



**Communications
Commission
of Kenya**

COMPETITION GUIDELINES

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TABLE OF CONTENTS

TABLE OF CONTENTS	- 2 -
1. INTRODUCTION	- 3 -
1.1 Background	- 3 -
1.2 Goals of the Guidelines	- 3 -
1.3 Scope of the Guidelines	- 3 -
1.4 Application of the Guidelines	- 4 -
1.5 Effective Date of the Guidelines	- 4 -
1.6 Amendments to the Guidelines	- 4 -
1.7 Guidelines are Advisory	- 4 -
2. DEFINITIONS	- 5 -
3. GUIDING PRINCIPLES	- 6 -
3.1 Reliance on Market Forces	- 6 -
3.2 Promotion of Effective and Sustainable Competition	- 6 -
3.3 Promotion of Facilities-based Competition	- 6 -
3.4 Relevance of Practices by Competition Authorities and Other Sectoral Regulators	- 6 -
3.5 “Unreasonably Restricts Competition” Standard	- 7 -
4. DEFINING RELEVANT MARKET	- 8 -
4.1 Products or Services	- 8 -
4.2 Geographic Aspects of Relevant Market	- 9 -
4.3 Customer Groups	- 10 -
4.4 Other Factors	- 10 -
5. COMPETITION ASSESSMENT	- 11 -
5.1 Competition Assessment Model	- 11 -
5.2 Identifying a Dominant Market Power Licensee	- 11 -
5.2.1 Criteria for Identifying DMP	- 12 -
5.2.1.1 Situation in the Relevant Market	- 12 -
5.2.1.2 Market Position of the Service Provider Concerned	- 12 -
5.2.1.3 Ease of Entry into the Market	- 13 -
5.2.1.4 Demand Side Factors	- 13 -
5.2.2 Individual and Collective Dominant Market Power	- 13 -
5.2.2.1 Identifying Individual DMP	- 13 -
5.2.2.2 Identifying Collective Dominant Market Power	- 14 -
5.3 Reclassifying Dominant Market Power Licensee	- 15 -
5.4 Abuse of Dominant Position	- 15 -
5.4.1 Pricing Abuses	- 16 -
5.4.1.1 Predatory Pricing	- 16 -
5.4.1.2 Price Squeeze	- 17 -
5.4.1.3 Cross Subsidisation	- 18 -
5.4.2 Other Abuses	- 19 -
5.4.2.1 Discrimination	- 19 -
5.4.2.2 Predatory Network Alteration	- 19 -
5.4.2.3 Refusal to Supply	- 20 -
5.4.2.4 Anti-Competitive Discounts	- 20 -
5.4.2.5 Tying	- 20 -
5.4.2.6 Anti-Competitive Preferences	- 21 -
5.5 Unfair Methods of Competition	- 21 -
5.5.1 General Prohibition	- 21 -
5.5.2 Specific Prohibited Practices	- 21 -
5.5.2.1 Degradation of Service Availability or Quality	- 21 -
5.5.2.2 Provision of False or Misleading Information to Competitors	- 21 -
5.5.2.3 Improper Use of Information Regarding a Competing Licensee’s Customers	- 22 -
6. COMPETITION CONCERNS AND OBLIGATIONS OF DOMINANT OPERATORS	- 23 -
6.1 Obligations of an Operator with DMP	- 23 -
6.2 Regulatory Obligations for Wholesale Services	- 24 -
6.3 Regulatory Obligations for Retail Services	- 24 -
7. MONITORING, COMPLIANCE AND PENALTIES	- 25 -
A. Annex 1: Competition Guideline Flowchart	- 26 -
B. Annex 2: Structure Conduct Performance	- 26 -

1. INTRODUCTION

1.1 Background

The Communications Commission of Kenya (hereinafter referred to as “Commission”) was established under the Kenya Information Communications Act, Chapter 411A (hereafter referred to as the Act) to license and regulate telecommunications, radio communications, postal and broadcasting services in Kenya. The Commission is also responsible for promoting competition, protecting consumers, and ensuring fairness and efficiency within the Communications sector.

The Kenya Information and Communications (Fair Competition and Equality of Treatment) Regulations, 2010 (hereinafter referred to as Regulations) mandates the Commission to assess the status of competition in the communications market, define the market segment and develop guidelines for determining whether a licensee has dominant market position.

1.2 Goals of the Guidelines

These guidelines are intended to:

- a) Promote efficiency and competitiveness of the information and communications industry in Kenya;
- b) Ensure that communication services are reasonably accessible to all people in Kenya, and are supplied as efficiently and economically as practicable and at performance standards that reasonably meet the social, industrial and commercial needs of all people in Kenya;
- c) Promote and maintain fair and efficient market conduct and effective competition between licensees engaged in commercial activities provided via communication technology in Kenya;
- d) Encourage, facilitate and promote industry self regulation in the information and communications industry in Kenya; and
- e) Encourage, facilitate and promote investment in - the establishment, development and expansion of the information and communications industry in Kenya.

1.3 Scope of the Guidelines

These guidelines set out the framework that the Commission will use to determine whether a licensee has contravened any of the prohibitions contained in the Act and Kenya Information and Communications Regulations.

The Regulations prohibit:

- a) A dominant licensee from abusing its dominant position;
- b) A licensee from engaging in unfair methods of competition; and
- c) A licensee from entering into agreements that unreasonably restricts, or is likely to unreasonably restrict competition.

1.4 Application of the Guidelines

These guidelines are issued pursuant to the Act and the Kenya Information and Communications (Fair Competition and Equality of Treatment) Regulations, 2010 and shall apply to all licensees as licensed under the Act.

1.5 Effective Date of the Guidelines

The guidelines will be effective from the issue date.

