

LEGAL NOTICE NO.

**THE KENYA COMMUNICATIONS (FAIR COMPETITION AND
EQUALITY OF TREATMENT) REGULATIONS, 2009**

ARRANGEMENT OF REGULATIONS

Regulation

PART I – PRELIMINARY PROVISIONS

1. Citation
2. Interpretation
3. Purpose and object
4. Competence of the Commission over competition matters

PART II MARKET DEFINITION

5. Commission to define the market
6. Dominant market position
7. Dominant market power reports
8. Interconnection obligations imposed on telecommunications licencees
9. Accounts

PART III FAIR COMPETITION AND EQUALITY OF TREATMENT

10. Obligations of licensees
11. Guidance

PART IV MISCELLANEOUS PROVISIONS

12. Investigations into complaints of unfair competition and discrimination
13. Exclusions
14. Revocation of Part IV of L.N 68 of 2001

THE KENYA COMMUNICATIONS ACT, 1998
(No. 2 of 1998)

IN EXERCISE of the powers conferred by sections 27, 38 66, of the Kenya Communications Act, and section 84R and 84W of the Kenya Communications (Amendment) Act, 2009 the Minister for Information and Communication in consultation with the Communications Commission of Kenya makes the following Regulations –

**THE KENYA COMMUNICATIONS (FAIR COMPETITION AND
EQUALITY OF TREATMENT) REGULATIONS, 2009**

PART I – PRELIMINARY PROVISIONS

Citation 1. These Regulations may be cited as the Kenya Communications (Fair Competition and Equality of Treatment) Regulations, 2009.

Interpretation 2. In these Regulations unless the context otherwise requires-

“Act” means the Kenya Communications Act, No 2 of 1998 ~~and the Kenya Communications Amendment Act 2009 as amended~~

~~“Commission” means the Communications Commission of Kenya;~~

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

~~“Contract” means any agreement, arrangement, bond, commitment, franchise, indemnity, indenture, lease, concession, licence or understanding, whether in writing or not;.~~

~~“dominant licensee” means a licensee with the ability to materially raise prices without suffering a commensurate loss in service demand in comparison with other licensees or the ability to erect, or to benefit from, barriers to market entry that will materially affect the decision of other licencees to~~

~~enter the market in one or more communications markets, as determined by the Commission in a dominant market power report, pursuant to a consideration of the circumstances and criteria set forth in these Regulations but excludes a dominant telecommunications licensee;~~

“Dominant telecommunications ~~licensee~~service provider” has the meaning ascribed to it under section 2 of the Act.

“licensee” means a person licensed ~~to provide communication services~~ under the Act;

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

“subscriber” means any person provided with a communications service by a licensee and who is responsible for payment of all charges and rentals.

Purpose and object

3. (1) The purpose of these Regulations is to provide a regulatory framework for the promotion of fair competition and equal treatment in the communication sector, and protection against the abuse of market power or other anti-competitive practices.

(2) Without prejudice to the generality of sub-regulation (1), these Regulations seek to-

(a) provide guidance on the standards and procedures to be applied by the Commission in determining whether particular conduct constitutes substantially to lessening of competition;

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~~(a)~~(b) clarify what agreements or practices the Commission will deem to be anti-competitive, and so prohibited under the Act;

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~~(b)~~(c) provide guidance on the standards and

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processes which the Commission will apply in determining whether a telecommunication service provider is dominant in a given market licensee has a dominant market position in one or more communications markets;

~~(e)~~ (d) clarify what conduct the Commission will find to be an act of unfair competition.

Competence of the Commission over competition matters.

4. (1) The Commission shall have the power to determine, pronounce upon, administer and enforce compliance of all its licensees with competition laws and Regulations, ~~whether of a general or specific nature~~, as it relates to commercial activities in the communications sector.
- (2) In so far as such matters fall concurrently under the jurisdiction of any statutory agency responsible for competition matters, the Commission shall co-operate with the said agency in matters related to fair competition.

PART II DETERMINATION OF MARKET DEFINITION BREACH OF FAIR COMPETITION AND EQUALITY OF TREATMENT

Commission to define the market

5. (1) In order to determine whether a particular agreement or form of conduct is in breach of these Regulations, the Commission shall-
- (a) define the relevant communication market segment to which the agreement or conduct in question relates ~~together with the dominant market position~~; and
 - (b) consider whether the licensee in question has market dominance.
- (2) In its assessment and designation of the relevant communications market or markets, the Commission may consider -

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(a) the communications products or services that make up a specific market, as well as the geographic scope of that market for a given group of consumers;

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

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

(d) any other factor or issue which in the Commission's view is relevant to the matter.

