

GOVERNMENT NOTICE NO. 1

COMMUNICATIONS ACT

(CAP. 68:01)

COMMUNICATIONS (TARIFF) REGULATIONS, 2023

IN EXERCISE of the powers conferred by Section 200 of the Communications Act, I, GOSPEL KAZAKO, Minister of Information and Digitalization, on recommendation of the Malawi Communications Regulatory Authority, make the following Regulations—

PART I—PRELIMINARY

1. These Regulations may be cited as the Communications (Tariff) Regulations, 2023. Citation
2. In these Regulations, unless the context otherwise requires— Interpretation
- “dominant licensee” means a licensee who has a status of a dominant market player;
- “framed tariff” means a tariff that is determined by the Authority and imposed on a dominant licensee for a wholesale or retail electronic communication service under section 78 of the Act;
- “licensee” means a person holding an electronic communication licence, as defined under the Act;
- “postpaid” means the method of payment for a service where the consumer pays for the service in arrears on terms and conditions set out in the service contract between the consumer and the licensee;
- “prepaid” means the method of payment for a service where the consumer pays for a service in advance on terms and conditions set out in the service contract between the consumer and the licensee;
- “promotional offer” means a tariff that operates only for a specified period;
- “relevant market” means a discrete electronic communication service market which is determined as such by the Authority;
- “tariff” means a price, rate or charge applied in relation to use of an electronic communication service; and
- “zero-rate” means the use of an electronic communication service at no cost to the consumer.
- 3.—(1) A licensee shall not charge a tariff for use of its service unless the tariff is approved by the Authority. Tariffs to be approved
- (2) A licensee shall not revise a tariff for use of its service unless the revised tariff is approved by the Authority.

Application for  
tariff approval

4.—(1) A licensee who intends to set or revise a tariff shall submit an application for approval of the tariff or revised tariff to the Authority—

(a) where the licensee is a dominant licensee, at least twenty-eight days before the intended effective date; or

(b) where the licensee is not a dominant licensee, at least twenty-one days before the intended effective date.

(2) An application under subregulation (1) shall be in the form set out in the *First Schedule*.

(3) In addition to the information provided in the application form, the Authority may request additional information from the applicant as the Authority would determine necessary to dispose-off the application.

(4) The applicant shall submit additional information requested under subregulation (3) within seven days of receipt of the request.

(5) A tariff submitted for approval under subregulation (1) shall comply with the principles set out in section 74 of the Act.

(6) For purposes of this regulation, “setting or revising a tariff” means increasing, decreasing or changing the structure of the tariff.

Decision on  
application for  
tariff approval

5.—(1) The Authority shall, within fourteen days from the date of receipt of an application for tariff approval, communicate its decision, in writing, to the applicant.

(2) Where the Authority requests additional information under regulation 4 (3), the Authority shall communicate its decision to the applicant within fourteen days from the date of receipt of the additional information.

(3) The Authority may, where it is satisfied that the application for tariff approval complies with section 74 of the Act, approve the application.

(4) The Authority may, in granting approval under subregulation (3), impose any condition as the Authority may determine appropriate.

(5) The Authority may reject an application for tariff approval where—

(a) the proposed tariff does not comply with section 74 of the Act;

(b) the licensee fails to provide additional information requested under regulation 4 (3);

(c) the tariff relates to a service in a relevant market in which the Authority has declared the applicant a dominant licensee and the tariff does not comply with anti-competitive pricing prohibited under regulation 6; or

(d) in the opinion of the Authority, approval of the application would not advance the objects of the Act or the welfare of consumers.

Prohibition of  
anti-  
competitive  
pricing by  
dominant  
licensees

6.—(1) An application for tariff approval submitted by a dominant licensee under regulation 4 shall not—

(a) contain any exclusive or tying condition, such that provision of the service to which the tariff relates, is conditional on the consumer taking up another service from any other source;

(b) result in a margin squeeze as provided in the *Second Schedule*, which may hinder a wholesale consumer from competing fairly with a retail service of the licensee or an affiliate of the licensee, after allowance for the retail cost of a reasonably efficient operator;

(c) contain reserved or unexpressed terms and conditions, or terms and conditions to be applied at the discretion of the dominant licensee; or

(d) involve predatory or excessive pricing, as set out in the *Second Schedule*, which is anti-competitive in intent or likely effect.

(2) Where an application for tariff approval submitted by a dominant licensee under regulation 4 relates to a tariff for a retail service, the tariff shall—

(a) be described in a clear and unambiguous manner so that a consumer may determine, from the information provided in the tariff, the description of how the tariff shall be applied and the liability for payment that will arise under the tariff; and

(b) not contain any service bundle if each component of the bundle cannot be obtained separately by a consumer.

