



# GOVERNMENT GAZETTE

## OF THE

# REPUBLIC OF NAMIBIA

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## General Notice

### COMMUNICATIONS REGULATORY AUTHORITY OF NAMIBIA

No. 379

2019

#### NOTICE OF INTENTION TO MAKE REGULATIONS PRESCRIBING PENALTIES UNDER SECTION 129(2)

The Communications Regulatory Authority of Namibia, in terms of section 129(2) of the Communications Act, 2009 (Act No. 8 of 2009), and the Regulations regarding Rule-Making Procedures published in Government Gazette No. 4630, General Notice No. 334 dated 17 December 2010 -

- a) publishes this Notice of Intention to Make Regulations Prescribing Penalties under Section 129(2) of the Communications Act as set out in Schedule 1; and
- b) sets out the concise statement of the reasons and purpose for the proposed regulations in Schedule 2.

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

The public are hereby invited to make written representations, comments, communications and submissions (hereafter collectively called "submissions") to the Authority within thirty (30)

consecutive days from the date of publication of this notice in the *Gazette*, in the manner set out below for making of written submissions.

All written submissions must -

- a) contain the name and full contact details (physical and postal address, email address and telephone or cell phone number) of the person making the written submissions and the name and similar contact details of the person for whom the written submission is made if different; and
- b) be clear and concise.

In the event where any person making a submission wishes to designate any information contained in such submission as confidential, such information must be clearly marked as "confidential". Notwithstanding, if the Authority is of the opinion that information is not confidential it will inform the person thereof thereby -

- a) allowing the person to withdraw the information from the rule-making proceedings;
- b) agreeing with the person that it will not be treated anymore as confidential information; or
- c) requesting a hearing on the issue of confidentiality to be conducted in accordance with section 28 of the Communications Act.

All written submissions must be send or submitted to be received by the Authority on or prior to the due date anticipated above in any of the following manners -

- a) by hand to the head office of the Authority, namely Communications House, 56 Robert Mugabe Avenue, Windhoek;
- b) by post to the head office 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) by fax-to-email to: 0886550852.

**H. M. GAOMAB II**  
**CHAIRPERSON OF THE BOARD**  
**COMMUNICATIONS REGULATORY AUTHORITY OF NAMIBIA**

**SCHEDULE 1****PROPOSED PENALTY REGULATIONS: COMMUNICATIONS ACT, 2009**

The Communications Regulatory Authority of Namibia, in terms of section 129(2) of the Communications Act, 2009 (Act No. 8 of 2009), makes the regulations set out in Schedule 1.

**Definitions**

1. In these Regulations, any word or expression to which a meaning is assigned in the Act, has the same meaning and unless the context indicates otherwise -

“authorisation” means a licence, certificate, permit or any other similar type of authorisation issued under the Act;

“contravention” means a contravention of a provision of a regulation made under the Act;

“failure” means a failure to comply with a provision of a regulation made under the Act;

“monetary penalty” means a monetary penalty contemplated in regulation 7;

“penalty” means any penalty provided for in these Regulations and includes any penalty specified in any other regulation made under the Act;

“punitive measure” means a punitive notice or a monetary penalty;

“punitive notice” means a notice contemplated in regulation 6;

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

“these Regulations” means these Penalty Regulations as amended from time to time.

**Objects and application of these Regulations**

2. (1) The objects of these Regulations are:
- (a) To consolidate and simplify the penalty regime for contraventions and failures and matters related to penalties in regulations;
  - (b) to improve compliance with the Act and regulations made under the Act;
  - (c) to promote a transparent, non-discriminatory, well-defined and consistent approach when dealing with compliance, enforcement and penalties;
  - (d) within the communications sector, to promote a stable regulatory environment thereby fostering market and investor confidence and understanding;
  - (e) to accommodate a layered and flexible approach to enforcement of regulations and proportionality of punitive responses to contraventions and failures;
  - (f) to promote a cooperative relationship between the regulator and the regulated focussing on understanding of the regulated environment, regulatory obligations and the enforcement regime and offence prevention;

- (g) to work towards an accountable and a cost-effective regulatory enforcement regime with appropriate safeguards.