1.6 Amendments to the Guidelines

These guidelines may be amended from time to time in accordance with the Act and Regulations. The Commission will eliminate or modify provisions that it determines, based on experience and the growth and development of competition are no longer necessary. The Commission will also make any other changes necessary to achieve the goals of this guideline.

1.7 Guidelines are Advisory

The provisions in these guidelines are advisory. These Guidelines are intended to describe the procedures and standards that the Commission will apply, in implementing the competition framework. For clarity, certain sections of the Act and Regulation have been summarised or repeated in these guidelines. In the event of any conflict between the Act and Regulations and these Guidelines, the provisions of the Act and the Regulations will prevail.

2. DEFINITIONS

An Affiliate of a Licensee- means an entity that has an attributable interest in any Licensee

Call origination - means service of originating calls on a network, for completion either on the same or a different network.

Call termination - The service of terminating calls on a network, whether originated on the same or a different network.

Collective DMP - DMP attributable to two or more service providers collectively, through collusion, joint ownership, or other means.

Consumer - Any person, other than a service provider, that is a potential customer or end user.

Cost accounting - The preparation by service providers with DMP of accounting information according to the costing methodology and any regulation on cost accounting prescribed by the Commission in order to identify the cost of providing a service.

Dominant Market Power (DMP) - A determination made by the Commission under Regulation 8 of the Kenya Information and Communications (Fair Competition and Equality of Treatment) Regulations, 2010.

End user - Any person who uses communications services, whether or not such person pays for such services, and who does not provide access to communications services to persons outside their respective defined user group or on a commercial scale or for profit.

Local loop unbundling - A process that allows multiple service providers access to local loops.

Number portability - A service which allows a customer to change service providers while maintaining his access number.

Relevant market - A market defined by the Commission under section 4 of these guidelines for purposes of determining DMP.

Interconnection Agreement-means a written agreement between Licensees governing interconnection and related arrangements;

Significant Market Power- means the ability to unilaterally restrict output, raise prices, and reduce quality or otherwise act, to a significant extent, independently of competitive market forces.

3. GUIDING PRINCIPLES

The Act and Regulations give the Commission power to determine, pronounce upon, administer and enforce compliance of its licensees with competition laws and regulations, which relate to commercial activities in the communications sector.

3.1 Reliance on Market Forces

Market forces are generally far more effective than regulation in promoting consumer welfare. Competitive markets are most likely to provide consumers with a wide choice of services at just and reasonable prices. Therefore, to the extent that markets or market segments are competitive, the Commission will primarily rely on private negotiations and industry self-regulation, subject to minimum requirements designed to protect consumers and prevent anti-competitive conduct.

3.2 Promotion of Effective and Sustainable Competition

Recognizing the effectiveness of market forces in promoting consumer welfare, Commission will endeavor to take resolute measures to promote and maintain effective and sustainable competition. Such measures will include:

- a) Removing or minimizing any artificial form of impediment to market entry and exit;
- b) Curtailing any concentration of Significant Market Power that has the effect of unreasonably restricting competition;
- c) Eliminating anti-competitive behaviour by industry participants;
- d) Ensuring that industry participants and consumers have easy access to information on market conditions; and
- e) Ensuring that there is inter-operability and, where necessary, reasonable access to networks to prevent impediments to effective competition and market growth.

3.3 Promotion of Facilities-based Competition

The Commission believes that effective and sustainable competition will be best achieved through facilities-based competition. However, where there are technological, market or other impediments that would hamper competing licensees' ability to build facilities, the Commission will seek to strike a balance between providing the economic incentives to build facilities and permitting services-based competition to take place for the benefit of consumers.

3.4 Relevance of Practices by Competition Authorities and Other Sectoral Regulators

The Act and Regulations are grounded in well established principles of competition, and they are consistent with "best practices" in other jurisdictions. Therefore, in applying these provisions, the Commission will give appropriate consideration to best practices in other jurisdictions, as well as practices of the Competition Authorities of Kenya. However, the

Commission may adopt standards or methodologies that are designed to address the unique conditions of Kenya's communication market.

3.5 “Unreasonably Restricts Competition” Standard

The Act and Regulations protects against the abuse of market power or other anti-competitive practices that are likely to unreasonably restrict competition in any communication market in Kenya. In addition the Commission notes that:

- a) There is no single “test” for assessing whether a licensee has engaged in conduct that has, or is likely to, unreasonably restrict competition. However, the Commission will conduct a fact-specific assessment of the licensee's conduct and the structure of the relevant market.
- b) It is not prudent to wait until a licensee's conduct has caused actual competitive injury in order to intervene. Rather, the Commission can take enforcement action if it determines that a licensee has engaged in conduct that is likely to unreasonably restrict competition.
- c) In seeking to determine whether a Licensee's conduct contravenes the Regulations, it is important to focus on the actual or likely competitive effects of a Licensee's actions, rather than the Licensee's subjective intent (i.e., what the Licensee hopes to accomplish). Most market participants want to increase their market share at the expense of their rivals. So long as a Licensee seeks to do so by meeting End Users' needs more efficiently and effectively than its rivals, its subjective intent does not contravene the Regulations. The Commission will only consider evidence regarding a Licensee's subjective intent to the extent that it assists the Commission in assessing the likely effect of the Licensee's conduct. For example, if the evidence indicates that a Licensee undertook an action in order to force a competing Licensee from the market, the Commission might consider this evidence as relevant to its assessment of the likely competitive effect of the Licensee's action. However, the mere fact that the Licensee intended to force the competing Licensee from the market would not, in itself, provide a basis on which to find that the Licensee had contravened the Regulations.

4. DEFINING RELEVANT MARKET

The general approach to reviewing the nature and level of competition in the communications markets is two-fold. The first step, defines the boundaries of the relevant markets in which competition will be assessed. This is because competition takes place within economic markets and cannot be properly appreciated with a vague review of the overall sector. Once specific candidate markets are defined the second step involves the assessment of competition within the relevant markets in order to appreciate the nature and extent of competition. To the extent that market failure in those markets is as a result of market power, operators with dominant market position can be identified.

