “setting or revising a tariff” shall entail increasing, decreasing or changing of any of its tariff.

Timeframes for tariff submission

4.— (1) A licensee shall submit for approval, its tariff to the Authority at least—

(a) twenty one days prior to the effecting of that tariff, where the licensee is a not a dominant licensee; and

(b) twenty eight days prior to the launch of that tariff, where the licensee is dominant licensee.

(2) Without prejudice to the timeframes set out in subregulation (1)—

(a) the tariff may not be launched for that period unless it is approved earlier by the Authority; and

(b) the tariff shall be submitted in writing under cover of a letter stating that the tariff complies with the provisions of regulation 3(3), and signed by an authorised representative of the licensee and accompanied by the information set out in the First Schedule hereto.

Additional information

5.— (1) The Authority may seek additional information if the circumstances of the application, the tariff or of the service suggest that such information is reasonably required to enable the Authority make its decision.

(2) Where the Authority requires submission of additional information under this regulation, unless the Authority otherwise requires, such information shall be submitted within seven days of making such request.

Tariff approval

6. The Authority may, in writing, grant an application for tariff approval with or without conditions as the Authority may determine appropriate.

Rejection of an application

7. The Authority may reject an application for tariff approval where—

- (a) the tariff does not comply with regulation 3(2);
- (b) the tariff is not submitted in accordance with regulation 4;
- (c) the tariff relates to a service in a relevant market in which the Authority has declared the licensee submitting the tariff to be a dominant licensee and the tariff does not comply with anti-competitive pricing prohibitions under these Regulations;
- (d) the licensee fails to provide the additional information required under regulation 5; or
- (e) in the opinion of the Authority, the grant may not advance the objects of the Act or the welfare of consumers.

Communication of decision

8.— (1) The Authority shall, within fourteen days from the receipt of an application for tariff approval, communicate to an applicant, a decision made on an application.

(2) The timeframe prescribed in subregulation (1) shall not apply where the Authority has requested additional information under these Regulations:

Provided that the decision made shall be communicated within fourteen days from the receipt of the additional information.

Tariff register

9. The Authority shall maintain a register for all approved tariffs which shall be open to the public on such conditions as the Authority may determine.

Review of approved tariffs

10. (1) The Authority may review an approved tariff and may require the submission of any information which the Authority deems necessary for such review.

(2) Where the Authority intends to review a tariff under sub-regulation (1) it shall notify the licensee affected by the review in writing and give the licensee at least 14 days to respond to the review.

Confidentiality

11. All information submitted to the Authority in support of a proposed tariff shall be treated as strictly confidential, until the Authority approves the tariff and the licensee publishes it.

Billing arrangements

12.-(1) A licensee shall provide to its consumers a timely, clear and concise statement of charges and on regular basis.

(2) In relation to post-paid customers, the statement referred to in subregulation (1) shall reflect—

- (a) the total charges specifying the cost of service;
- (b) due date of payment before late charges are incurred; and
- (c) any other information deemed necessary by the Authority.

(3) In relation to a pre-paid customer, the statement referred to in subregulation (1) shall be in form of a notification which shall include—

- (a) cost of call;
- (b) duration of call;
- (c) airtime balance; and

(d) any other information deemed necessary by the Authority.

(4) A licensee shall not bill its consumer for any charges which it has not disclosed to the consumer in its published tariff or terms and conditions or for services that have not been sought for by the consumer.

(5) A licensee shall establish appropriate procedures to ensure that consumer bills are accurate and the amount due after deducting any credits, discounts or similar adjustments is not higher than the amount which represents the true extent of the services actually provided by the licensee to the consumer.

(6) Without prejudice to the generality of the foregoing subregulations, the licensee shall at all times maintain in operation such a billing process that facilitates compliance with these Regulations.

(7) A licensee shall keep billing records as may be necessary or as may be determined by the Authority for the purpose of satisfying the requirements of this regulation:

Provided that nothing in this regulation shall require the licensee to retain any records for not less than five years from the date on which they were generated.

(8) The Authority shall have the right to inspect and independently verify the licensee's billing process for purposes of ensuring compliance with this regulation.

(9) Where the Authority provides written notice to the licensee that it is exercising its right under this regulation, the licensee shall cooperate with the Authority by making available, for a reasonable period, appropriate personnel with knowledge of the billing process and provide all back up and support documentation and other information that the Authority may deem fit.

Bundled
voice and
SMS
services

13.-(1) A licensee shall send usage depletion notifications via SMS, push notification or any applicable means to consumers when their usage reaches 50%, 60%, 70%, 80%, 90% and 100% .