(2) Unless the imposition of a punitive measure under these Regulations is specifically excluded in a regulation made under the Act, these Regulations apply to every holder of an authorisation, a user, a customer and any other person (hereafter in these Regulations collectively referred to as “a person”) to whom a regulation made under the Act applies and who commits a contravention or failure.

(3) A punitive measure may be imposed, in the manner provided in these Regulations, on a person who commits a contravention or failure.

- (4) These Regulations apply also to a code or standard made or set under the Act.

### **Jurisdictional matters**

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

(2) Where the Authority imposes a monetary penalty under these Regulations, the amount thereof constitutes a debt due to the Authority by the person on whom it was imposed and may be recovered by the Authority from such person by means of proceedings instituted in any court of competent jurisdiction.

(3) A person against whom a punitive measure was taken or imposed by the Authority may appeal against such measure to a court of competent jurisdiction.

(4) The Authority may postpone compliance with a punitive measure pending the outcome of an appeal under subregulation (3).

### **Interaction between various punitive actions**

4. (1) Punitive measures taken under these Regulations -

- (a) do not exempt a person from civil or criminal liability in respect of the contravention or failure on account of which those measures were taken by the Authority;
- (b) unless specifically excluded, do not preclude the Authority from taking any other punitive action it is authorised to take under the Act with regard to such contravention or failure.

(2) Unless clearly not compatible, the punitive measures provided for in these Regulations are not exclusionary and the Authority may impose more than one such measure if appropriate under circumstances.

- (3) (a) Where the conduct of a person constitutes a contravention or failure with more than one regulation, punitive measures may be taken against such person as regards such person’s contravention or failure with any one or more of those regulations.

- (b) However, the person is not liable to more than one monetary penalty under these Regulations in respect of the same contravention or failure subject thereto that a monetary penalty imposed under regulation 7(2), if it constitutes both a daily monetary penalty and a once-off monetary penalty, is deemed to be one punitive measure.

(4) Punitive measures imposed by the Authority under these Regulations may differ between persons according to the criteria which the Authority considered and which were relevant to the contravention or failure.

### **Warning notices**

5. (1) Without derogating from the Authority's right to issue a punitive notice and impose a monetary penalty under these Regulations, the Authority may at any time issue a warning notice to a person if the Authority has reasonable grounds to suspect that such person's conduct may constitute a contravention or failure or, based on the perceived conduct of such person, such conduct would likely, or has the potential to, result in a contravention or failure.

(2) A warning notice must be in writing and regulation 6(3)(a) to (f) and (h) apply with the necessary changes to a warning notice.

### **Punitive notices**

6. (1) Punitive notices issued under these Regulations aim at promoting, enforcing and ensuring compliance with regulations made under the Act and must be in writing.

(2) A punitive notice, without limiting the power of the Authority to issue a warning notice or any other general notice deemed appropriate under circumstances, may include one or more of the following types of notices:

- (a) A compliance notice instructing a person to take such action as may be necessary to ensure compliance;
  - (b) a cease and desist notice instructing a person to cease, within a specified period, with a contravention or failure;
  - (c) a remedial notice requiring a person to implement remedial action by taking such action or adopting such practice as the Authority requires and as set out in the notice for remedying a contravention or failure or preventing the re-occurrence of a contravention or failure;
  - (d) a compliance programme notice instructing a person to draw up, submit for approval to the Authority and implement a particular programme for compliance;
  - (e) a monetary penalty notice ordering a person to pay a monetary penalty determined in accordance with these Regulations.
- (3) A punitive notice given by the Authority under this regulation -
- (a) must specify the type of notice;
  - (b) must specify the name of the person to whom the notice is issued;
  - (c) must describe the contravention, failure or other type of behaviour involved or which is a cause of concern which, in so far as may be available, must include the place and date or time when it occurred;
  - (d) must set out the reasons for the notice;
  - (e) must, if applicable, indicate the consequences of such contravention, failure or behaviour;

- (f) must, if applicable, indicate the period within which there must be compliance with the notice;
- (g) must inform the person to whom the notice is addressed of such person's right to make written presentations to the Authority regarding the notice or any other matter related thereto within the time period specified in the notice;
- (h) may contain such other information as the Authority may deem appropriate.

