



# GOVERNMENT GAZETTE

## OF THE

# REPUBLIC OF NAMIBIA

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## General Notice

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### COMMUNICATIONS REGULATORY AUTHORITY OF NAMIBIA

No. 467 2017

#### NOTICE OF INTENTION TO MAKE REGULATIONS TO ENSURE FAIR COMPETITION IN THE TELECOMMUNICATIONS SECTOR, COMMUNICATIONS ACT, 2009

The Communications Regulatory Authority of Namibia in terms of regulation 4(3) of the Regulations Regarding Rule-Making Procedures published as General Notice No. 334 of 17 December 2010 publishes this notice of intention to make regulations to ensure fair competition in the telecommunications sector, which contains the following:

1. A concise statement of the purpose for the proposed Regulations as set out in Schedule 1;
2. A draft of the proposed Regulations as set out in Schedule 2.

The public may make oral submissions to the Authority on the proposed regulations at a time, date and place notified by the Authority by subsequent notice in the Gazette.

The public may also make written submissions to the Authority no later than 30 days from the date of publication of this notice of intention to make regulations, in the manner set out below for making written submissions.

Reply comments to written submissions may be submitted to the Authority-

- (a) no later than 15 days after the time for the making of written submissions has lapsed; or
- (b) if the opportunity for the submission of reply comments is published in a subsequent Gazette, after the lapse of 14 days from the date of such publication.

All written submissions must-

- (a) contain the name and contact details of the person making the written submissions and the name and contact details of the person for whom the written submission is made, if different; and
- (b) be clear and concise.

All written submissions must be sent or given in any of the following ways:

1. By hand to the head offices of the Authority, namely Communication House, No 56 Robert Mugabe Avenue, Windhoek.
2. By post to the head offices of the Authority; namely Private Bag 13309, Windhoek, 9000;
3. By electronic mail to the following address: legal@cran.na;
4. By fax to email to: 0886550852

In terms of regulation 7 of the Regulations regarding Rule-Making Procedures published in Government Gazette No. 4630, General Notice No.334 dated 17 December 2010 herewith gives notice that it will hold a hearing regarding the proposed Code of Conduct as follows:

**DATE: 5 December 2017**

**TIME: 08H00 - 10H30**

**VENUE: TBA**

The public is invited to make comments and/or oral submissions at the hearing on the proposed regulations to ensure fair competition in the telecommunication sector.

All written comments and notice of oral submissions to be made during the hearing must be submitted to the Authority on or before the 1 December 2017.

**All written comments and notice of oral submission must be submitted to the Authority either physically or electronically-**

1. By hand to the head offices of the Authority, namely Communications House, 56 Robert Mugabe Avenue, Windhoek;
2. By post to the head offices of the Authority namely Private Bag 13309, Windhoek;
3. By electronic mail to the following address legal@cran.na;
4. By facsimile to the following facsimile number +264 61 222 790; or
5. By fax to email to: 088642748

Oral submissions must-

1. Include a statement of the name and contact details of the person making the oral submissions and the name and contact details of the person for whom the oral submission is made, if different;
2. Be clear and concise.

**F. KISHI**

**CHAIRPERSON OF THE BOARD OF DIRECTORS**

**COMMUNICATIONS REGULATORY AUTHORITY OF NAMIBIA**

**CONCISE STATEMENT OF PURPOSE**

The objects of these regulations are -

- (a) to provide a regulatory framework for -
  - (i) the promotion of fair competition; and
  - (ii) the protection against anti-competitive practices, in the telecommunications sector in the Republic of Namibia;
- (b) to induce licensees to become more efficient in order to offer a greater choice of products and services at lower prices;
- (c) to ensure that licensees -
  - (i) exercise market power with due regard to consumer welfare and overall industry performance; and
  - (ii) do not abuse their market power;
- (d) to ensure that essential facilities are available to competitors of licensees on reasonable terms;
- (e) to ensure competitive outcomes in order to enhance consumer welfare
- (f) to make provision for tariff application and review; and
- (g) to promote consumer protection in the telecommunications sector.

**SCHEDULE 1****PROPOSED REGULATIONS TO ENSURE FAIR COMPETITION IN THE  
TELECOMMUNICATIONS SECTOR: COMMUNICATIONS ACT, 2009**

The Communications Regulatory Authority in terms of section 129 of the Communications Act, 2009 (Act No. 8 of 2009), makes the regulations set out in the Schedule.

