



RESULTS OF PUBLIC CONSULTATIONS ON COMMUNICATIONS (TARIFF) REGULATIONS

1. INTRODUCTION

The Malawi Communications Regulatory Authority (MACRA) has concluded public consultations on the Communications (Tariff) Regulations. MACRA commenced the consultation process in November 2020 by publishing a draft of the Regulations and inviting stakeholders and the general public to submit written comments on the regulations.

MACRA hereby publishes the results of the consultations inline with section 202(2) of the Communications Act (Cap 68:01 of the Laws of Malawi).

MACRA is established under section 4 of the Communications Act. Its general mandate is to ensure that, as far as it is practicable, reliable and affordable communication services are provided throughout Malawi. Chapter VIII of the Act gives MACRA the power to regulate tariffs for communication services in line with principles of affordability and promotion of competition. MACRA therefore developed the Communication (Tariff) Regulations to compliment the Act and provide for processes for regulation of tariffs under the Act.

2. CONSULTATION PROCESSES

The consultations were done through a process of inviting stakeholders and the general public to submit written comments on draft Regulations published by MACRA. Numerous comments were submitted by stakeholders. The comments submitted were given due consideration by MACRA and some provisions of the Regulations were revised. MACRA also conducted a stakeholder workshop on the Regulations which was held on 15th April 2021 in Lilongwe at Sunbird Capital Hotel.

The stakeholder comments and MACRA's responses to the comments are in **Annex 1** of this report.

3. **SUMMARY OF THE RESULTS OF THE CONSULTATIONS**

A final version of the Regulations has been developed by MACRA which will be submitted to the Minister of Information for promulgation under section 200 of the Communications Act. The final version is in **Annex 2** of this report.

The following are some of the areas covered by the Regulations:

- **Tariff approval processes:** The regulations provide for a period of fourteen days for MACRA to approve a tariff and an additional period of seven before the tariff can become effective to allow communication of the tariff by a service provider to its customers.
- **Notification of bundle usage to customers:** The Regulations require a service provider to communicate to a customer data bundle usage when such usage reaches prescribed thresholds.
- **Rollover of data bundle:** The regulations require a service provider to give a customer an option to roll over data unused before the expiry date a data bundle. Service providers will decide how data will be rolled over.
- **Out of bundle data charging:** The Regulations will require a service provide to give a customer an option, upon depletion of a data bundle, to either purchase another data bundle or consent to be charged an out bundle data tariff rate. A customer will not be automatically defaulted to an out of bundle tariff rate upon depletion of a data bundle.

The Regulations, once promulgated by the Minister, shall become effective upon their publication in the Government Gazette.

Dated this 12th July 2021.

HENRY SILIKA
ACTING DIRECTOR GENREAL

Annex 1 – Comments on Tariff Regulations and MACRA’s responses

STAKEHOLDER COMMENTS ON DRAFT ONE (1) OF THE COMMUNICATIONS (TARIFF) REGULATIONS AND MACRA’S RESPONSES TO THE COMMENTS

Clause No.	Provision	Comments	Proposition	MACRA’s response
		Comments from TNM		
4 (1)	<p>A licensee shall submit for approval, its tariff to the Authority at least—</p> <p><i>(a) twenty one days prior to the effecting of that tariff, where the licensee is a not a dominant licensee; and</i></p> <p><i>(b) twenty eight days prior to the launch of that tariff, where the licensee is dominant licensee.</i></p>	<p>The period of approval is long considering that we are in a fast changing market.</p>	<p>TNM proposes that the period should be 10 working days as per the current processes.</p>	<p>The approval period is 14 days (see Regulation 8). Regulation 4 provides for when the tariff will become effective. The provision takes into account the period for communication to consumers after approval has been given.</p>
7	Rejection of tariff	<p>The regulation should also state that before rejecting a tariff MACRA shall consider the below principles</p> <ul style="list-style-type: none"> • financial sustainability of licensees, • price stability for the consumer, • equity and fairness, • cost of service, 		<p>Section 74 of the Communications Act provides for the basis for setting tariffs. The Authority will be guided by the principles stated in that provision which take into account the factors listed by TNM.</p>