In compliance with the regulatory framework, Commission considers that the definition of relevant markets will have three dimensions:

- a) The products or services included;
- b) The geographical area and/or route affected; and
- c) The customer groups served

4.1 Products or Services

To group services into relevant markets, the Commission will consider primarily demand-side substitutability. Examination of supply-side substitutability will be necessary only if demand-side substitutability does not result in clear definition of a relevant market.

- a) **Demand-side substitutability** approach measures 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. The Commission will attach great significance to demand-side substitutability in its market definition exercises, on the basis that it represents the most immediate and effective disciplinary force on the suppliers of a product or service.

The Commission may examine evidence of consumer behaviour, relative prices and price movements of potentially competing products or services, and switching costs, which may hinder consumers from substituting a product or service for another.

The Commission plans to use the “Hypothetical Monopolist Test” which is a market test to define a relevant market in a defined geographical area such that a hypothetical profit-maximizing service provider, not subject to price regulation, that is the only present and future producer or provider of products or services for the relevant market in that area could impose a small but significant and non-transitory increase in price (SSNIP), assuming the terms of provision of all other products are held constant. The test is repeated until the market boundary is set. This test requires an analysis of whether consumers of a particular product or service would be likely to switch to readily available substitutes in the short term and at a negligible cost in response to a hypothetical SSNIP in the range of 5 to 10% that is applied to the products or services under consideration.

b) Supply-side substitutability approach determines 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. Supply-side substitutability will form part of the Commission's market definition analysis, complementing the demand-side substitutability analysis to assist with a clear definition of relevant markets.

If required, the Commission will assess supply-side substitutability based on the overall costs to a provider of switching production to the product or service in question and any legal, statutory, or other regulatory requirements which could defeat a time-efficient entry into the relevant market, for example, delays and obstacles in concluding agreements for collocation, interconnection, access, or rights of way.

The Commission will not take into account supply-side substitutability in the definition of a relevant market where such substitution would entail significant changes to existing tangible and intangible assets, additional investments, strategic decisions, or time delays.

The reaction of marginal customers to a shift in prices will be an important element of market definition.

The Commission will generally define relevant markets at the wholesale level with reference to retail markets, as they usually establish the parameters of the corresponding wholesale markets.

4.2 Geographic Aspects of Relevant Market

Service providers may be active only in specific geographic areas or routes. Hence the geographic area or the routes covered may be important in defining relevant markets. The Commission will define relevant geographic markets as the areas in which competitors are able to offer their services and the objective conditions of competition are similar.

The Commission will characterize the geographic dimension of relevant markets, taking into account the following conditions:

- a) The extent and coverage of the network and the customers that can economically be reached and whose demands may be met;
- b) Any legal or regulatory barriers limiting competitors and their right to provide a service or services in a defined area;
- c) The geographic distribution of, and evaluation over time of market shares;
- d) The pricing of services across the area under consideration;
- e) The pricing of services by different operators as well as its evolution over time in the relevant market;
- f) Additional supply and demand characteristics which may indicate the existence of different competitive pressures; and
Any other factors or issues which are, in the opinion of the Commission, relevant.

4.3 Customer Groups

Since a service provider's services, prices, access methods, and terms of business may vary between customer groups, the Commission will distinguish, where appropriate, in its analysis between groups of customers insofar as required to delimit the market or markets at issue. Some of the factors that the Commission may consider in this regard include include: age, gender, income levels, whether individual or corporate, whether urban or rural, among others.

4.4 Other Factors

Some of the other factors that the Commission will consider include:

- a) Common pricing constraints which are primarily relevant to geographical market definition and where a uniform price across regions effects a form of de facto competition across what are otherwise distinct regional markets;
- b) Cluster markets which recognize that the precise composition of relevant markets may depend upon the way products are generally supplied to consumers and consumer behaviour and attitudes;
- c) Homogeneity of demand and supply conditions may enable the placement of products/services not linked by demand and supply substitution in the same economic market; and
- d) Chains of substitution where two products (or areas) are not direct substitutes but are effective pricing constraints on one another due to the presence of a third product (area) which lies in the middle of these products (areas) and which is a direct substitute for each of them.

5. COMPETITION ASSESSMENT

5.1 Competition Assessment Model

Once markets are defined, they can be subjected to market analysis for the purpose of assessing whether or not there is effective competition in a relevant market, with the ultimate objective being to identify operators who can be characterised as possessing (significant) market power. Underlying the Commission's approach to market analysis is the well-established Structure-Conduct-Performance (SCP) paradigm, which places primacy on the structural characteristics of markets. This approach, which equates the absence of effective competition with the existence of market power, reflects the logical point that a market with firms with market power cannot be considered effectively competitive. Equivalently, a market can be considered to be effectively competitive only in the absence of firms with significant market power. In addition to market power held by particular firms, it will be important to identify features of the market other than market power which may also be acting as barriers to more effective competition.

In its basic form the SCP model is based on three key concepts: market structure; conduct and performance. The underlying linkage between these elements is the presumption that the structure (number of sellers, ease of entry) of a market would explain or even determine to a large degree the conduct of the participants in the market (pricing policies, advertising). In turn, the conduct of industry players would then determine the performance of the industry (profitability, efficiency, technical progress). The reliance on such a model is especially relevant in the context of forward-looking ex ante regulation, since conduct detrimental to competition must be anticipated primarily on the basis of the market's structural characteristics. Hence, in this approach to the analysis of competition in markets, Commission will place primary weight on the structural characteristics in assessing competition

5.2 Identifying a Dominant Market Power Licensee

The Commission's concern is on anti-competitive behaviour and the extent to which incumbents can harm entrants or potential entrants and thus preserve their market power. The DMP model is relevant primarily because of incumbency and the way in which cost conditions and network relationships create opportunities for anti-competitive behaviour that give rise to competition concern.