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PART 1  
INTRODUCTORY PROVISIONS

**Definitions**

1. In these regulations, any word or expression to which a meaning is assigned in the Act has that meaning, and -

“Act” means the Communication Act, 2009 (Act. No. 8 of 2009);

“agreement” means any form of contract, arrangement or understanding, whether or not legally enforceable, between licensees, and includes a decision by an association of licensees and a concerted practice;

“anti-competitive practice” means any practice or activity that has the object or effect of preventing, restricting or distorting competition in a relevant market for the supply of telecommunications or any product or service used in connection with these services;

“Cost Accounting Regulations” means the Regulations Setting Out Cost Accounting Procedures and Reporting Requirements, 2013 (Regulations No. 474 of 6 December 2013);

“bundling of services” means combining of various telecommunications services provided by a licensee in one package under a bundled rate or rate formula where the offering of one or more services within the package is contingent on acceptance of the entire package;

“commercial activities in the telecommunications sector” means the provision of telecommunication services, the supply or export of telecommunication apparatus and the production or acquisition of telecommunication apparatus for supply or export;

“Competition Act” means the Competition Act, 2003 (Act No. 2 of 2003);

“Competition Commission” means the Namibian Competition Commission established by section 4 of the Competition Act;

“concerted practice” means any form of coordination between licensees which involves direct or indirect contact or communication between licensees, the object or effect of which is either -

- (a) to influence the conduct of one or more licensees in a market; or
- (b) to disclose the course of conduct which a licensee has decided to adopt or is contemplating to adopt in a relevant market, in circumstances where such disclosure would not have been made under normal conditions of competition;

“cross subsidization” means charging artificially low prices in a relevant market and subsidizing those prices from high prices in a different market where there is less or no competition;

“Determination of Licensees Holding a Dominant Position” means the Determination of Licensees Holding a Dominant Position in the Telecommunication Market in terms of Section 78(1) of the Act, published as General Notice No 214 of 2016 in the Government Gazette No. 6054 of 28 June 2016;

“dominant licensee” means a licensee determined to be dominant in a relevant market as contemplated in section 78 of the Act;

“essential facility” means a facility associated with a telecommunications system or a telecommunications service that is supplied exclusively or predominantly by a single licensee or a limited number of licensees, and that cannot be easily substituted by other licensees for economic or technical reasons;

“geographic market” means a geographic area in which licensees are involved in the supply and demand of the relevant products or services under similar or sufficiently homogeneous conditions of competition and that can be distinguished from neighbouring areas in which the prevailing conditions of competition are appreciably different;

“horizontal agreement” means an agreement between competing licensees each of which operates at the same level in a relevant market;

“infringement” means an infringement of any prohibition under the Act, these Regulations or the terms and conditions of a license;

“Infrastructure-sharing Regulations” means the Regulations Prescribing Sharing of Infrastructure, 2016 (Regulations No. 400 of 4 October 2016);

“licensee” means the holder of a telecommunications license;

“market power” refers to the ability of a licensee or group of licensees to profitably raise and maintain a price for goods or services above the level that would prevail under competition subject thereto that a licensee or group of licensees may possess market power, *but will not be in a dominant position in that market if such licensee or licensees could be restrained in their conduct by rivals with comparable levels of market power.*

“merger” means the merger, acquisition, amalgamation, combination or joining of two or more licensees or part thereof into an existing licensee or to form a new licensee;

“price” or “rate” includes any form of consideration given in return for any telecommunications service or goods or services used in conjunction with any telecommunication service, whether such consideration has actually been given or is advertised or stated as being required to be given in exchange for such services;

“price squeeze” means increasing the price for provision of essential facilities required by competitors while charging relatively low price for retail services;

“product or services market” comprises all those products or services which are regarded as interchangeable or substitutable by the consumer by reason of the services’ or products’ characteristics, their prices and their intended use;

“relevant telecommunications market” means any of the markets referred to in **regulation 5**, having been determined by the Authority with reference to a product or service market and a geographic market, taking into account the functional and temporal dimensions of the market;

“supply” includes -

- (a) in relation to goods, the supply and resupply, by way of sale, exchange, lease, hire or hire-purchase of the goods; and
- (b) in relation to services, the provision by way of sale, grant or conferment of the services;

“Tariff Regulations” means the Regulations Regarding the Submission of Interconnection Agreements and Tariffs, 2011 (Regulations No. 126 of 18 May 2011);

“significant market player” or SMP means a licensee, who has the ability to materially affect the terms of participation (having regard to price and supply) in a relevant market as a result of: (i) control over essential facilities; or (ii) use of its position in the market as determined by the Authority in accordance with these rules;

“vertical agreement” means an agreement between licensees each of which operates at different levels in the same or in a related market;

whether upstream or downstream in the production or distribution chain of a relevant market.

### **Objects and application of regulations**

2. (1) The objects of these regulations are -
  - (h) to provide a regulatory framework for -
    - (iii) the promotion of fair competition; and
    - (iv) the protection against anti-competitive practices,in the telecommunications sector in the Republic of Namibia;
  - (i) to induce licensees to become more efficient in order to offer a greater choice of products and services at lower prices;
  - (j) to ensure that licensees -
    - (iii) exercise market power with due regard to consumer welfare and overall industry performance; and
    - (iv) do not abuse their market power ;
  - (k) to ensure that essential facilities are available to competitors of licensees on reasonable terms;
  - (l) to ensure competitive outcomes in order to enhance consumer welfare;
  - (m) to make provision for tariff application and review; and
  - (n) to promote consumer protection in the telecommunications sector.
- (2) These regulations apply to -
  - (a) all licensees issued with a telecommunications licence under section 38(1) of the Act;
  - (b) dominant licensees;
  - (c) all users and consumers.