(2) A licensee shall provide consumers who are on post-paid plans with an option to buy additional voice service or SMS services at any time.

(3) Where a consumer who is on a post-paid or combo bundles plan and whose voice and SMS service are depleted does not buy additional voice services or SMS services, a licensee shall provide such consumer with an option not to access the relevant depleted services and allow such consumer access to emergency services, customer care services, incoming voice calls, incoming SMSs and any other free services.

Data services:
out of bundle
billing

14.-(1) A licensee shall ensure that a consumer is-

- (a) sent data usage depletion notifications via SMS, push notification or any other applicable means when usage reaches 50%, 60%, 70%, 80% , 90% and 100%;
- (b) provided with an option to buy additional data bundles via the USSD platform, push notification, or any other applicable means at any time;
- (c) not defaulted onto out of bundle data charges upon depletion of data bundles; and
- (d) provided an option via SMS, push notification, USSD or any other applicable means at any time to opt-in to out-of-bundle usage charges.

(2) Where a consumer does not opt-in to out-of-bundle data charge as per subregulation(1)(d), a licensee shall not permit any out-of-bundle data usage by a consumer until such time that a consumer purchases new data bundles or consents to be charged out-of-bundle data rates via USSD, SMS, push notification or any other applicable means.

Data services: roll over of unused data and transfer of data

15.-(1) A licensee shall provide a consumer with an option to roll over unused data before expiry date of the bundle.

(2) In the event of unused data being rolled over, a licensee shall, in the first instance, apply data usage against the rolled over data until that data is fully depleted, and thereafter against the newly allocated data.

(3) A licensee may provide a consumer with an option to transfer data to other consumers on the same network.

Itemised bill

16.-(1) A licensee shall, upon request, provide any post-paid or pre-paid consumer with an itemized bill as follows in respect of the following services-

- (a) voice and bundled voice calls: specifying for each call, date, time, duration, recipient number and cost;
- (b) SMS and bundled SMS: specifying for each SMS, date, time, recipient number and cost;
- (c) in-bundle and out-of-bundle data: specifying for each data session, date, time and total data used.

(2) A Licence shall provide to the consumer the itemized bill requested under sub-regulation (1) –

- (a) within seven days from the date of the request where the information is less than three months old;
 - (b) within 21 days from the date of the request where the information is more than three months old.
- (3) A licensee shall ensure that calls which are zero-rated to its consumers, including calls to emergency lines, shall be identified in its consumer's itemized bills.

Determination of framed tariffs

17.— (1) The Authority may frame one or more tariffs pursuant to section 78 of the Act, where, in the view of the Authority, there is a likelihood of material risk of harm to competition or to consumer welfare.

(2) Where subregulation(1) applies, the tariffs for services of a licensee that are provided on a wholesale or retail basis in a relevant market in which that licensee is dominant, shall be framed by the Authority as follows—

(a) the Authority shall construct and maintain network cost models for such wholesale or retail services as the Authority may consider to be relevant markets in order to determine the tariffs to be framed for dominant licensees and the dominant licensees shall provide complete and verifiable cost data to the Authority for this purpose; and

(b) the Authority shall frame the tariff under paragraph (a) with reference to internationally recognised costing models, taking into account the costs incurred by the licensee but allowing the licensee a reasonable rate of return for a period not longer than three years from the date on which the framed tariff is first applied to the service in the relevant market.

(3) In exercising the powers under this regulation, the Authority may construct and maintain cost models to inform other regulatory pricing decisions pursuant to sub-regulation (1).

Zero-rated tariffs

18.— (1) The Authority may determine that a particular electronic communications service be zero-rated.

(2) Before determining any electronic communication service to be zero rated, the Authority shall publish a notice to that effect

in the *Gazette* for public comments and allow not less than thirty days from the date of the publication to give an opportunity to any person with an interest in the matter to make representations.

(3) Where the Authority determines that a particular electronic communication service be zero-rated in accordance with subregulation (1), the Authority shall publish a notice in the Gazette.

(4) Without prejudice to the generality of the subregulation (1), the tariffs for voice calls to emergency service numbers shall be zero-rated.

(5) Where a licensee offers a zero-rated data service, the data used by the subscriber shall not be counted for the purposes of any data cap or other limitation that applies to the services to which the subscriber has subscribed.

Promotional offer

19.— (1) The provisions of regulation 3 shall apply to a tariff for a promotional offer.