(3) The Authority shall use the criteria set out in the *Second Schedule* to determine whether a tariff submitted for approval is anti-competitive.

(4) Where the Authority determines that a tariff proposed by a dominant licensee under regulation 4 is anti-competitive, the Authority shall reject the application.

7. The Authority shall treat with strict confidence information submitted by an applicant under regulation 4 until the proposed tariff is approved and published in accordance with section 76 of the Act.

Confidentiality

8.—(1) The Authority may, at any time, review a tariff approved under regulation 5.

Review of approved tariffs

(2) Where the Authority intends to review a tariff, the Authority—

(a) shall give notice of the intended tariff review in writing to the licensee; and

(b) may request the licensee in writing to submit such information as the Authority may determine necessary for the review.

(3) A licensee shall, within fourteen days of receipt of a notice under subregulation (2)—

(a) make a written submission on the intended tariff review to the Authority; and

(b) submit any information requested by the Authority under subregulation (2) (b).

(4) The Authority shall communicate its decision on the tariff review within fourteen days of receipt of submissions under subregulation (3).

Tariffs  
framing

9.—(1) The Authority may frame a tariff pursuant to section 78 of the Act, where a licensee is determined to be a dominant licensee in a relevant market and there is a likelihood of unfair competition or harm to consumer welfare.

(2) The Authority shall develop and maintain network cost models which shall take into account internationally recognised costing models to guide tariff framing.

(3) The Authority shall, before framing a tariff, require the licensee to provide verifiable cost data on the tariff.

(4) The Authority shall, in framing a tariff, take into account—

(a) the submission of the licensee under subregulation (3);

(b) the network cost models maintained under subregulation (2);

(c) the cost incurred by the licensee; and

(d) the need to allow the licensee a reasonable rate of return on its investment.

(5) The Authority shall allow the licensee a reasonable rate of return for a period of not more than three years from the date on which the framed tariff is first applied

(6) In addition to the cost model developed under subregulation (2), the Authority may develop and maintain other cost models to inform other regulatory pricing decisions pursuant to sub-regulation (1).

Zero-rated  
tariffs

10.—(1) A tariff for voice calls for emergency services shall be zero-rated.

(2) In addition to emergency calls, the Authority may determine other electronic communication services to be zero-rated.

(3) Where the Authority intends to declare any electronic communication service as zero-rated, the Authority shall, by notice published in the *Gazette* and newspapers of wide circulation in Malawi, invite comments from interested persons on the intended zero-rating of the service.

(4) Any person may, within thirty days of publication of a notice under subregulation (3), submit his comments on the matter in writing to the Authority.

(5) Where, after considering the comments submitted under subregulation (4), the Authority determines that the particular electronic communication service be zero-rated, the Authority shall publish a notice of its decision in the *Gazette*.

(6) Where a licensee offers a zero-rated data service, the data used by a subscriber on a zero rated service shall not be counted for the purpose of any data cap or other limitation applicable to the service to which the subscriber has subscribed.

11.—(1) A licensee may provide any electronic communication service on promotional offer. Promotional offer

(2) A licensee who intends to provide an electronic communication service on promotional offer shall submit an application for approval of the promotional offer to the Authority at least twenty-one days before the intended launch of the promotional offer.

(3) The Authority shall, within fourteen days of receipt of an application for promotional offer approval, communicate its decision in writing to the applicant.

(4) A licensee shall not provide electronic communication services on promotional offer for a period exceeding ninety days per promotional offer.

(5) A licensee who has provided an electronic communication service on promotional offer shall not, until the expiry of six months from the last date of the promotional offer, provide the same promotional offer.

(7) A licensee shall notify the Authority in writing at least seven days before discontinuing or cancelling a promotional offer.

(8) The Authority shall, in considering an application under subregulation (2), take into account views of any regulatory body which has interest in the promotional offer, but the Authority's decision in respect of quality of service of the subject matter under the promotional offer shall be final.

12. The Authority shall maintain a register of approved tariffs which shall be open to the public for inspection on such terms and conditions as the Authority may determine. Tariff register

13.—(1) A licensee shall, at all times, maintain a billing system that complies with these Regulations. Billing arrangements

(2) A licensee shall, on request by a consumer, provide to the consumer a statement of usage of electronic communication services of the licensee used by the consumer.

(3) A statement provided under subregulation (2) shall include—

(a) for a post-paid consumer—

- (i) the total charges, including the cost of each service;
- (ii) the due date for payment of the charges incurred; and
- (iii) any other information as the Authority may specify by notice in writing; and

(b) for a pre-paid consumer—

- (i) the cost of services rendered;
- (ii) information on duration of calls;
- (iii) airtime balance; and
- (iv) any other information as the Authority may specify by notice in writing.