### **Mandate of Authority in relation to competition**

3. (1) The Authority must determine, pronounce upon, administer and enforce compliance of all licensees with Chapter 4 of the Act particularly in relation to commercial activities of licensees in the telecommunications sector.

(2) In so far as any matter relating to competition falls concurrently within the jurisdiction of the Competition Commission, the Authority must cooperate with the Competitions Commission in accordance with the Memorandum of Understanding entered into between the respective parties with effect from 1 February 2012 and published as General Notice No. 17 of 2012 in Government Gazette No. 4868 of 10 January 2012.

### **Submission of documents to the Authority**

4. In these regulations, when persons are permitted or called upon to submit information to the Authority in writing, they may do so either physically or electronically -

- (a) by hand to the head offices of the Authority, namely Communications House, 56 Robert Mugabe Avenue, Windhoek;
- (b) by post to the head offices of the Authority, namely Private Bag 13309, Windhoek 9000;
- (c) by electronic mail to the following address: [legal@cran.na](mailto:legal@cran.na);
- (d) by facsimile to the following facsimile number: +264 61 222790; or
- (e) in any other manner or at alternative addresses set out by the Authority from time to time.

## **PART 2**

### **MARKET DEFINITION AND OBLIGATIONS OF LICENSEES**

#### **Markets in the telecommunications sector**

5. (1) The Authority has, in terms of the Determination of Licensees Holding a Dominant Position defined four relevant telecommunications markets in the telecommunications sector, namely the -

- (a) fixed and mobile call termination market;
- (b) wired end user access market;
- (c) national data transmission market; and
- (d) wireless end user access market.

(2) The Authority must ensure that open and fair competition is facilitated and encouraged in relevant markets within the telecommunications sector.

#### **Licensees holding a dominant position**

6. The Authority has determined that -

- (a) for the fixed and mobile call termination market, the following licensees are dominant:



- (i) Mobile Telecommunications Limited;
  - (ii) Telecom Namibia Ltd; and
  - (iii) Paratus Telecom (Pty) Ltd.
- (b) for the wired end user access market, Telecom Namibia Ltd is dominant;
- (c) for the national data transmission market, Telecom Namibia Ltd is dominant;
- (d) for wireless end user access market, Mobile Telecommunications Limited is dominant.

### **Obligations of licensees holding a dominant position**

7. (1) A dominant licensee in any relevant market -
- (a) must comply with all obligations imposed on such licensee under regulation 4, 5, 7, 8, 9, 10 and 11 of the Infrastructure-sharing Regulations if such licensee is a “carrier” or “dominant carrier” as defined in regulation 1 of the Infrastructure-sharing Regulations;
  - (b) must –
    - (i) afford access to its poles, ducts and conduits to other licensees;
    - (ii) provide to any requesting licensee non-discriminatory access to network elements on an unbundled basis at any technically feasible point;
    - (iii) provide for physical co-location of equipment necessary for interconnection or access to unbundled network elements at the premises of the dominant licensee;
    - (iv) must provide unbundled network elements in a manner that allows requesting licensees to combine such elements in order to provide telecommunications services,in the manner contemplated in, and subject to, the provisions of section 48 of the Act;
  - (c) must allow any other licensee to interconnect its network with that of the dominant licensee for the purpose of the transport and termination of telecommunications and information in the manner contemplated in, and subject to, the provisions of section 49 of the Act;
  - (d) must lease any infrastructure to any other licensee or must allow the latter licensee to install telecommunications equipment on such infrastructure or to otherwise utilise such infrastructure in the manner contemplated in, and subject to, the provisions of section 50 of the Act;
  - (e) must, in respect of any class of telecommunications services in which that licensee is dominant, offer telecommunications services for resale at a discounted rate to any requesting reseller in the manner contemplated in, and subject to, the provisions of section 51 of the Act; and

- (f) subject to section 52 of the Act, may not provide telecommunications services on terms that discriminate against a user, reseller or licensee.
- (2) For purposes of subregulation (1) -
  - (a) “licensee” means a carrier referred to in section 47(3) of the Act;
  - (b) “network element” means a network element defined in section 47(9) of the Act.