Dominant market position

6. (1) A licensee shall be in a dominant market position where it has the ability to materially raise prices without suffering a commensurate loss in service demand in comparison with other licensees or the ability to erect, or to benefit from, barriers to market entry that will materially affect the decision of other licensees to enter the market in one or more communications markets or as determined by the Commission in a dominant market power report, pursuant to a consideration of the circumstances and criteria set forth in these Regulations;

(2) the Commission shall from time to time develop and publish in the Gazette guidelines to be followed in determining whether a licensee is a dominant licensee

in a specific communications market or markets, which shall include-

- (a) the degree of market concentration or the market share of the licensee, determined by reference to revenues, numbers of subscribers or volumes of sales;
- (b) the degree to which a licensee's prices vary over time;
- (c) the ability of the licensee to maintain or erect barriers to entry to the market, including, by means of control of essential facilities, ~~access to superior technology~~, privileged access to resources or capital markets or superior buying or negotiating position, ;
- (d) the ability of the licensee to earn supernormal profits;
- (e) the global technology and commercial trends affecting market power;
- (f) the licensee's power to make independent rate setting decisions;
- (g) the degree of product or service differentiation and sales promotion in the market and;
- (h) any other matters which the Commission may deem relevant.

Dominant market
power reports

7. (1) On its own motion or upon the application by any interested person, the Commission may at any time prepare a dominant market power report, to determine whether one or more licensees is ~~a dominant licensee~~ in one or more service or geographic communications markets.

(2) In its assessment and designation of the relevant communications market or markets, the Commission

may consider _ the factors in Regulation 5 (2) of these Regulations amongst other factors.

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

(4) Subject to any other decision of the Commission, or to a demonstration by a licensee in the specific circumstances that the presumption should not apply, the Commission may presume that a licensee is a ~~dominant licensee~~ in a communications market where the licensee's gross revenues derived from the market exceeds twenty five per cent of the total revenues of all licensees derived from that market; or

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~~(a) the licensee's gross revenues derived from the market exceed twenty five per cent of the total gross revenues of all licensees derived from that market; or~~

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~~(b) the licensee's volume of sales in the market exceeds forty percent of the volume of sales of all licensees in that market.~~

~~(75)~~The Commission may direct a dominant telecommunications service provider ~~licensee~~ to cease a course of conduct in that market which has or may have the effect of substantially lessening competition in any communication market in the manner described under Regulation 10 or

implement any other corrective remedies it deems appropriate.

Interconnection
obligations imposed
on dominant
telecommunications
[service
Licensee/provider](#)

8 (1) Where a Licensee has been designated a dominant telecommunications ~~Licensee~~ service provider by the Commission, it shall-

- (a) meet all reasonable requests for access to its public telecommunications network, in particular access at any technically feasible point on its telecommunications network;
- (b) adhere to the principle of non-discrimination with regard to interconnection offered to other interconnecting licensees; in particular, it shall apply similar conditions in similar circumstances to interconnecting licensees providing similar services and provide interconnection facilities and information to other telecommunications Licensees under the same conditions and of the same quality as it provides for its own services or those of its affiliates and/or subsidiaries;
- (c) make available on request to other interconnecting licensees considering interconnection with its public telecommunications network, all information and specifications reasonably necessary, in order to facilitate conclusion of an agreement for interconnection, including information on changes planned for implementation within the next six months, unless ~~agreed~~ provided otherwise by the Commission;
- (d) submit to the Commission for approval and publish a Reference Interconnection Offer, sufficiently unbundled, giving description of the interconnection offerings broken down into components according to market needs and the associated terms and conditions including tariffs; and
- (e) provide access to the technical standards and specifications of its telecommunications network with which another interconnecting licensee shall be interconnected.

(2) Where a dominant telecommunications ~~Licensee-service provider~~ abuses its position in negotiating interconnection agreements, the Commission shall-

(a) require the dominant telecommunications ~~licensee-service provider~~ to desist or modify its conduct and / or adopt a particular course of conduct; or

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

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

(4) A dominant telecommunications ~~licensee-service provider~~ shall set charges for interconnection based on ~~an~~ objective criteria, observe the principles of transparency and cost orientation as set out in Regulation 12.