		<ul style="list-style-type: none"> • improving quality of service and encourage investment in new technology • considering the value of the Malawi Kwacha in relation to foreign currencies • Inflation movement • Change in Fuel/ Electricity prices above a given threshold 		
8(1)	The Authority shall, within fourteen days from the receipt of an application for tariff approval, communicate to an applicant, a decision made on an application.	This should be reviewed in line with the comments made in reg 4(1) above. We are in a fast changing market and as such we sometimes have Adhoc decisions to respond to customer needs as such fulfilment of 4(1) may not always be possible.	The clause should also indicate what happens if TNM does not get feedback within the stipulated timeframe.	There will be no default approval. The Authority will ensure that a decision is made within the stipulated period.
13(1)	Bundled voice and SMS A licensee shall send usage depletion notifications via SMS, push notification or any applicable means to consumers when their usage reaches 50%, 60%, 70%, 80%, 90% and 100% .	Using percentage when sending usage notification is not always the best. The regulations should not restrict to the stated percentages but there should be regular notification to customers about bundle depletion.	The regulation should provide another option rather than percentages.	The provision is not restricting licensee to use percentages when communicating data usage. The licensee can use any other form that it deems best. However it must notify the consumer his data usage whenever he reaches the thresholds stated in the regulations.

14(1)	<p>Data service: out of bundle billing</p> <p>A licensee shall ensure that a consumer is-</p> <p>(a) sent data usage depletion notifications via SMS, push notification or any other applicable means when usage reaches 50%, 60%, 70%, 80% , 90% and 100%;</p>	<p>Using percentage when sending usage notification is not always the best. However, customers can be notified by indicating the amount of data remaining at different intervals. For instance: for a customer who has bought 50mb, a message can be sent at 50mb, 30mb, 15mb, and 5mb. Sending percentages as indicated will be irritating to the customer because the bundle is small.</p>	<p>The regulation must provide other options of notifying customers based on remaining data and set thresholds.</p>	<p>See comment above</p>
14(1c)	<p>not defaulted onto out of bundle data charges upon depletion of data bundles; and</p>	<p>It must be noted that the out of bundle rate has significantly reduced as such customers may not see a lot of difference with in bundle rates</p> <p>This regulation needs some more work on our billing systems in order to be able to implement it successfully, and this comes with a significant investment on the billing platform.</p> <p>Additionally, it will also affect the experience of some customers, since they will have to stop browsing sessions after bundle depletion, which could be a potential customer experience issue on the network providers.</p>	<p>Currently TNM does not have system capability to implement and we would request MACRA to provide sufficient time if this is to be implemented smoothly</p> <p>The implementation should also consider the investment into the right systems and also customer experience should they not choose to buy a bundle</p> <p>TNM propose that the out of bundle rate could match the highest</p>	<p>The clause aims at reducing the bill shock that customers experience when data is depleted hence the need of the cutoff point.</p> <p>From experience the phased approach has not worked and the Authority does not recommend it.</p> <p>Furthermore the Authority would like operators to generate revenue with full</p>

		Furthermore, this also has revenue implications on data, since out of bundle contributes significantly to the data revenue.	effective rate for the bundles (in a phased approach in order not to affect the costing of data), in order not to affect the browsing experience of customers, and also not to disturb the normal billing operations with alterations, as well as suffer on huge investments in order to implement this draft regulation.	knowledge of the customer's data usage.
14(1d)	provided an option via SMS, push notification, USSD or any other applicable means at any time to opt-in to out-of-bundle usage charges.	This draft regulation needs some more work on our billing systems in order to be able to implement it successfully, and this comes with a significant investment on the billing platform.	Currently TNM does not have system capability to implement and we would request MACRA to provide sufficient time if this is to be implemented smoothly	Regulations allow for exemptions to be made by the Authority (see regulation 21). TNM will therefore have the opportunity to apply to the Authority to be exempt from complying with some obligations to upgrade its billing platforms within a specified time frame.
15(1)	A licensee shall provide a consumer with an option to roll	This draft regulation needs some more work on our billing systems in order to be able to implement it successfully, and this	Regulations should provide for options to have bundles that do not	The Authority is aware that operators are

	<p>over unused data before expiry date of the bundle.</p>	<p>comes with a significant investment on the billing platform. Additionally, in countries where this works, the customer awareness on data plans is between 95%-100%, and so is the bundle revenue contribution on data, while in our market, there is this huge knowledge gap on data plans and we still have work to be done, therefore implementing this will also come at a cost to TNM, with significant revenue loss.</p>	<p>expire so that customers have a wider choice.</p> <p>As indicated, TNM does not have system capability to implement and we would request MACRA to provide sufficient time if this is to be implemented smoothly</p>	<p>rolling over unused data before expiry date.</p> <p>Under the Communications Act and Consumer Protection Regulations, it is the operators primary responsibility to conduct consumer awareness, however MACRA has also the responsibility to do consumer awareness programmes.</p> <p>On billing TNM can approach the Authority for an exemption for limited time (see response above)</p>
<p>15(2)</p>	<p>In the event of unused data being rolled over, a licensee shall, in the first instance, apply data usage against the rolled over data until that data is fully depleted, and thereafter against the newly allocated data.</p>	<p>This draft regulation needs some more work on our billing systems in order to be able to implement it successfully, and this comes with a significant investment on the billing platform. If we are to implement this as well, bundle extension will come at a cost to the customer.</p>	<p>We recommend that we take a phased approach to implement this, as this has huge cost implications in order to implement and roll it out.</p>	<p>Refer to our response on regulation 14 (1d).</p>