A licensee will be classified as dominant if the licensee:

- a) Is licensed to operate facilities used for the provision of telecommunication services in Kenya that are sufficiently costly or difficult to replicate such that requiring new entrants to do so would create a significant barrier to rapid and successful entry into the telecommunication market in Kenya by an efficient competitor; and/or
- b) The licensee has the ability to exercise Significant Market Power in any market in which it provides telecommunication services pursuant to its licence.

5.2.1 Criteria for Identifying DMP

The factors the CCK will consider in order to identify DMP in a defined relevant market may include, *but are not limited to*:

5.2.1.1 Situation in the Relevant Market

When examining the situation in the relevant market, the Commission will consider the following:

- a) The rate of growth;
- b) The penetration rate;
- c) The technological advances and degree of innovation;
- d) The number of potential competitors;
- e) The degree of price competition;
- f) The development of prices over time;
- g) The degree of competition on quality;
- h) The degree of differentiation of products; and
- i) Whether the same or a similar choice, quality and price of products and services are available in comparable markets in other countries.

5.2.1.2 Market Position of the Service Provider Concerned

When examining the market position of the service provider concerned, the Commission will consider the following:

- a) Market share and market concentration – this focuses on both historical and current trends;
- b) Overall size of the provider and economies of scale;
- c) Access to capital markets and financial resources;
- d) Strength of brand and brand loyalty;
- e) Length of time the provider has been in a strong position;
- f) Economies of scope e.g. bundled products or services;
- g) The ability of the provider to influence market conditions especially prices; and
- h) Pricing and profitability - a service provider's opportunity to price at levels significantly higher than competitive ones, or to increase prices without a corresponding loss of sales revenues is an indicator of DMP.

If a major provider in a market has high profitability or prices compared to providers in comparable markets elsewhere, DMP may be present. However, allowance must be made for high profitability being the result of factors other than pricing, for example the benefits of economies of scale, efficiency gains or innovation. Correspondingly, low profitability by competitors is not necessarily an argument against a provider having DMP. Where possible and if information is available, profitability may also be measured over a sustainable period before declaring a provider as DMP.

5.2.1.3 Ease of Entry into the Market

When examining the ease of entry into the market, the Commission will consider the following:

- a) Entry barriers related to the control of infrastructure by a provider, in particular, control of the means of access to end users or control of other infrastructure not easily replicated;
- b) Control of transit services by a provider;
- c) Utilization of excess capacity - if a service provider has significant excess capacity, this may result in an entry or growth barrier to others because in the event of an increase in demand in the market, such a service provider can increase production without major investment and thus prevent new providers from entering or winning market share;
- d) Product diversification or bundling of products;
- e) Degree of vertical integration of a provider;
- f) Size of distribution and sales network of a service provider; and
- g) Technological advantages or superiority enjoyed by a service provider.

5.2.1.4 Demand Side Factors

The Commission will consider the following demand-side factors:

- a) Countervailing buying power;
- b) Switching costs and lock-in effects - restrictions or high costs for end users when changing service providers, increases the opportunity for a provider to gain DMP; such restrictions may be of a practical, technical, or financial nature; and
- c) End user access to information - for end users to make an effective choice between service providers in a market, they must have access to information that makes it possible to carry out a comparison of the offerings in the market; complexities such as the use of complicated price structures, bonus and discount arrangements restrict the opportunities for effective end user choice and may contribute to strengthening a provider's position in the market.

5.2.1.5 Individual and Collective Dominant Market Power

After identifying a DMP operator(s), the Commission may distinguish between individual and the collective DMP.

5.2.1.6 Identifying Individual DMP

The Commission will assess whether there is a service provider with DMP in each relevant market. Such assessments will take place periodically, or may be initiated due to proposed changes of ownership of providers, or by complaints received about anti-competitive behaviour.

The Commission will take into account all the relevant criteria in assessing whether a service provider has DMP in a relevant market. However, it is not possible to define in advance the weight to be given to each criterion in any given market assessment. These weights may vary between the relevant markets. Market share, market concentration, and the presence of lasting market entry barriers will be key criteria in every assessment. A conclusion that a provider has DMP may be based on a combination of different criteria.

The Commission's analysis of DMP will include an assessment of whether the relevant market is likely to become competitive in the near future, and thus whether any lack of effective competition is durable. Where the Commission determines that a service provider has DMP in a relevant market, the services offered by that provider in that market shall be *regulated services*.

In addition, where providers has DMP in a specific relevant market, it may also be deemed to have DMP in a closely related market, where the links between the two markets are such as to allow the market power held in one market to be leveraged into the other market, thereby strengthening the market power of the provider

5.2.1.7 Identifying Collective Dominant Market Power

DMP in a relevant market can be held by a single provider or collectively by two or more service providers. In assessing collective DMP, the Commission will examine whether the service providers concerned operate with coordinated effects even in the absence of structural or other links between them.

The Commission's collective DMP test will examine whether the structural characteristics of the relevant market encourage parallel or aligned anti-competitive behaviour. The Commission notes that a relevant market characterized by the presence of many market participants is less likely to give rise to collective DMP concerns. Accordingly, the Commission will analyze the degree of market concentration and shares at the outset to determine whether it is at such a level as to preclude the existence of collective DMP.

A high and stable market share divided among two or more participants in the relevant market will not of itself point conclusively to the existence of collective DMP. An assessment of the potential existence of collective dominance will take into account best practice and consider whether conditions exist such that providers may tacitly collude (for example over prices or market shares) to prevent the establishment of a competitive market. In particular, for this purpose, Commission may consider:

- a) The potential incentive that providers may have to tacitly collude; and
- b) The ability that providers may have to tacitly collude (for example, examining factors such as transparent and simple pricing structures and levels; and denial to provide services to others).