(5) The Commission shall request the dominant telecommunications ~~licensee-service provider~~ to justify – that its interconnection charges are based on actual cost and, where it deems necessary request an adjustment of the charges or impose default interconnection charges in the event the proposed adjustment is not implemented by the dominant telecommunications ~~licensee-service provider~~.

~~(5)~~ (6) A dominant telecommunications ~~Licensee-service provider~~ shall-

(a) give written notice of any proposal to change interconnection charges to the Commission in a form and manner as published by the Commission from time to time.

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

(c) maintain a cost accounting system which-

- (i) shall be in accordance with any cost accounting guidelines published by the Commission from time to time;
- (ii) is suitable to demonstrate that its charges for interconnection have been fairly and properly calculated; and would readily provide any information to the Commission on request

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

~~(6)~~ (7) If interconnection services are not provided through a structurally separated subsidiary, a dominant telecommunications ~~licensee-service provider~~ shall keep separate accounts as if the telecommunications activities in question were in fact carried out by legally independent companies, so as to identify all elements of cost and revenue with the basis of their calculation and the detailed attribution methods used.

~~(8)~~ (8) A dominant telecommunications ~~licensee-service provider~~ shall maintain separate accounts in respect of interconnection services and its core telecommunications services and the accounts shall be submitted for independent audit and thereafter published.

~~(9)~~ (9) A dominant telecommunications ~~licensee-service provider~~ shall promptly, on request supply financial information to the Commission and to the level of detail required by the Commission.

~~(10)~~ (10) The Commission shall upon satisfying that the dominant telecommunications ~~licensee-service provider~~

has fully complied with these regulations together with any other guidelines that it may have prescribed, publish a compliance report of such compliance.

~~(11)~~(11) In addition, the Commission while taking account of considerations of commercial confidentiality, may publish such financial information in order to contribute to an open and competitive telecommunications market.

Accounts

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

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

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

PART III FAIR COMPETITION AND EQUALITY OF TREATMENT

Obligations of licensees

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

(2) It shall not amount to violation of the principle of equal access and non preferential treatment for a licensee to –

(a) consider the ability of a person to pay for a

service when deciding whether to provide a service to such person; or,

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

(3) All persons within a given class shall be provided with service on a non-preferential, first-come, first-serve basis.

Guidance

11. (1) Where a licensee intends to make an agreement or take any action involving another licensee within the same market segment or segments ~~and it is of the view that making such agreement or taking such action may have an adverse effect on competition or equality of treatment~~, it shall seek guidance from the Commission at least thirty (30) days prior to the making of such agreement or taking of such action.

(2) The Commission ~~'s guidance~~ shall be given its response within thirty (30) days ~~after it is sought~~ and shall indicate whether or not the agreement or conduct would be likely to infringe these regulations;

(3) Nothing in this Regulation shall be construed to mean that the licensee does not bear responsibility for ensuring that its agreements and conduct are lawful.

PART IV MISCELLANEOUS PROVISIONS

Investigations into complaints of unfair competition and discrimination

12. (1) The Commission in carrying the investigations – on any licensee under section 84S and 84T of the Act, may-

(a) require the production of any document or information that is specified or that falls within a specified category, which it considers

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material to any matter relevant to the investigation, at a time and place, and in the manner or form specified;

- (b) take copies of, or extracts from any document produced;
- (c) require an explanation of any such document; and
- (d) if a document is not produced, require a statement as to where it can be found;
- (e) enter any premises with a warrant and, among other things, require the production of any document appearing to be the kind in respect of which the warrant was granted relevant to the investigation and require any relevant information held in a computer to be produced in a form in which it can be read and can be taken away;
- (f) enter premises with a warrant and amongst other things, search the premises and take copies of, or extracts from, any documents appearing to be the kind in respect of which the warrant was granted and require any relevant information held in a computer to be produced in a form in which it can be read and taken away.

Exclusions

13. (1) These Regulations shall not apply to a conduct which is necessary -

- (a) for a licensee entrusted with the operation of essential communication services including but not limited to health, national security, and other circumstances as may be prescribed by the Commission, insofar as the application of the Regulations would obstruct the performance, in law or in fact, of the particular tasks assigned to the licensee

- (b) to comply with a legal requirement;
- (c) to avoid conflict with international obligations
- (d) for the performance or avoidance by a licensee of any act as the Commission may prescribe

Revocation of Part
IV of L.N 68 of
2001

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

Made on the, 2009.

SAMUEL POGISHIO,
Minister for Information and Communication.