15(3)	<p>A licensee shall provide a consumer with an option to transfer data to other consumers on the same network.</p>	<p>This will also need to be implemented at a cost, therefore there is need for investment on the operators' side in order to acquire the capabilities in our billing systems that allow this feature.</p>	<p>TNM does not have system capability to implement and we would request MACRA to provide sufficient time for investing in the system required for smooth implementation</p>	<p>Refer to our response on regulation 14 (1d).</p>
17(1)	<p>The Authority may frame one or more tariffs pursuant to section 78 of the Act, where, in the view of the Authority, there is a likelihood of material risk of harm to competition or to consumer welfare.</p>	<p>This is necessary in order to make competition fair in the market.</p>	<p>We propose that the regulation should indicate that framing shall be done after proper consultation with the affected operator and economic factors must always be consideration</p>	<p>The affected operator will always be consulted as required under section 202 of the Communications Act.</p>
17(2)	<p>Where sub regulation(1) applies, the tariffs for services of a licensee that are provided on a wholesale or retail basis in a relevant market in which that licensee is dominant, shall be framed by the Authority as follows—</p> <p>(a) the Authority shall construct and maintain network cost models for such wholesale or</p>	<p>This is necessary in order to make competition fair in the market.</p>	<p>As per 17(1) above</p>	<p>The affected operator will always be consulted as required under section 202 of the Communications Act</p>

	retail services as the Authority may consider to be relevant markets in order to determine the tariffs to be framed for dominant licensees and the dominant licensees shall provide complete and verifiable cost data to the Authority for this purpose; and			
17(2b)	the Authority shall frame the tariff under paragraph (a) with reference to internationally recognised costing models, taking into account the costs incurred by the licensee but allowing the licensee a reasonable rate of return for a period not longer than three years from the date on which the framed tariff is first applied to the service in the relevant market.	This is necessary in order to make competition fair in the market.	As per 17(1) above	The affected operator will always be consulted as required under section 202 of the Communications Act
Comments from Wananchi				
	Regulation 7-Rejection of a tariff application, Communication of decision		Where rejected the Authority should communicate reason for rejection and allow the licensee to make presentation and explain	The Authority will always provide reasons for rejection. A licence can resubmit an

			justification behind the tariff submitted before rejection.	application with additional justification.
	Regulation 14 Data Service Usage Notification		Requirement by licensee to send usage depletion SMS at 50%, 60%, 70%, 80% and 100% is punitive to the licensee and expensive. This will be quite expensive especially if the licensee has many customers. We propose that the notification be made only once on depletion of data.	The objective of the Regulation is to ensure transparency on the part of the operator to the consumer. Additionally operators are already implementing this indicating that its feasible.
	Regulation 17 -Determination of framed tariff by the Authority		Licensee consultation is required before any tariff framing by the Authority to ensure that tariffs set enables licensees to maintain their financial integrity and safeguard the interest of stake holders and investors. Since licensee better understand the market conditions and cost incurred in providing the services they are best placed to advise on pricing for services. We note that the regulations and Act	The affected operator will always be consulted as required under section 202 of the Communications Act

			only provide for consultation of the Competition and Fair Trading Commission. Licensees input is required.	
	Regulation 10- Review of approved tariffs/ Regulation 22 (2)		Where the authority intends to review any approved tariff, it shall notify the licensee and give the licensee twenty days to respond to the intended review/ adjustment	Proposal accepted. However the period given to the licensee will be fourteen days
	Regulations 18- Zero rated tariffs		Notice and representations be requested from licensees before any telecommunication services are zero rated by the Authority.	Proposal accepted. We will insert a provision in the regulations for notification and consultation.
	Regulation 19- Promotional offers		Provides that an offer may not be offered more than once over a period of 8 months. We propose that this be shortened and a repeat of the offer be allowed after say 3 months.	Proposal accepted with the validity shortened to six months.
	Regulations 19- Promotional offers		Specify timelines by the authority for approval of application in respect to a	The period for any tariff approval will be fourteen (14) days.