(2) A licensee shall file the tariffs for promotional offers with the Authority for approval at least fourteen days prior to the launch of the promotional offer.

(3) A tariff for promotional offer may be available for a period not longer than ninety days from the date of approval by the Authority.

(4) The same promotional offer shall not be offered more than once in a period of six months and the periods during which it is available shall not run consecutively.

(5) A Licensee shall notify the Authority in writing at least seven days before discontinuing or cancelling any promotional offer.

(6) The Authority shall take into account positions of any other regulatory body which has an interest in the terms of the promotional offer, but the Authority's decision in respect of quality of service of the subject matter under the promotional offer shall be final.

Prohibitions on anti-competitive pricing by dominant licensees

20.— (1) Tariffs submitted to the Authority for approval by a dominant licensee shall not—

(a) contain any exclusive or tying conditions, such that provision of the service to which the tariff

relates is conditional on the subscriber taking up other services from any source;

- (b) result in margin squeeze, as set out in the Second Schedule hereto, which may hinder a wholesale customer from competing fairly with retail services of the licensee or its affiliates after allowance for the retail costs of a reasonably efficient operator;
- (c) contain reserved or unexpressed terms and conditions, or terms to be applied at the discretion of a dominant licensee; and
- (d) involve predatory or excessive pricing, as set out in the Second Schedule hereto, which is anti-competitive in intent or likely effect.

(2) In addition to the requirements under subregulation (1), where the application relates to a tariff for a retail service, the tariff shall—

- (a) be described in a clear and unambiguous manner so that a subscriber may determine from the information provided in the tariff description how the tariff is to be applied and the liability for payment that will arise under the tariff; and
- (b) not contain any service bundles if the components of the bundle cannot also be obtained by the dominant licensee's subscribers separately from one another.

(3) Pricing that may be considered to be anti-competitive includes, without limitation, pricing that is significantly above the cost to provide the services, or significantly below the cost to provide the services.

Exemptions

21.— (1) The Authority may, in writing, exempt, with or without conditions, an undertaking or a class of undertakings from complying with any obligation under these Regulations.

(2) The following classes of undertakings shall be deemed to have been exempted—

- (a) the operation of a data centre; and
- (b) the operation of an internet café.

Regulatory
sanctions

22.— (1) Where a licensee fails to comply with these Regulations, The Authority may issue one or more of the following orders—

- (a) an order to cease and desist from doing an act or omission constituting the noncompliance;
- (b) an order to take specific remedial action such as restitution of monies received as revenue;
- (c) an order to pay an administrative penalty;
- (d) an order withdrawing approval of a tariff or part of a tariff; or
- (e) any other order which The Authority may deem in order to remedy the noncompliance in a fair and just manner.

(2) In the case of the specific forms of anti-competitive behaviour considered in regulation 15, the Authority may consider and, where reasonable and proportionate, impose the following remedies in addition to or in the alternative to (1)—

- (a) excessive pricing: impose a price cap based on the tariff that would yield a normal profit;
- (b) predatory pricing: impose a price floor on the licensee in relation to the service in which the predatory pricing took place;
- (c) margin squeeze: oblige the licensee to keep a minimum margin between the wholesale and retail tariffs in future or accept enforceable undertakings to this effect;
- (d) anti-competitive bundling and tying: oblige the licensee to keep a minimum discount justified by cost savings that may be permitted within the bundle; and
- (e) anti-competitive price discrimination: any of the foregoing or any other remedy that appears to be appropriate having regard to the circumstances.

Offences and
General penalty

23. Any person who fails to comply with these Regulations commits an offence and shall, upon conviction, be liable to a maximum fine of K5,000,000.00.

DRAFT

INFORMATION TO BE SUBMITTED BY A LICENSEE FOR APPLICATION FOR
TARIFF APPROVAL

1. Name of the applicant;
2. Identification of the tariff, with full description of the service and the application of the Tariff, including the market or brand name of the tariff (if applicable), together with a separate identification of each tariff element (if applicable);
3. Whether the Tariff is wholesale or retail;
4. Market segment addressed by the Tariff and any limitations on the availability of the Tariff to any segment or category of customers;
5. Purpose of the application – whether to establish a new Tariff for a new service, a new Tariff option; a variation or amendment of an existing Tariff, or the cancellation/withdrawal of a Tariff;
6. Whether the tariff application relates to a promotional offer or not;
7. Proposed effective date of the tariff;
8. In the case of a promotional offer, the proposed start and end date of the tariff;
9. Detailed terms and conditions relating specifically to the proposed Tariff which are additional to or different from the applicant's general terms and conditions of service;
10. in the case of applications relating to tariffs for new services, express confirmation that all technical issues, security arrangements, frequency spectrum issues, type approval, standard customer agreement, third party agreements, or other non-tariff matters have been evaluated, cleared or otherwise resolved;
11. In the case of amendment and cancellation of tariffs, express confirmation that all existing subscribers shall be notified on at least one billing cycle or 30 calendar days, whichever period is longer (details of arrangements for such notification, and migration plan to be provided with the application);
12. The name, position and contact details of the staff member in the applicant's organization; and
13. Any other relevant information deemed necessary by the Authority.