### **Obligations of all licensees to promote fair competition**

- 8.** (1) The provisions of regulation 7(1) apply with the changes necessitated by the context to licensees who are not dominant licensees.
- (2) In order to promote and facilitate fair competition, all licensees must -
    - (a) ensure the retention of separate accounts for its telecommunications services in accordance with regulation 4 of the Cost Accounting Regulations;
    - (b) comply with the Tariff Regulations with regards to the submission of interconnection agreements and tariffs.
    - (c) be transparent in relation to the publication of information, and such information must include relevant statutory accounting information, technical specifications, network characteristics and terms and conditions for supply and use, and prices;
    - (d) be non-discriminatory by applying equivalent conditions in equivalent circumstances to other licensees providing equivalent services and in providing services and information to third parties under the same conditions and with the same quality as the services and information provided to its own departments or to its subsidiaries or partners;
    - (e) 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;
    - (f) not violate the principle of equal access and non-preferential treatment if the licensee –
      - (i) considers the ability of a person to pay for a service when deciding whether to provide a service to the person; or,
      - (ii) makes other rational classifications among subscribers, such as business and residential, and to provide service on the basis of the classification.

### **Duty not to discriminate**

- 9.** (1) A licensee must provide non-discriminatory treatment to all users and licensees in the provision of telecommunication services.
- (2) An act or omission of a licensee amounts to an act of discrimination or undue preference where that licensee -
    - (a) directly or indirectly, by any means or device, makes unjust or unreasonable discrimination in the charges, practices, classification, regulations, facilities or services for or in connection with similar telecommunications services;

- (b) makes or gives undue or unreasonable preference or advantage to a particular person, class of persons or locality, or subjects any person, class of persons or locality to undue or unreasonable prejudice or disadvantage;
  - (c) unfairly favours a licensee so as to place other licensees lawfully competing with that licensee at a significantly competitive disadvantage;
  - (d) unjustly or unfairly denies access or service to a user; or
  - (e) refuses or fails to provide, or in any way denies users or licensees equal opportunity for access to the same type and quality of service.
- (3) A licensee must -
- (a) not discriminate against or grant any preference to any user; and
  - (b) offer rates, terms, conditions and technical standards for its services or through its affiliates, identical and equivalent to those offered to other unaffiliated licensees.

### PART 3 RULES OF FAIR COMPETITION

#### **Rules of fair competition**

**10.** (1) The rules of fair competition shall to the extent practicable, be based on the principles of competition law and practice relating to the prohibition of -

- (a) abuse of a dominant position;
- (b) anti-competitive agreements, decisions or concerted practices;
- (c) anti-competitive mergers, take-overs, consolidations, acquisitions or anti-competitive changes in the market structure resulting from changes in ownership, control, composition and structure of licensees; and
- (d) all other practices and acts with an effect on fair competition including unfair methods of competition, unfair or deceptive acts or practices, the purpose or effect of which is to distort competition in the telecommunications sector.

(2) A licensee may not engage in any activity, whether by act or omission, which has or is intended to or is likely to have the effect of unfairly preventing, restricting or distorting competition where the act or omission is done in the course of, or as a result of, or in connection with, any commercial activity in the telecommunications sector.

(3) For the avoidance of doubt, a licensee is deemed to have engaged or to be engaged in an anti-competitive practice, if by commission or omission that act has an appreciable effect of unfairly preventing, restricting or distorting competition in the telecommunications sector.

### PART 4 ANTI-COMPETITIVE PRACTICES

#### **Assessing whether conduct is an anti-competitive practice**

**11.** (1) In accordance with section 33(1) of the Act, any practice or activity that has the object or effect of preventing, restricting or distorting competition in a market for the supply of telecommunications or any product or service used in connection with these services is prohibited.

(2) Without limiting or detracting from the general application of section 33(1) of the Act the Authority, in assessing whether any conduct constitutes an anti-competitive practice, must consider the following -

- (a) definition of the relevant market or market segment;
- (b) impact of the conduct on existing competitors in the identified markets;
- (c) impact of the conduct on further market entry; and
- (d) impact of the conduct on users and consumers, including the availability and pricing of products and services.

#### **Anti-competitive behaviour by licensees in general**

**12.** (1) No licensee shall engage in an anti-competitive practice.

(2) Without limiting the generality of subregulation (1), a licensee is deemed to have engaged in an anti-competitive practice if that licensee:

- (a) defames or intends to defame a competitor through commercial advertisements or in any other manner;
- (b) without the consent of a user activates telecommunications services for that user and deducts charges against those services;
- (c) continues to charge a user after cancellation of a telecommunication service by that user;
- (d) hides actual prices of products and services;
- (e) abuses its dominant position in a relevant market in the manner contemplated in **regulation 13**;
- (f) although not a dominant licensee, commits any of the practices referred to in **regulation 13(2)** and **(3)**;
- (g) attempts to lock in users by any unfair means including high switching costs;
- (h) undertakes bundling of services whereby a user is required to purchase one product or service over which the licensee has market power conditional on the purchase of a second, competitively supplied, product or service whereas the two products or services can be provided and consumed independent of each other; or
- (i) indulge in a decision mutually beneficial to licensees in a specific relevant market or market segment;
- (j) engages in any other anti-competitive practice that may have the effect of impeding or preventing a competitor's entry into or expansion in a relevant market or market segment in an unfair manner.