(4) As regards the punitive notices set out in subregulation (2), the Authority may request the relevant person to submit such additional information to the Authority as the Authority may require -

- (a) to enable the Authority to determine the type of punitive notice which is to be issued and the contents thereof; or
- (b) regarding the manner in which such person intends to comply, or the steps which such person intends to take to comply, with the anticipated punitive measure.

(5) After considering a written presentation or, in the event where notwithstanding the request no representations were received, the Authority may -

- (a) withdraw the punitive notice; or
- (b) issue a final punitive notice with or without amendments and specify a reasonable period or periods within which the person to whom the notice is addressed must comply with the punitive notice.

#### **Monetary penalties which may be imposed by the Authority**

7. (1) In the event of a contravention or failure by a person, the Authority may by means of a monetary penalty notice -

- (a) impose a daily monetary penalty of not exceeding N\$ 10,000.00 for each day during which the contravention or failure continues, irrespective of the number of days during which such contravention or failure continues provided that such daily monetary penalties may not accumulate to more than N\$ 1,000,000.00; or
- (b) impose a once-off monetary penalty not exceeding N\$ 1,000,000.00; or
- (c) if appropriate, order a licensee to compensate its subscribers or customers to the amount and in the manner set out in the monetary penalty notice.

(2) Where a person fails to comply with a final punitive notice of the Authority as contemplated in regulation 6(5)(b), the Authority may, in addition to any other penalty which it may impose for a contravention or failure by that person, impose on such person by means of a monetary punitive notice a once-off penalty not exceeding N\$ 50,000.00.

#### **Interest on amounts due**

8. The Authority may charge interest on –

- (a) the failure to pay any fee, levy or other monetary amount payable under the Act by the date which such payment is due which interest may not exceed a rate of three percent above the prevailing prime rate as determined by the Bank of Namibia,

which interest shall be in addition to any other penalty which may be imposed with regard to such late payment;

- (b) any monetary penalty not paid by the due date which interest may not exceed the prevailing prime rate as determined by the Bank of Namibia.

**Criteria to be considered by Authority when deciding on imposition of penalty**

9. (1) When deciding on the type of punitive measure or measures to impose or the size or amount of a monetary penalty, the Authority must take into consideration the following criteria in so far as they are relevant:

- (a) The nature, extent and gravity of the contravention or failure including the consequences thereof;
- (b) the duration of the contravention or failure and whether it constituted a single contravention or failure or more than one;
- (c) the nature and extent of any loss or damage suffered as a result of the contravention or failure;
- (d) whether the person has engaged in any similar conduct and has been found in the past to be in contravention or failure in respect of that conduct;
- (e) whether any other sanction, penalty or fine has already been imposed under the Act or any other law with regard to the contravention or failure;
- (f) the extent to which the contravention or failure was deliberate or reckless or the degree of negligence involved;
- (g) the level of profit derived or to be derived from the contravention or failure;
- (h) whether the person who committed the contravention or failure showed a disposition to cooperate with the Authority in relation to the contravention or failure and any pro-active or voluntary steps taken by such person to remedy the contravention or failure;
- (i) whether the person has in place a compliance programme or a corporate culture or governance structure conducive to compliance as evidenced by, amongst others, guidelines, internal rules, educational programmes and disciplinary or other corrective measures in response to an acknowledged contravention or failure and, if so, whether the person has been complying therewith;
- (j) the deterrent effect of the relevant punitive measure;
- (k) in the event of the contravention or failure having been committed by the holder of an authorisation, whether such holder of an authorisation holds a dominant position in the market as anticipated in the Act or the degree of power the person who committed the contravention or failure, whether the holder of an authorisation or not, has as evidenced by the person's market share and ease of entry into the market;
- (l) any other circumstances under which the contravention or failure took place or relevant thereto which the Authority deems appropriate to take into consideration.

(2) The Authority must record the consideration of the above criteria, the evaluation thereof as regards their relevance to contravention or failure under consideration and the outcome of such evaluation.

### **False or misleading information**

**10.** No person may furnish false or misleading information to the Authority or any other authority, or make any false or misleading statement to the Authority or any other authority, knowing such information or statement to be false or misleading, in terms of the Act or in terms of any regulation made under the Act.