In addition to an assessment of market concentration, the Commission will have regard to the stability of market conditions, especially by reference to factors such as:

- a) The maturity of the market; and
- b) Technological innovation.

The Commission will examine the role of the following “facilitating factors” permitting competitors to coordinate their behaviour:

- a) Repeated interactions between firms, as such interactions facilitate market transparency and deterrent mechanisms;
- b) Transparency of the marketplace, particularly as regards pricing;
- c) Homogeneity of products or services;
- d) The existence of structural links between competitors; and
- e) The existence of symmetries or similarities between competitors, particularly as regards cost structures, financial resources, spare capacity, market share and sales, the purchasing power of customers.

Where the Commission determines that a group of service providers have collective DMP in a relevant market, the services offered by those providers in that market shall be considered as *regulated services*.

5.3 Reclassifying Dominant Market Power Licensee

- a) The Commission will reclassify a Dominant Licensee as non-dominant if the Commission concludes, based on relevant evidence, that the Licensee no longer satisfies the conditions for dominant classification specified in Sub-sections 5.2 of this guideline. Commission will reclassify a Non-dominant Licensee as dominant if Commission concludes, based on relevant evidence, that the Licensee satisfies any one of the conditions for dominant classification specified in Sub-section 5.2 of this guideline.
- b) Reclassification can occur in any of the following ways:
 - (i). Where appropriate, the Commission may initiate a proceeding to reclassify a Licensee. In such cases, the Commission will request the Licensee to provide information that will assist in determining whether or not the Licensee meets the conditions specified in Sub-section 5.2 of these guidelines
 - (ii). A Licensee or other interested party may petition the Commission to have a Licensee reclassified. A party seeking to have a Licensee reclassified must provide information demonstrating whether or not the Licensee meets the conditions specified in Sub-section 5.2 of these guidelines.

5.4 Abuse of Dominant Position

A dominant licensee must not use its position in the communications market in Kenya in a manner that unreasonably restricts, or is likely to unreasonably restrict, competition in any communication market in Kenya.

In assessing whether a practice constitutes an abuse of market power, the Commission will take into account the effect of impeding a competitor's entry into, or expansion in a market. The following sub-sections provide examples of practices that would constitute an abuse of dominant position:

5.4.1 Pricing Abuses

A dominant licensee must not price services in a manner that is likely to unreasonably restrict competition. To assess possible pricing abuses:

- a) In the case of a tariff for a retail service, the Commission will assess whether the prices, terms and conditions are either excessive or inadequate.
- b) The Commission will also seek to determine whether the prices, terms and conditions are discriminatory by comparing the prices, terms and conditions to those that the dominant licensee offer in other tariffs for comparable communication services.
- c) In the case of a resale tariff for a retail service, the Commission will seek to determine whether the dominant licensee is offering the service on the same (or, where the tariff is filed to meet the request of a Licensee seeking to acquire the service, on substantially equivalent) prices, terms and conditions as the dominant licensee's corresponding tariff for that service.
- d) In cases that the Commission determines that a communication service has a widespread public impact, the Commission may also consider other relevant factors.

In particular, a dominant licensee must not engage in the following types of anti-competitive pricing:

5.4.1.1 Predatory Pricing

The Commission will find that a dominant licensee has engaged in predatory pricing and, therefore, has abused its dominant position, if:

- a) The dominant licensee is selling its service at a price that is less than average incremental cost;
- b) The dominant licensee's pricing is likely to drive efficient rivals from the market or deter future efficient rivals from entering the market; and
- c) The dominant licensee erects barrier to entry.

After a successful predatory pricing, the dominant licensee could impose an increase in prices sufficient (in amount and duration) to enable the dominant licensee to recoup the full amount of the loss that it incurred during the period of price cutting.

In seeking to determine whether the dominant licensee's pricing is likely to drive efficient rivals out of the market or deter future efficient rivals from entering the market, the Commission will consider all relevant factors, including:

- a) The duration of the dominant licensee's sales at prices below its average incremental cost;
- b) The ability of other licensees to provide the service at an average incremental cost that is comparable to the dominant licensee's average incremental cost; and
- c) The effect of any comparable prior price cutting in the market.

In seeking to determine whether entry barriers are significant, Commission will consider the history of entry into the relevant market and the extent to which market conditions are likely to impede the entry (or re-entry) of competitors. The Commission will consider all relevant factors including:

- a) Technical barriers (such as the need to use specialised or proprietary technology);
- b) Access barriers (such as the need to obtain access to another entity's infrastructure in order to provide service, and any difficulty in doing so, or significant economies of scale and scope);
- c) Financial barriers (such as the need to incur significant "sunk costs" in order to enter the market);
- d) Commercial barriers (such as high advertising and retail distribution costs or high consumer switching costs); and
- e) Regulatory barriers (such as limitations on the number of licences or on the entities eligible to provide a service).

5.4.1.2 Price Squeeze

The Commission will find that a dominant licensee has engaged in a price squeeze and, therefore, has unreasonably restricted competition in the communications market by abusing its dominant position, if the evidence demonstrates that:

- a) The dominant licensee provides a communication service or facility that is required by downstream licensees to provide similar communication services; and
- b) The price that the dominant licensee charges for the communication service or facility is so high that the dominant licensee's downstream business(es) or Affiliate(s) could not profitably sell its product if it were required to recover the full purchase price of the input through its charges to its customers.

The Commission will find that a communication service or facility is required to provide a downstream service when, as a practical matter, licensees cannot participate in a downstream communication market without access to the service or facility and cannot obtain access to a service or facility that is a reasonable substitute for the dominant licensee's service or facility.