#### **Abuse of dominant position**

**13.** (1) In accordance with section 33(2) of the Act, any abuse of individual or collective dominant position by one or more persons in a market for the supply of telecommunications or any product used in connection with these services is prohibited.

(2) Without limiting or detracting from the general application of section 33(2) of the Act, an act or omission of a dominant licensee, whether independently or in any form of collusion with others, constitutes or amounts to an abuse of its dominant position where the act or omission involves -

- (a) price abuses or anti-competitive pricing including -
  - (i) price squeezing by a dominant licensee, of the margin of profit available to a competitor that requires wholesale or retail services from the dominant licensee, by increasing the prices for such wholesale or retail services required by that competitor, or decreasing the prices of such services in markets where they compete, or both;
  - (ii) requiring or inducing a supplier to refrain from selling to a competitor;
  - (v) any form of direct or indirect imposition of unfair purchasing, selling prices or other unfair trading conditions;
  - (vi) predatory pricing whereby a dominant licensee deliberately incurs short-term losses by setting a price for services below the cost of such services with the intent to eliminate the competitors;
- (b) cross-subsidising from one service to a competitive service with the objective of lessening competition, except where such cross-subsidy is specifically approved by the Authority or by approval of tariffs for relevant services;
- (c) any conduct which exploits users or suppliers through excessively high prices or discriminatory prices or terms, conditions or conducts which removes or limits competition from existing competitors or discourage entry or exclude new undertakings from entering the market through predatory behaviour, vertical restraints or refusal to supply existing or potential competitors;
- (d) discrimination in the provision of access, interconnection or other services or facilities to other licensees except under circumstances that are objectively justified based on differences in supply conditions, including different costs or a shortage of available facilities or resources;
- (e) adoption of technical specifications for its networks or systems that prevent interoperability with a network or system of a competitor;
- (f) failure to make available to other licensees on a timely basis technical information about essential facilities, technical specifications or other commercially relevant information which is required by such other licensees to provide services;
- (g) limiting production or supply of services, markets or technical development to the prejudice of consumers;
- (h) applying dissimilar conditions to equivalent transactions with other parties, which places them at a competitive disadvantage;
- (i) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the contracts;
- (j) bundling of services, whereby the dominant licensee -

- (i) requires, as a condition of supplying a service to a competitor, that the competitor acquire another service that it does not require; or
  - (ii) offers the competitor more favourable terms or conditions that are not justified by cost differences if that competitor acquires another service that it does not require;
  - (k) predatory network alterations, where the dominant licensee alters the physical or logical interface of its network in a manner that imposes significant costs on interconnected licensees without any legitimate business, operational or technical justification;
  - (l) pre-emptive acquisition or securing of scarce facilities or resources, including rights of way, required by another licensee for the operation of its business, with the effect of denying the use of the facilities or resources to that other licensee;
  - (m) supplying interconnection or other competitive services at prices below forward-looking incremental costs as contemplated in section 49(11) of the Act;
  - (n) engaging in unfair methods of competition that improperly deter or are likely to deter entry into relevant markets or restrict or are likely to restrict existing competition in those markets for reasons unrelated to the availability, price or quality of the service that a prospective or current licensee offers or seeks to offer through -
    - (i) false or misleading claims;
    - (ii) degradation of service availability or quality;
    - (iii) provision of false or misleading information to competitors; or
    - (iv) interference with an end-user;
  - (o) failure to comply with, or negotiate in good faith regarding, any duty relating to interconnection;
  - (p) refusal to supply or grant access to essential facilities within a reasonable time after a request and on reasonable terms and conditions, where the dominant licensee has such facilities available;
  - (q) using information to compete with a competitor where the dominant licensee obtained such information from the competitor for purposes related to interconnection to the dominant licensee or supply of services by the dominant licensee; or
  - (r) any other conduct that, in the opinion of the Authority, prevents or lessens or is likely to prevent or lessen competition substantially in a relevant market.
- (3) For the avoidance of doubt and without limiting the general effect of this regulation, the following conditions shall constitute vertical restraints imposed by a dominant licensee, that potentially reduce competition -
- (a) resale price maintenance which is the practice whereby a licensee and a reseller of that licensee's products and services agree that the reseller will sell that licensee's products or services at certain prices at or above a price floor or at or below a price ceiling;