(4) A licensee shall not bill a consumer for—

(a) any charge which the licensee has not disclosed to the consumer through a notice published in accordance with section 76 of the Act and through terms and conditions of the service; or

(b) a service that has not been sought by the consumer.

(5) A licensee shall put in place a system to ensure accuracy of consumer bills.

(6) A licensee shall keep a consumer billing record for a period of five years from the date the record is generated.

(7) The Authority may inspect and independently verify the billing system of a licensee for purposes of ensuring compliance with this regulation.

(8) The Authority shall give notice to a licensee before conducting the inspection under subregulation (7).

(9) Where the Authority has given notice under subregulation (8), the licensee shall—

(a) make available to the Authority for a reasonable period, appropriate personnel with knowledge of the billing system;

(b) provide all billing back-up and support documentation; and

(c) provide any other information on the billing system as the Authority may request.

Itemized bill

14.—(1) A licensee shall, on request, provide a post-paid or pre-paid consumer with an itemized bill.

(2) An itemized bill shall specify—

(a) in the case of voice and bundled voice calls, the date, time, duration, recipient number and cost of each call;

(b) in the case of short message service (hereinafter “SMS”) and bundled SMS, the date, time, recipient number and cost of each SMS; and

(c) in the case of in-bundle and out-of-bundle data, the date, time and total data used for each data session.

(3) A licensee shall provide to the consumer, the itemized bill requested under sub-regulation (1)—

(a) within seven days from the date of the request, where the information is less than three months old; and

(b) within twenty-one days from the date of the request, where the information is more than three months old.

(4) An itemised bill shall identify zero-rated calls.

Bundled voice  
and SMS  
services

15.— (1) A licensee shall send a voice bundle and SMS bundle usage depletion notification to a consumer via SMS, push notification or any applicable means, when usage of the bundle reaches 50%, 60%, 70%, 80%, 90% and 100% .

(2) A licensee shall provide a consumer who is on a post-paid plan, with an option to buy additional voice service or SMS at any time.

(3) Where a consumer is on a post-paid or combo bundle plan and his voice or SMS is depleted and the consumer does not buy another voice service or SMS, the licensee shall—

(a) provide the consumer with an option not to access the depleted service; and

(b) allow the consumer access to emergency services, customer care services, incoming voice calls, incoming SMS and zero-rated services.

**16.—**(1) A licensee shall send data bundle usage depletion notifications to a consumer via SMS, push notification or any other applicable means when usage of the bundle reaches 50%, 60%, 70%, 80%, 90% and 100%. Data bundle services

(2) A licensee shall provide a consumer with an option to buy an additional data bundle at any time through an unstructured supplementary service data platform, push notification, or any other applicable means.

(3) A licensee shall—

(a) not put a consumer on default “out-of-bundle data charges” upon depletion of a data bundle; and

(b) provide a consumer with an option, through SMS, push notification, USSD or any other applicable means, to opt-in to “out-of-bundle usage charge”.

(4) Where a consumer does not opt-in to an “out-of-bundle data charge” as provided under subregulation (3) (b), the licensee shall not permit any “out-of-bundle data usage” by the consumer until the consumer purchases a new data bundle or consents to be charged an “out-of-bundle data rate” via an unstructured supplementary service data, SMS, push notification or any other applicable means.

**17.—**(1) A licensee shall provide a consumer with an option to roll over unused data before the expiry date of a data bundle. Roll over of unused data and transfer of data

(2) Where unused data is rolled over, the rolled over data shall be utilized before any newly allocated data.

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

**18.—**(1) These Regulations shall not apply to— Exemptions

(a) the operation of a data centre; and

(b) the operation of an internet café.

(2) The Authority may exempt, in writing and with or without conditions, an undertaking or a class of undertakings from complying with any of these Regulations.

**19.—**(1) Where a licensee fails to comply with these Regulations, the Authority may issue one or more of the following regulatory sanctions— Regulatory sanctions

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

(2) In the case of anti-competitive behavior by a dominant licensee, the Authority may impose the following remedies in addition to or in the alternative to the regulatory sanctions under subregulation (1)—

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

Offences and General penalty

20. Any person who contravenes a provision of these Regulations commits an offence and shall, upon conviction, be liable to a fine of K5,000,000 or imprisonment for five years.