### **Amendment of regulations**

**11.** The regulations set out in the Schedule are hereby amended as set out in the third column thereof.

### **Transitional provision and commencement**

**12.** (1) These Regulations do not apply to a contravention or failure which took place or which commenced prior to the commencement date set out in subregulation (2).

(2) These Regulations will become effective on date of publication of these Regulations in the *Gazette* (or on a specific date).



**SCHEDULE**

(Regulation 11)

<b>Column 1 Government Gazette and Government Notice</b>	<b>Column 2 Title of Regulations</b>	<b>Column 3 Extent of Amendment</b>
Government Gazette No. 5037 of 13 September 2012 Government Notice No. 308 of 2012	Regulations regarding Licence Conditions for Telecommunications Service Licences	Repeal of regulations 21, 23 and 25.
Government Gazette No. 5037 of 13 September 2012 Government Notice No. 309 of 2012	Regulations regarding Licence Conditions for Broadcasting Service Licences	Repeal of regulations 16, 18 and 20.
Government Gazette No. 5269 of 19 August 2013 Government Notice No. 329 of 2013	Regulations regarding Licence Conditions for Class Comprehensive Multiplex and Signal Distribution Service Licences, Multiplex Licences and Signal Distribution Service Licences	Repeal of regulation 22.
Government Gazette No. 5357 of 6 December 2013 Government Notice No. 474 of 2013	Regulations Setting Out Cost Accounting Procedures and Reporting Requirements	The substitution for regulation 12 of the following regulation:  <b>“12. Submission of information</b>  A licensee must submit information and reports in the manner and format set out in these regulations.”.
Government Gazette No. 5357 of 6 December 2013 Government Notice No. 475 of 2013	Regulations Setting Out Minimum Technical Standards for Set-Top Box Decoders	Repeal of regulation 9(2).
Government Gazette No. 5659 of 30 January 2015 Government Notice No. 22 of 2015	Regulations in respect of Type Approval and Technical Standards for Telecommunications Equipment	Repeal of regulation 16(2).
Government Gazette No. 5713 of 21 April 2015 Government Notice No. 152 of 2015	Notice of Regulations Prescribing Quality of Service Standards Applicable to Service Licensees	(a) The substitution for regulation 7 of the following regulation:  <b>“7. Submission of information</b>  A licensee must submit information and reports in the manner and format as set out in these regulations.”; and (b) the substitution for regulation 8 of the following regulation:  <b>“8. Contraventions and failures</b>  Each failure to comply with, or contravention of, a quality of service standard set out in items 1 to 3 of Annexure A, and each such repeated failure or contravention, constitutes a separate failure or contravention with regard to which a penalty may be imposed.”.

<p>Government Gazette No. 5983 of 1 April 2016 Government Notice No. 97 of 2016</p>	<p>Regulations Prescribing the National Numbering Plan for Use in the Provision of Telecommunications Services in the Republic of Namibia, Numbering Licence Fees and Procedures for Number Licences</p>	<p>(a) The amendment of regulation 16 -</p> <p>(i) by the repeal of subregulation (2); and</p> <p>(ii) by the substitution for subregulation (3) of the following subregulation:</p> <p>“(3) Where the Authority finds that a licensee has failed to comply with a responsibility, an obligation or a term or condition subject to which numbering resources were allocated to such licensee, the Authority may -</p> <p>(a) impose an appropriate penalty on such licensee in accordance with regulations made under section 129(2) of the Act; and</p> <p>(b) in addition to paragraph (a), withdraw one or more of such licensee’s rights to use numbering resources allocated to that licensee and regulation 21(5) applies to such withdrawal with the necessary changes.”;</p> <p>(b) the repeal of regulation 40(2) to (6); and</p> <p>(c) the repeal of item 8 of Annexure 1A.</p>
<p>Government Gazette No. 6141 of 4 October 2016 Government Notice No. 400 of 2016</p>	<p>Regulations Prescribing Sharing of Infrastructure</p>	<p>(a) The repeal of regulation 15(2) to (5); and</p> <p>(b) the substitution for regulation 16 of the following regulation:</p> <p><b>“Prohibitions</b></p> <p><b>16.</b> No carrier, dominant carrier, utility or other person may -</p> <p>(a) fail to submit, within a timeframe specified by the Authority, information requested by the Authority pursuant to these regulations;</p> <p>(b) submit or publish false or misleading information about its infrastructure, network elements or any other matter;</p> <p>(c) obstruct or prevent an inspection or investigation carried out by the Authority pursuant to these regulations;</p>