- (b) selective distribution, which is a distribution system whereby a supplier of telecommunication services and products enters into vertical agreements with a limited number of selected resellers in the same geographic market, thereby restricting the number of authorised resellers;
- (c) exclusive distribution, which is a distribution system in which a licensee grants exclusive rights on its products or services to another entity;
- (d) exclusive purchasing or dealing which is an arrangement whereby reseller of telecommunications services and products are tied to purchase from a licensee on the understanding that no other reseller will be appointed or receive supplies in a given area;
- (e) third line forcing, which involves the supply of goods or services on condition that the purchaser acquires goods or services from a particular third party, or a refusal to so supply because the purchaser will not agree to that condition;
- (f) tie-in sales and bundling, which is the practice of conditioning the sale of one product on the purchase of another product;
- (g) full-line forcing which is the practice of obligating resellers to sell a licensee's product line in its entirety;
- (h) quantity forcing, which refers to pricing schemes that reward a purchaser for buying some threshold quantity from a supplier of telecommunications products and services;
- (i) non-linear pricing, which involves a pricing strategy of not charging the same price for each unit sold and so becomes an indirect form of price discrimination.
- (4) Without limiting subregulations (2) or (3), "abusive conduct" generally includes -
  - (a) conduct which interferes with the competitive process by adversely affecting a user of consumer, directly through the price charged, or indirectly through raising and enhancing entry barriers or increasing competitors costs; and
  - (b) anti-competitive conduct that -
    - (i) exploits a user, consumer or supplier through excessively high prices; or
    - (ii) discriminatory prices or other terms and conditions through removing or limiting competition from existing competitors; or
    - (iii) excludes new licensees from entering a relevant market or market segment.

## PART 5 ANTI-COMPETITIVE AGREEMENTS

### **Anti-competitive agreements**

**14.** (1) In accordance with section 33(5) of the Act, any agreement determined by the Authority to be anti-competitive will be automatically null and void.

(2) Without limiting or detracting from the general application of section 33(5) of the Act, an agreement between a licensee or a decision by an association of licensees, however

constituted, or a concerted practice restricting or distorting competition in the telecommunications sector, constitutes an anti-competitive agreement.

- (3) An anti-competitive agreement contemplated in subregulation (2) includes -
- (a) price fixing agreements intended to directly or indirectly manipulate purchase or selling price;
  - (b) agreements to fix trading conditions intended to directly or indirectly manipulate market trading conditions;
  - (c) agreements to share markets where licensees apportion product and service markets and geographic markets amongst themselves;
  - (d) agreements to limit or control production of telecommunication services or products or investment in the telecommunication sector;
  - (e) collusion tendering or bid-rigging where licensees collude to determine who will win or what the winning price or conditions will be in respect of a tender or a bid;
  - (f) group boycotts which refers to an agreed-upon refusal by competitors to deal with another entity unless that entity refrains from dealing with a potential competitor trying to enter a relevant market, intended to shut a competitor out of that market, or preventing entry of a new competitor into the market;
  - (g) agreements with a potential to result in higher prices or reductions in output of telecommunications services or equipment;
  - (h) agreements between licensees and entities at different levels in the supply chain as a down-stream reseller or an upstream provider of communications services, such as vertical price fixing, vertical market allocation or exclusive dealing;
  - (i) tie-in sales and bundling, which is the practice of conditioning the sale of one product on the purchase of another product;
  - (j) joint buying or selling agreements between buyers to fix the price at which they are prepared to buy or sell and similar agreements between sellers where they agree to boycott certain customers;
  - (k) information-sharing agreements where the exchange has an appreciable effect on competition;
  - (l) exchange of price information that eliminates competition between the cooperating licensees;
  - (m) exchange of non-price information that has an effect on competition;
  - (n) advertising restrictions relating to among others, the amount, nature or form;
  - (o) standardisation agreements that contain restrictions on what the parties may produce and which as a result limit competition from other sources through raising entry barriers; and
  - (p) any agreement with an appreciable effect on competition including aggregated rebate schemes, specialisation agreements, co-operation in research and development or joint ventures for the development of new products or markets.



PART 6  
EXEMPTIONS

**Exemptions**

**15.** (1) A licensee may apply to the Authority for an exemption order, for the exemption of an agreement or a conduct of the licensee falling within the acts of unfair competition in these Regulations.

(2) An application for an exemption order shall be in writing, in a form approved by the Authority and shall be accompanied by the prescribed fee.

(3) The Authority shall upon receiving an application for an exemption order, publicise the receipt of the application in such manner as the Authority considers fit.

(4) Where the Authority receives an application for an exemption order, it may invite public comments to discuss the application or hold a public hearing on the matter.

(5) Where the Authority decides to invite public comments or to hold a public hearing, it shall give the applicant and any other person whom the Authority considers interested, a reasonable opportunity to attend and take part in the public inquiry.

(6) The Authority may grant an exemption order in relation to particular conduct of a licensee where the Authority is satisfied that –

- (a) the conduct will result, or is likely to result in a benefit to the public;
- (b) the resultant public benefit outweighs, or will outweigh the detriment to the public constituted by any lessening of competition that will result, or is likely to result from engaging in the conduct; or
- (c) the conduct is not anti-competitive or a breach of the rules of fair competition.