FIRST SCHEDULE

(reg. 4 (2))

COMMUNICATIONS ACT (CAP. 68.01)

COMMUNICATIONS (TARIFF) REGULATIONS

APPLICATION FOR TARIFF APPROVAL

1. Name of applicant .....
2. Identification of the tariff\* .....
3. Whether the tariff is wholesale or retail.....
4. Market segment addressed by the tariff and any limitations on availability of the tariff to any segment or category of customers .....

\*Provide a full description of the service and the application of the tariff, including the market or brand name of the tariff (if applicable), together with a separate identification of each tariff element (if applicable).

- 5. Purpose of the application\*\* .....
- 6. Whether the tariff application relates to a promotional offer or not.....
- 7. Proposed effective date of the tariff .....
- 8. In the case of a promotional offer—
  - (a) proposed start date.....
  - (b) proposed end date.....
- 9. Detailed terms and conditions of the proposed Tariff\*\*\* .....
- 10. In the case of an application for a tariff for a new service, confirm if all technical issues, security arrangements, frequency spectrum issues, type approval, standard customer agreement, third party agreements, or other non-tariff matters have been evaluated, cleared or otherwise resolved .....
- 11. In the case of amendment or cancellation of a tariff, provide a written undertaking that consumers shall be notified on at least one billing cycle or thirty calendar days, whichever period is longer (details of arrangements for such notification, and migration plan to be provided with the undertaking).....
  - Name of person submitting the application .....
  - Contact details of person submitting the application .....
  - Position of person submitting the application .....

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\*\* Indicate purpose of application, whether to establish a new tariff for a new service, a new tariff option, a variation or amendment of an existing tariff, or the cancellation/withdrawal of a tariff.

\*\*\* List the applicable additional terms and conditions of service which are different from the applicant’s general terms and conditions of service.

## SECOND SCHEDULE

(reg. 6 (1) &amp; (3))

## COMMUNICATIONS ACT (CAP. 68.01)

## COMMUNICATIONS (TARIFF) REGULATIONS

## FORMS OF ANTI-COMPETITIVE BEHAVIOUR BY DOMINANT LICENSEES

**1. Excessive Pricing**

- (a) A tariff shall be determined to be excessive pricing where a dominant licensee takes advantage of its dominant position to make supra-normal profits.
- (b) In determining whether a tariff set by a dominant licensee is excessive or not, the Authority may—
  - (i) examine accounts of the dominant licensee to establish whether, over a significant period of time, the licensee made supra-normal profits from provision of the service in the market in which the licensee has significant market power;
  - (ii) examine profits earned by other licensees in a similar market that are subject to effective competition, whether in Malawi or in a comparable country; and
  - (iii) use cost studies and cost models to determine if a tariff is excessive when compared to long run costs for the service in question.

**2. Predatory pricing**

A tariff shall be determined to be predatory pricing where the tariff set by a dominant licensee—

- (a) is unreasonably low;
- (b) has the objective or effect of eliminating or inhibiting competition; and
- (c) has been in effect for a prolonged period of time.

**3. Margin squeeze**

The Authority shall determine that there is a margin squeeze where a vertically integrated licensee, that is dominant in a relevant wholesale market, sets the margin between its wholesale and retail tariffs such that a reasonably efficient retail licensee cannot earn a sufficient margin to compete effectively.

For purposes of this provision, a vertically integrated licensee means a licensee that operates in wholesale and retail markets.

**4. Tying and bundling**

The Authority shall determine that there is tying or bundling of services where a licensee provides a service on condition that another service is also purchased.

**5. Price discrimination**

- (a) The Authority shall determine that there is price discrimination where—
  - (i) a licensee sells units of the same service at different prices, either to the same consumer or to different consumers; and

- (ii) the price discrimination has the intention or effect of substantially reducing competition in a relevant market.
- (b) For purposes of section 74 of the Act, a setting or revision of a tariff under these Regulations shall be “discriminatory” if the setting or revision results in—
  - (i) treating similar class of consumers or services differently, unless the difference in treatment is justifiable with reference to the type of class; or
  - (ii) different treatment of wholesale consumer or retail business of the licensee as compared to the affiliates of the licensee.
- (c) In making the assessment under paragraph (a), the Authority shall determine whether the price discrimination has—
  - (i) pro-competitive effects such as raising the overall demand level for the service thereby achieving economies of scale that are available in the form of reduced unit costs to be passed on to consumers of the service; or
  - (ii) substantial anti-competitive effects, such as, passing on reduced costs to large volume consumers only while keeping prices to small volume customers materially higher than they would be in the absence of the discriminatory pricing.

Made this 26th. day of January, 2023.

(FILE NO.INFO/ADM/01/04)

G. KAZAKO  
*Minister of Information and Digitalization*

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