In making this determination, the Commission will consider the ability of licensees to:

- a) Self-provide comparable services or facilities at a cost that would enable an efficient licensee to provide a competitive communication service; or

- b) Obtain comparable services or facilities from providers other than the dominant licensee on prices, terms and conditions that would enable it to provide a competitive communication service.

The Commission will conclude that a service or facility performs the same (or comparable) function, regardless of the technology used, as the licensee's service or facility if a customer would view the service or facility as a reasonable substitute for the licensee's service or facility, given both price and non-price factors.

The Commission generally will assess whether the dominant licensee's input price is so high that the dominant licensee's downstream business(es) or Affiliate(s) cannot profitably sell its product. The Commission may assess the price that the dominant licensee charges its downstream business(es) or affiliate(s) as compared to what it charges downstream competitors for the same input, to determine if such downstream business or affiliate is able to make a commercially reasonable profit if it were required to recover the full purchase price of the input through its charges to its customers.

5.4.1.3 Cross Subsidisation

The Commission will find that a dominant licensee has engaged in cross-subsidisation and, therefore, has abused its dominant position, if the dominant licensee uses revenues from the provision of a communication service that is not subject to effective competition to cross-subsidise the price of any communication service and equipment that is subject to effective competition where this would unreasonably restrict competition in any communication market in Kenya.

The Commission will find that a dominant licensee has engaged in cross-subsidisation and, therefore, has abused its dominant position, where the evidence demonstrates that the dominant licensee:

- a) Has used revenues from the provision of a communication service that is not subject to effective competition to cross-subsidise the price of any communication service and equipment that is subject to a greater degree of competition; and
- b) The dominant licensee's conduct has unreasonably restricted, or is likely to unreasonably restrict, competition in any communication market in Kenya.

The Commission may conduct cost allocation studies in order to determine whether cross-subsidisation has occurred. The Commission will find that cross-subsidisation has occurred where:

- a) The dominant licensee offers multiple services, some of which are not subject to effective competition, that use common facilities or have other common costs; and
- b) The dominant licensee has improperly allocated costs to, or used revenues from, those facilities and services that are not subject to effective competition.

5.4.2 Other Abuses

A dominant licensee is also precluded from taking any other action that abuses its dominant position. In particular, a dominant licensee must not engage in the following practices

5.4.2.1 Discrimination

The Commission will find that a dominant licensee has engaged in discrimination, and therefore has abused its dominant position, if the dominant licensee provides its Affiliate with access to inputs such as infrastructure, systems, services, or information that, as a practical matter, are necessary to non-affiliated licensees to provide communication services, on prices, terms or conditions that are more favourable than the prices, terms and conditions on which the dominant licensee provides those infrastructure, systems, services or information to non-affiliated Licensees

The Commission will find that a dominant licensee has engaged in discrimination and, therefore, has unreasonably restricted competition, or is likely to unreasonably restrict competition, in the Kenya communication market by abusing its dominant position, if the evidence demonstrates that:

- a) The dominant licensee has provided its affiliate with access to infrastructure, systems, services or information;
- b) Access to the dominant licensee's infrastructure, systems, services or information is necessary to enable a non-affiliated licensee to provide communication services; and
- c) The dominant licensee provided its affiliate with access to the infrastructure, systems, services or information, on prices, terms or conditions that are more favourable than the prices, terms and conditions on which the dominant licensee provides those infrastructure, systems, services or information to licensees that are not Affiliates without any objective justification, such as a verifiable difference in the cost of providing access.

In determining whether access to infrastructure, systems, services or information is necessary, the Commission will consider the ability of an efficient licensee to:

- a) Self-provision comparable infrastructure, systems, services or information at a cost that would enable it to provide a competitive communication service; and
- b) Obtain comparable infrastructure, systems, services or information from providers other than the dominant licensee on prices, terms and conditions that would enable it to provide a competitive communication service.

5.4.2.2 Predatory Network Alteration

The Commission will find that a dominant licensee has engaged in predatory network alteration and, therefore, has abused its dominant position, if the dominant licensee alters, without a legitimate business, operational or technical justification, the physical or logical

interfaces of its network in a manner that imposes significant costs on interconnected licensees.

The Commission will find that a dominant licensee has no legitimate business, operational or technical reason for altering its network interface when:

- a) The alteration was not a technically reasonable means for the dominant licensee to reduce its costs, offer a new service, improve service quality or otherwise benefit its end users; and
- b) The adverse impact of the dominant licensee's actions on interconnected licensees was grossly disproportionate to the benefit to the dominant licensee and its end users.

5.4.2.3 Refusal to Supply

Dominant licensee's refusal to supply a service to a competing Licensee may constitute an abuse of dominant position. This may occur, for example, where a dominant licensee controls an input that is required to provide a competing service and the competing licensees have no feasible alternatives to obtaining the service from the dominant licensee.

5.4.2.4 Anti-Competitive Discounts

Anti-competitive discount constitutes an abuse of dominant position. Typically, this will occur where a dominant licensee offers a significant discount, not justified by any objective factor, which has the effect of foreclosing competing licensees from a significant portion of the market. Certain types of discounts may raise competitive concerns, these include:

- a) Loyalty discounts, in which a dominant licensee offers a discount on the condition that the customer may not purchase the service from competing licensees;
- b) Volume discounts that are based on a customer's total expenditure, but that are applied only to charges for communication services that are subject to effective competition; and
- c) A discount that is available only to customers that have the greatest ability to switch to alternate suppliers.

The permissibility of any discount will depend on the specific facts, especially the extent to which they result in significant market foreclosure.

5.4.2.5 Tying

A dominant licensee must not require a customer to purchase any other service or equipment as a condition for purchasing a specific communication service. In addition, a dominant licensee may abuse its dominant position where it requires a customer that purchases a communication service that is not subject to effective competition to purchase other services or equipment, especially if those services or equipment are subject to a greater degree of competition. Such requirements, even if offered as an option, may foreclosure competition in a significant portion of an otherwise competitive market.