			promotional offer. We propose within two days	The period gives the Authority adequate time to assess the information.
	Regulation 21 (2) (b)- Exemption		This is not clear. What do you mean by provision of service to which content is incidental?	The provision has been deleted because it had the capacity to bring confusion.
	Regulation 22 – Regulatory Sanction		Administrative penalty – Specify maximum amounts of penalty for non-compliance with regulations.	The maximum amount cannot be specified as it will unduly limit the discretion of the Authority. The amount of the penalty will depend on the gravity of the offence and other circumstances surrounding the case.
Comments from Airtel				
4(1)	A licensee shall submit for approval, its tariff to the Authority at least	Does this include changes in the tariff that change because of external international factors (beyond our control) like International Mobile Termination Rates. These affect other services like Roaming as the MTR is effected in the call charges		It affects all tariffs. Any external international factors will justify the tariff revision.
4(1)(a) and 4(1)(b)	Seven days prior to the effecting of that tariff, where the licensee is a not a dominant licensee;	More than 20 days is too much. There is no point to discriminate on the		The period has been revised to 14 days for non dominant operator

		<p>timeframes between dominant and non-dominant players</p> <p>Seeking and waiting for tariff approvals for 21 days is detrimental to business practices. It is like controlling all operations of the business.</p> <p>Malawi is not in a position where there is NO competition. Malawi is still an infant market and there is still very low penetration of communication</p> <p>We recommend that such approvals be granted just as is done in the current timelines, maximum of 7 days which include submission and determination of the tariff approvals.</p> <p>The 21 days makes the business decision to revise tariff lose its relevance</p>		<p>and 21 days for dominant operator to allow for thorough assessment of the submission.</p> <p>Dominant operators require stricter regulation and more time is needed to assess their submissions.</p>
8 (2)	The Authority shall, within fourteen days from the receipt of an application for tariff approval, communicate to an applicant, a decision made on an application.	<p>The stipulated total 21-28 days for submission of tariff before launch will adversely affect time to market as well as competitiveness in the market place. Our recommendation is at least 5-7 days</p> <p>Timeframes and Collection methods of</p>		<p>The period has been maintained at fourteen days for non dominant licensee and twenty one days to dominant licensee to ensure</p>

		<p>information</p> <ol style="list-style-type: none"> 1. The regulator expresses its willingness to conduct a market study 2. The regulator collects Data from operators or uses data periodically collected 3. The regulator or an external firm performs the market study 4. Additional information needed from the operators? 5. The regulator requests additional data from the operators 6. The regulator organizes a meeting to discuss findings of the draft report 7. The regulator shares the draft report with all operators for written comments 8. The regulator reviews the draft report by taking into account relevant comments 9. The regulator publishes the final report and the determination with: (1) the relevant markets (2) the SMP operators (3) The remedies 		<p>thorough assessment of the application.</p> <p>The time frame for launch under regulation 4 has been revised to 14 /21 days for non dominant and dominant licensees respectively. Licensees will still have to comply with obligations on notification of customers</p>
13(2)	Where a consumer does not opt-in to out-of-bundle data charge as per subregulation(1)(d), a licensee shall not permit any out-of-bundle data usage by a consumer until such time that a consumer	Each simcard is programmed to be at a default basic pricing plan. When customer opts out of any bundle or pricing plan, they are automatically sent to a basic plan. Customer numbers are created in systems to earn /give value for the owners		The clause aims at reducing the bill shock that customers experience when data is depleted hence the need of the cutoff point.

	<p>purchases new data bundles or consents to be charged out-of-bundle data rates via USSD, SMS, push notification or any other applicable means.</p>	<p>and investors</p> <p>Services are offered to make money from which they get costs of their operations</p> <p>This regulation defeats and contradicts with the requirement to have the Tariff approved by the Authority. It does not make sense when the Tariff is already approved, and customer is restricted from using the basic Tariff</p> <p>One of the functions of the Authority is stir growth of businesses and not stifle them. Business should be left to run on their own. This Regulation puts the Authority as the management and owner running the businesses</p> <p>Businesses exist to operate in order to cover costs (at a minimum) (and earn a return on their investment)</p>		<p>Additionally it is important that the customer should be given a choice to choose to use the basic tariff plan or purchase a bundle to continue accessing internet.</p> <p>Giving the customer a choice to either choose a basic tariff plan or a data bundle cannot affect an operators ability to generate revenue.</p>
14(2)	<p>Where a consumer does not opt-in to out-of-bundle data charge as per subregulation(1)(d), a licensee shall not permit any out-of-bundle data usage by a consumer until such time that a consumer purchases new data bundles or consents to be charged out-of-bundle data rates via USSD, SMS,</p>	<p>Licensees should be given liberty to operate in the best interests of the business. Data sharing, opt in and opt out solutions should be left for the business to decide. Customers are given several pricing plans that they have options to adopt.</p> <p>Each simcard is programmed to be at a</p>		<p>Under the current legal framework, a consumer is given an opportunity to opt in and not to opt out. This enhances consumer protection since the consumer knowingly consents to the terms of data usage.</p>