(7) In determining whether to grant an exemption order under subregulation (1), the Authority may have regard to-

- (a) the extent to which the conduct relates to the supply of goods or services on favourable terms and conditions to -
  - (i) a financially disadvantaged individual;
  - (ii) an individual who is disadvantaged on health grounds;
  - (iii) a non-profit community organisation or a non-profit charitable organisation;
  - (iv) an educational institution; or
  - (v) a health facility;
- (b) the extent to which the conduct relates to the supply of goods or services for –
  - (i) community, charitable or educational purposes; or
  - (ii) the promotion of health or safety, on favourable terms and conditions;
  - (iii) the need to satisfy any applicable universal service obligation;

- (iv) the extent to which the conduct prevents or reduces, or is likely to prevent or reduce pollution or other forms of degradation of environmental amenities; and
- (v) the extent to which the conduct contributes, or is likely to contribute to technical innovation, or the development of new goods or services.

(8) Where the Authority makes an exemption order, it must give the applicant a written notice setting out the order and the reasons for the order.

(9) Where the Authority refuses to make an exemption order, it must give the applicant a written notice stating that the order is refused and the reasons for the refusal.

(10) An exemption order is subject to such conditions as the Authority may specify in the order.

(11) The Authority must, if satisfied that -

- (a) the order was made on the basis of information that was false or misleading in a material particular;
- (b) a condition to which the order is subject is contravened; or
- (c) there has been a material change of circumstances since the order was made,

revoke the order.

(12) The Authority may not revoke an exemption order unless the Authority -

- (a) publishes a draft notice of revocation and invites the public to make submissions on the draft notice; and
- (b) considers any submissions received, within the time limit specified in the draft notice.

(13) Where the Authority revokes an exemption order relating to a person, the Authority must give that person a written notice stating that the order is revoked and setting out the reasons for the revocation.

(14) The Authority must keep a register of the exemption orders issued.

(15) The register under subregulation (14) must include –

- (a) particulars of all exemption orders;
- (b) applications for exemption orders received by the Authority;
- (c) particulars of decisions for refusal to make exemption orders;
- (d) particulars of decisions revoking, or refusing to revoke, exemption orders; and
- (e) particulars of the Authority's reasons for making exemption orders.

(16) The register shall not set out any information whose disclosure would reasonably be expected to prejudice substantially the commercial interests of the licensee, or of any of the persons, to whom the information relates.

- (17) Any person may, on payment of the fee prescribed by the Authority –
- (a) inspect the register; and
  - (b) make a copy of or take an extract from the register.
- (18) A licensee applying for an exemption order shall not in connection with the application, intentionally or recklessly -
- (a) give information to the Authority, that is false or misleading in a material particular; or
  - (b) omit from information given to the Authority, any matter or thing without which the information given would become misleading in a material particular.
- (19) For the avoidance of doubt -
- (a) an act or omission of a kind described as abusive conduct is not prohibited where -
    - (i) it has or would have no appreciable effect on competition;
    - (ii) it has or would have no effect on competition between persons engaged in commercial activities connected with the communications sector; or
    - (iii) it would have no effect on users of communication services;
  - (b) an act or omission of a kind described as an anti-competition agreement, decision or concerted practice is not prohibited where the anti-competition agreement, decision or concerted practice contributes to improving the provision of any goods or services or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit and where the anti-competition agreement, decision or concerted practice does not -
    - (i) impose on the parties concerned, restrictions which are not indispensable to obtaining the objectives stated in this regulation; and
    - (ii) afford the parties the possibility of eliminating competition in respect of a substantial part of the goods or services in question.

### **Types of exemptions**

- 16.** (1) There shall be the following exemptions -
- (a) individual exemptions; and
  - (b) block exemptions.
- (2) An individual exemption shall be applied for by a licensee and upon satisfying the exemption criteria, the Authority shall grant an individual exemption order.
- (3) An individual exemption shall be granted subject to such conditions or obligations and for such a period as the Authority may determine.
- (4) The Authority may make a block exemption which exempts a particular category of agreements, which it considers likely to satisfy the statutory exemption criteria.

- (5) A block exemption shall impose the following conditions or obligations –
- (a) authority to the Authority to cancel the block exemption in respect of an agreement where there is a breach of a condition imposed by the block exemption;
  - (b) authority to the Authority to cancel the block exemption in respect of an agreement where there is failure to comply with an obligation imposed by the block exemption; or
  - (c) authority to the Authority to cancel the block exemption in respect of an agreement where the Authority considers that an agreement does not satisfy the statutory exemption criteria.

### Notifications

17. (1) A licensee may make a notification to the Authority for guidance on whether the licensee's agreement and conduct comply with the provisions of fair competition under the Act or the rules of fair competition under these Regulations.

(2) It shall be the responsibility of a licensee to ensure that the licensee's agreement and conduct comply with the Act and these Regulations.