5.4.2.6 Anti-Competitive Preferences

A licensee that is affiliated with an entity that has Significant Market Power in either a communication or non-communication business, is prohibited from using the market position of its Affiliate, or of its non-communication business, in a manner that enables it to, or is likely to enable it to, unreasonably restrict competition in any communication market in Kenya

In particular, a licensee who engages in any of the following practices will be found to have abused his dominant market power:

- a) A Licensee that uses an input, that is provided by an Affiliate that has Significant Market Power in the market for an input that other Licensees require in order to provide a communication service, and has obtained the input at a price that is so high that efficient competing non-affiliated Licensees could not profitably sell their end-product if they were required to purchase the input at the same price as the Licensee; and
- b) A Licensee who accepts any cross-subsidisation from an Affiliate that has Significant Market Power, where this would enable the licensee to engage in predatory pricing. The Commission will find that a licensee has engaged in predatory pricing.

5.5 Unfair Methods of Competition

5.5.1 General Prohibition

A Licensee must not engage in unfair methods of competition. An unfair method of competition is an improper practice by which a licensee seeks to obtain a competitive advantage for itself or an Affiliate in the communication market in Kenya, for reasons unrelated to the availability, price or quality of the service that the licensee or its Affiliate offers.

5.5.2 Specific Prohibited Practices

The following practices constitute unfair methods of competition and are specifically prohibited:

5.5.2.1 Degradation of Service Availability or Quality

A licensee must not take any action, or induce any other party to take any action, that has the effect of degrading the availability or quality of another licensee's communication service or equipment, or raising the other licensee's costs, without a legitimate business, operational or technical justification.

5.5.2.2 Provision of False or Misleading Information to Competitors

Whilst licensees are not required to disclose proprietary or commercially sensitive

information to their competitors, a licensee must not provide information to other licensees that is false or misleading

5.5.2.3 Improper Use of Information Regarding a Competing Licensee's Customers

A licensee that receives information from another licensee about the other licensee's customers in order to fulfil any duty under the Regulations must not use that information for any purpose other than the purpose for which it was provided. In particular, the licensee must not use the information that it receives to market services to the other licensee's customers or otherwise interfere in the other licensee's existing relationship with its customers.

6. COMPETITION CONCERNS AND OBLIGATIONS OF DOMINANT OPERATORS

The section expounds on the competition concerns as related to unfair methods of competition in the communication market. All provisions in this section will apply to all licensees, and especially those designated as having Dominant Market Position in relevant market segments.

Competition concerns shall arise where:

- a) There is discernible market failure;
- b) A licensee directly or indirectly imposes purchase or selling prices or other trading conditions that unfairly prevent, restrict or distort competition;
- c) A licensee limits production, markets or technical development to the prejudice of consumers and other licensees;
- d) A licensee apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- e) A licensee makes 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 contract; and
- f) A licensee is dominant in a relevant market or market segment.

If evaluation by the Commission there is found to be a competition concern of a dominant nature, the DMP operator identified in line with clause 5.2 of these guidelines shall be required to comply with Regulation 9 of the Kenya Information and Communications (Fair Competition and Equality of Treatment) Regulations, 2010 all other Dominant service provider obligations in the Act and Regulations.

6.1 Obligations of an Operator with DMP

To achieve its objectives of ensuring there is no abuse of market power; the Commission may impose obligations on providers with DMP in wholesale and retail markets. Such obligations are provided for in the Act, the Regulations and other regulatory provisions issued by the Commission from time to time. The obligations may include, among others:

- a) A transparency obligation to make public specified information (e.g., accounting information, technical specifications, network characteristics, and prices);
- b) A non-discrimination obligation to apply equivalent conditions in equivalent circumstances, and not to discriminate in favour of the regulated firm's own subsidiaries or partners;
- c) An accounting separation obligation involving the preparation of separate accounts for different businesses and parts of businesses run by the same service provider, so that the costs and revenues associated with each business and part of a business (and transfers between them) can be separately identified and properly allocated in order to ensure compliance with a non-discrimination obligation or to prevent unfair cross-subsidies;

- d) Access obligations relating to requests for access or interconnection or use of specific network elements, including obligations regarding negotiation of terms and conditions of providing access and other matters to be set forth in the relevant regulation; and
- e) A price control and cost accounting obligation, which may require service a provider to set cost-oriented access charges or be subject to a price control. A price control obligation is restricted to cases where market analysis suggests that, absence of such regulations charges might be sustained at excessively high levels.

6.2 Regulatory Obligations for Wholesale Services

The Commission will check against failure to comply with the interconnection obligations of a service provider with respect to DMP; Service providers with DMP will be obliged to deal fairly and responsively with other service providers.

6.3 Regulatory Obligations for Retail Services

Intervention in wholesale markets is preferable to regulatory intervention in retail markets. If measures taken at the wholesale level do not resolve problems in the retail market, then obligations to DMP to offer retail services under certain price, availability, quality, or other conditions obligations may be applied. Generally, regulatory controls on retail services will only be imposed where the Commission considers that relevant wholesale measures would fail to achieve the objective of ensuring effective competition or will take a prolonged period of time to take effect.

Retail obligations on DMP service providers may include, but are not limited to, prohibitions against:

- a) Charging excessive retail prices;
- b) Inhibiting market entry or restricting competition by setting prices below cost;
- c) Showing undue preference or undue discrimination vis-a-vis specific end-users; and
- d) Unreasonably bundling retail services.

The Commission may subject such service providers to appropriate retail price cap measures, measures to control individual tariffs, or measures to orient prices towards costs or towards prices in comparable markets, in order to protect end-user interests while promoting effective competition.