POTENTIAL FORMS OF ANTI-COMPETITIVE BEHAVIOUR BY DOMINANT LICENSEES

(a) Excessive Pricing

- (i) Excessive pricing is an abuse where a dominant licensee sets prices that take advantage of its strong position in the market (and the correspondingly weak position of customers and end users) to ensure supra-normal profits. The Authority can examine the licensee's accounts to determine whether over a significant period of time it has earned supra-normal profits from the provision of services in the markets in which it has market power.
- (ii) The Authority can also examine the profits earned by other providers in similar markets subject to effective competition whether in Malawi or in comparable countries, or use cost studies provided by the licensee concerned and the cost outputs of The Authority cost models to determine if the pricing is excessive when compared against long run costs for the services in question.

(b) Predatory pricing

- (i) In general terms a company is said to be pricing in a predatory way when it prices at levels that are unreasonably low, whether because they are below some measure of costs or because they otherwise generate an inadequate rate of return, and where they have the purpose or effect of eliminating, disciplining or otherwise inhibiting the competitive conduct of an existing or potential rival.
- (ii) Tariffs must be in place for a sufficient period to cause competitive damage and it is therefore unlikely that promotional offers that operate for 1 calendar month or less on a non-extendable basis (up to the maximum 3-month period recommended) will have the intention or effect required to be predatory.
- (iii) Where a dominant licensee in a relevant market or a related market seeks to set a Tariff below the cost dictated by the relevant cost standard, it is presumed to be acting abusively and with the intention to abuse its dominance and will therefore be acting unlawfully.
- (iv) Where a dominant licensee in a relevant market or a related market seeks to set a tariff between the cost dictated by the relevant cost standard and its average total cost (which could be its fully allocated costs for the relevant service) and this is or appears to be done as part of a strategy to severely damage or eliminate a competitor the behaviour of the provider will be held to be predatory and therefore unlawful.
- (v) The burden of proof in relation to these cases is on the Authority.

- (vi) The Authority should take into account initial tariffs of telecommunications services where the service volumes are small and unit costs are high pending effective traction in the market and greater penetration of the service in question.

(c) Margin squeeze

- (i) Margin squeeze may occur where a vertically integrated licensee – that is, one that operates in the wholesale and retail markets – with significant market power in the relevant wholesale market, sets the margin between its wholesale and retail prices so that a reasonably efficient retail operator would not earn a sufficient margin to be able to compete effectively. Margin squeeze may occur if the dominant licensee increases the tariff for its wholesale service or reduces the Tariff for its retail service, or where it sets a tariff for its wholesale service that discriminates in favour of its own retail business.
- (ii) Margin squeeze is unlawful if the available margin for an efficient retail competitor is insufficient to sustain effective competition.
- (iii) The Authority should investigate the costs associated with both the wholesale and retail services involved based on information available from the licensee concerned and from the Authority's own network cost models.
- (iv) The Authority may use the retail costs of the licensee concerned as the efficient costs for the purpose of the analysis in the absence of cost data for other operators that can be proven to be reasonably efficient retail operators.

(d) Tying and bundling

- (i) Tying or bundling occurs when a service is offered by a licensee under the condition that another service is also bought. Mixed bundles occur where the services that are included in the bundle are available separately from the licensee but at higher Tariffs than in the bundle. Pure bundles occur where one or more of the services that are included in the bundle are not available separately from the licensee.
- (ii) The Authority can decide whether, in the interests of subscribers, to allow pure bundles or not – the Act is silent on this.
- (iii) Mixed bundles are often accepted when provided by dominant licensees where the price discount implied by the aggregate Tariff of the bundle compared to the sum of the Tariffs of its component services is reasonably reflective of the economies of scope expected to arise from the provision of the services as a bundle.
- (iv) The dominant licensee concerned has the burden of showing that the discount referred to above is reasonably reflective of the costs that may be avoided through service provision as a bundle.