(3) The guidance by the Authority sought by a licensee in subregulation (1) shall indicate -

- (a) whether the agreement or conduct is likely to infringe any relevant provisions of fair competition under the Act or these Regulations; or
  - (b) whether the conduct or agreement would be likely to be granted an exemption if an application in that regard, was made.
- (4) Where guidance is given, the Authority shall not re-open a case unless-
- (a) there are reasonable grounds for believing that there has been a material change of circumstances since the guidance was given;
  - (b) there is a reasonable suspicion that materially incomplete, misleading or false information was given; or
  - (c) a complaint is received from a third party.

## PART 7 ENFORCEMENT

### Regulatory actions

18. (1) The Authority may exercise any of the powers conferred upon it under any law for ensuring compliance of these regulations.

- (2) Without detracting from or limiting the generality of subregulation (1), the Authority-
- (a) shall prosecute regulatory offences and enforce the provisions of these regulations in terms of sections 114 to 127 of the Act, where applicable;
  - (b) may approach a court of law to obtain urgent interdictory or other suitable relief in respect of any licensee or other person who contravenes the provisions of **regulations**

**7, 8, 9 and 10, and Part 4 and Part 5**, upon notice to such licensee or other person in order to prohibit that licensee or person from engaging in unfair competition until that licensee or person complied with the provisions of the aforesaid regulations and Parts.

(3) In the exercise of its powers and functions under these regulations, the Authority may act of its own accord or upon a complaint from an aggrieved person.

### **Penalties**

**19.** (1) If a licensee or other person contravenes one or more of the regulations contained herein, the Authority may -

- (a) issue a written warning to that licensee and a final date for submitting outstanding information where the licensee is guilty of not submitting information as required by these regulations;
- (b) impose a penalty of not more than N\$500,000.00 for-
  - (i) every failure by a licensee or any other person to comply with any requirement or obligation contained in these regulations;
  - (ii) each submission or causing the submission of false or misleading information to the Authority; or
  - (iii) every failure to submit any documents or information as required pursuant to a written warning issued in terms of paragraph (a); or
- (c) take any other measure the Authority regards as reasonable in the circumstances.

(2) Any amount of penalty payable in terms of paragraphs (b) or (c) of subregulation (1) constitutes a debt due to the Authority by the licensee or other person involved and may be recovered by the Authority by means of proceedings instituted in any competent court.

(3) Notwithstanding subregulations (1) and (2), the Authority may waive the payment of or refund the whole or any part of a penalty payable.

(4) Before imposing any penalty as contemplated by paragraphs (b) or (c) of subregulation (1), the Authority must give licensee or other person concerned the opportunity to be heard, whereafter the Authority may -

- (a) decide not to impose any penalty; or
- (b) impose such penalty the Authority deems fit.

## PART 8 GENERAL

### **Accounts**

**20.** (1) A licensee must comply with the Cost Accounting Regulations.

(2) In addition to the duties imposed by the Cost Accounting Regulations a licensee must maintain separate books of account for each telecommunication service license it holds and may not cross-subsidize the prices for any service it offers in any telecommunications market with revenue from the sale of telecommunication equipment, systems or services.

(3) The Authority may 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.

### **Confidential information**

**21.** If a person has designated information or documentation submitted to the Authority as confidential, the provisions of section 28 of the Act apply.

### **Reconsideration**

**22.** (1) The Authority may in terms of section 31 of the Act reconsider any decision or order made in terms of these regulations, within 90 calendar days from the date of making that decision or issuing that order.

(2) Any person (hereinafter “the requesting party”) may within 15 days of receiving any decision or order made by the Authority request the Authority in writing to reconsider decision or order subject to the following:

- (a) The requesting party must comprehensively complete the Reconsideration Form (Form A hereto) and submit that form to the Authority within 30 days from date of receipt of the Authority’s decision or order.
- (b) The Authority must within three days of receipt of the Reconsideration Form determine whether there are grounds for reconsideration.
- (c) Where there are no valid grounds for reconsideration, the Authority must forthwith notify the requesting party of its decision and close the file pertaining to the dispute.
- (d) Where the Authority considers that the request for reconsideration should be heard, the Authority must provide a copy of the Reconsideration Form to any party with a direct or substantial interest in the matter and simultaneously notify the requesting party of its decision within 7 days from the lapse of the period referred to in paragraph (b).
- (e) A party with a direct or substantial interest referred to in paragraph (d) must deliver a response in writing to the request for reconsideration within a period of 14 days of receipt of the Reconsideration Form.
- (f) Upon receipt of the response referred to in paragraph (e), the Authority must deliver that response to the requesting party and afford that party 14 days from receipt of the response to reply thereto.
- (g) The Authority must thereafter, subject to subregulation (3), make a determination on whether or not to reconsider its decision or order.

(3) The Authority may publish its determination on reconsideration without further submissions having been received, or it may provide an opportunity to the public to provide further written or oral submissions, prior to making a determination contemplated in subregulation (2)(g), in a manner stated by the Authority.

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