7. MONITORING, COMPLIANCE AND PENALTIES

The Commission shall monitor Service Providers' compliance with Competition Guidelines;

- a) The Commission shall issue decisions requiring Service Providers with DMP to comply with the regulatory framework in force.
- b) The Commission shall monitor and prevent abuses of Market Position of Service Providers with DMP;
- c) The Commission shall monitor and prevent practices that may restrict competition;
- d) The Commission shall review any transaction or transactional relationship (e.g., interconnection), particularly those involving Service Providers with DMP, to ensure that they will not restrict, undermine or distort competition;
- e) The Commission shall take all necessary measures, whether preventive (i.e., before abuse of DMP) or remedial (i.e. after abuse of DMP), to protect competition and ensure a sustainable competitive market.

The preventive measures will include

- i. Tariff approval of a DMP operator;
- ii. Enforcing Interconnection obligations of a DMP;
- iii. Any other measure

Appropriate and proportionate remedies will be implemented in accordance with the Act and the Regulations

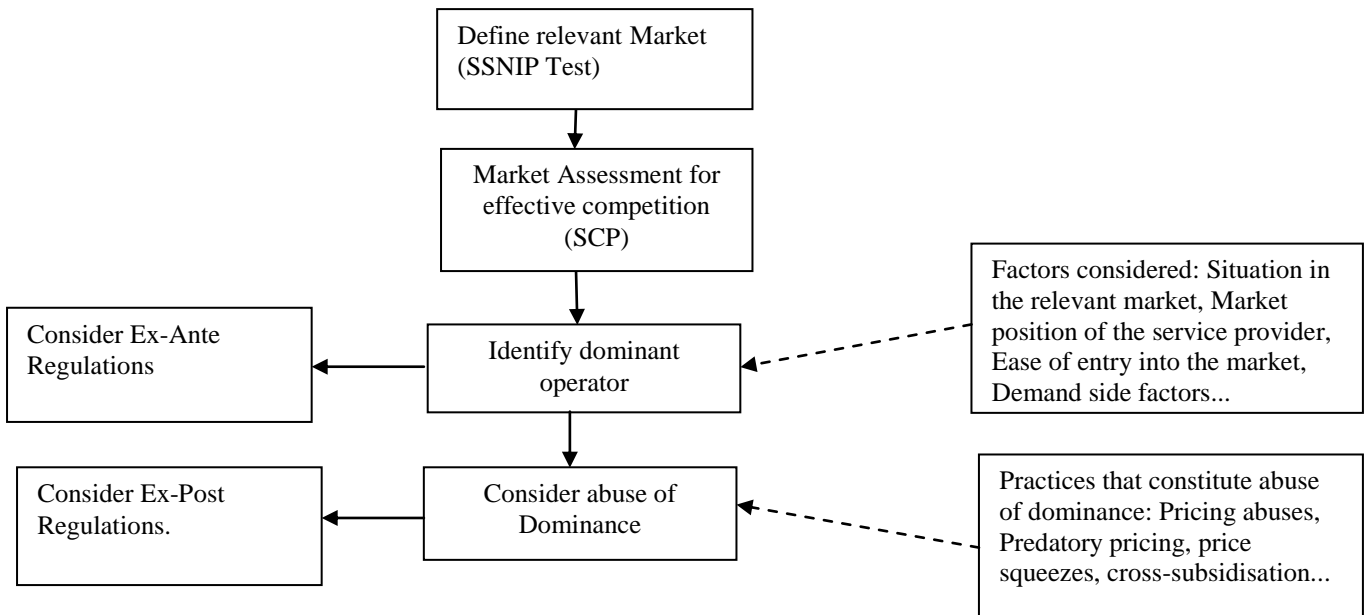
- f) The Commission shall also impose penalties allowed by the Law.

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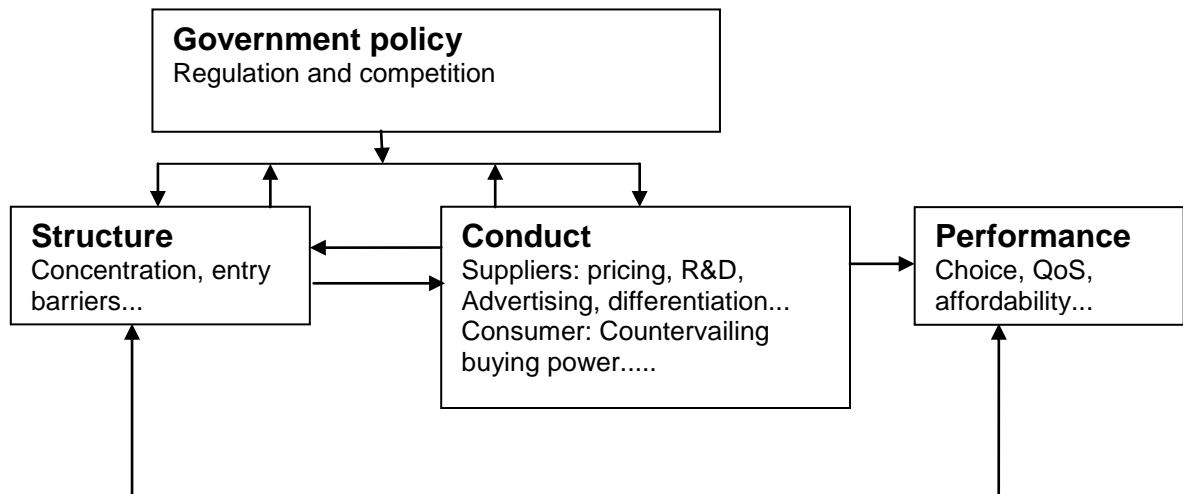
Director General
Communications Commission of Kenya

Date

A. Annex 1: Competition Guideline Flowchart



B. Annex 2: Structure Conduct Performance



-- End of Competition Guidelines --