		(d) engage in any act or omission whose effect would be to defeat the purposes of these regulations.”.
Government Gazette No. 6466 of 9 November 2017 Government Notice No. 468 of 2017	Regulations Regarding Procedures for the Adjudication of Disputes	Amendment of regulation 12 by the substitution for subregulation (4) of the following subregulation:  “(4) No person may, without lawful excuse, refuse to answer a question put to that person by the Authority in terms of subregulation (3)(b).”.
Government Gazette No. 6589 of 8 May 2018 Government Notice No. 178 of 2018	Regulations Prescribing the Provision of Universal Service by Telecommunications Service Licensees	Repeal of regulation 13(2) to (5).
Government Gazette No. 6593 of 14 May 2018 Government Notice No. 179 of 2018	Regulations to Ensure Fair Competition in the Telecommunications Sector	(a) The amendment of regulation 18 by the repeal of paragraph (a) of subregulation (2); and  (b) the repeal of regulation 19.
Government Gazette No. 6888 of 29 April 2019 Government Notice No. 104 of 2019	Regulations Prescribing Procedures Regarding Application for, and Amendment, Renewal, Transfer and Cancellation of Spectrum Licences	(a) The amendment of regulation 17 -  (a) by the substitution for paragraphs (a) and (b) of subregulation (1) of the following paragraphs:  “(a) issue an appropriate punitive notice to the person in question as set out in the Penalty Regulations, 2019; and  (b) in such notice require the person in question to inform the person’s end-users, customers or subscribers, if any, within the period stated in the notice of the date on which the person will discontinue using the radio frequency spectrum.”;  (ii) by the deletion of subregulation (2); and  (iii) by the renumbering of subregulation (3) to subregulation (2) and the substitution thereof with the following subregulation

		<p>“(2) Failure by a person to comply with subregulation (1) may result in the sealing, altering or seizure of apparatus or equipment as anticipated in section 102 of the Act.”;</p> <p>(b) the deletion of regulation 27; and</p> <p>(c) the deletion of regulation 28(2), (3), (4), (5) and (6).”.</p>
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## SCHEDULE 2

### CONCISE STATEMENT OF PURPOSE

In order to have a successful and efficient enforcement regime, a regulator must have practical, flexible and sufficiently powerful enforcement mechanisms to foster growth in the regulated industry through compliance of provisions. Enforcement mechanisms are an important tool in enforcing the regulatory framework and legislation under which a regulator operates.

The Communications Regulatory Authority of Namibia has reviewed all regulations drafted under the Communications Act, 2009 (Act No. 8 of 2009) and identified those regulations which either do not have penalties and enforcement provisions or do have but which may not be aligned, appropriate and harmonised. Having investigated the current penalty and enforcement provisions under the Act it was found to a great extent to be haphazard, inconsistent and incomplete.

The Authority aims to implement flexible, valid, consistent, authorised and comprehensive enforcement mechanisms which are in harmony and aligned both with other regulations and with the Communications Act. Harmonised enforcement mechanisms will afford the Authority the necessary choice to select the most appropriate, fair and efficient mechanism based on the circumstances of each offence. The proposed Penalty Regulations, to be issued under section 129(2), also provide criteria when deciding on the imposition of a penalty for purposes transparency, consistency and fair practice.

It is the Authority's intention to promote a transparent, non-discriminatory, well-defined and consistent approach when dealing with compliance, enforcement and penalties and to work towards an accountable and a cost effective enforcement regime with appropriate safeguards. The objects of the proposed Penalty Regulations, amongst others, are to consolidate and simplify the penalty regime for contraventions and failures and matters related to penalties and to improve compliance with the Act and regulations made under the Act. Contrary to the current enforcement and penalty regulations, the proposed Penalty Regulations accommodate a layered and flexible approach to enforcement of regulations and proportionality of punitive responses to contraventions and failures.

With this approach, the Authority will grow a stable regulatory environment and foster market and investor confidence and also promote a cooperative relationship between the regulator and the regulated focusing on understanding of the regulated environment, obligations and the enforcement regime and offence prevention.

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