	<p>push notification or any other applicable means.</p>	<p>default basic pricing plan. When customer opts out of any bundle or pricing plan, they are automatically sent to a basic plan. Customer numbers are created in systems to earn /give value for the owners and investors</p> <p>Services are offered to make money from which they get costs of their operations</p> <p>This regulation defeats and contradicts with the requirement to have the Tariff approved by the Authority. It does not make sense when the Tariff is already approved, and customer is restricted from using the basic Tariff</p> <p>One of the functions of the Authority is stir growth of businesses and not stifle them. Business should be left to run on their own. This Regulation puts the Authority as the management and owner running the businesses</p> <p>Businesses exist to operate in order to cover costs (at a minimum) (and earn a return on their investment)</p>		<p>The operator should generate revenue from services that a customer has willingly purchased.</p> <p>Furthermore bundle and out of bundle rates are different and a customer should have an option of choosing the rate to apply.</p>
15)1)	<p>A licensee shall provide a consumer with an option to roll over unused data before expiry date of the bundle.</p>	<p>Currently we already provide an option for customers to share data. How much to be shared and for how long should be left for the businesses to decide. The</p>		<p>Proposal rejected. The objective of this regulation is to enhance consumer experience</p>

		<p>Authority should not interfere in the nitty details of business operations</p> <p>Bundled services (data, SMS and voice bundles) are pricing plans that customers have liberty to opt in and opt out. Customers are not forced to stay within the bundle</p> <p>Secondly, customers have different bundles under each pricing point that suits their purchasing power. When purchasing the bundle, customers are also given clear details and are aware of the terms and condition of each pricing point.</p> <p>To that effect, we suggest that this Regulation be removed from these Regulations. It defeats the purpose of the companies innovating specific bundled products that are competitive on the market, and that are tailor made for the business growth and development</p>		<p>and to avoid consumers losing out already purchased data.</p> <p>Additionally operators are already rolling over unused data.</p>
15(3)	A licensee shall provide a consumer with an option to transfer data to other consumers on the same network.	Data sharing is already available. Data bundle pricing and sharing is a business strategy and not a mandatory pricing. The authority should leave business operate competitively and given the liberty to decide which strategy fits its business. Regulating data services should NOT		The regulation has been revised to make it optional on the licensee to provide the data sharing service.

		include imposing how the licensee does its business. Management and operations of businesses should be left for the market forces to decide on their own		
16(1)	A licensee shall within seven days from date of request provide any post-paid or pre-paid consumer with an itemized bill as follows in respect of the following services-	The Authority should also consider a different timeline for data for postpaid or prepaid that is older than 3 months as it would take more time for retrieval from licensee archived platforms considering huge and big data available		Proposal accepted to allow for request for provision of itemized bill for post paid or prepaid that is less than 3 months to be provided within 7 days and older than 3 months to be provided within 21 days after receiving the request.
17 (1)	The Authority may frame one or more tariffs pursuant to section 78 of the Act, where, in the view of the Authority, there is a likelihood of material risk of harm to competition or to consumer welfare.	Not clear how the Authority will determine dominant player. Need clarification as this has a potential to stifle innovation and fair trading and competition		The Authority will issue guidelines on determination on dominant players.
18	The Authority may determine that a particular electronic communications service be zero-rated	The clause stipulates that the Authority shall determine what service to be zero rated. This pose a business risk as there is no clear definition of what will entail a free service. We would propose that the authority should consult the MNOs before		The Authority will insert a provision in the regulations for notification and public consultation.

		deeming any service free to ensure a healthy, sustainable and profitable telecom environment		
19	A licensee shall file the tariffs for promotional offers with the Authority for approval at least fourteen days prior to the launch of the promotional offer.	<p>The authority indicates that they will require a minimum of 14 days for a notification on promotional offer.</p> <p>We would like to request for a shorter period such as 2-3 days since our business is fast paced and such that a restriction of a minimum of 14 days might stifle competition and fair trading in the event there is need for a quick turn around to protect the business.</p> <p>The current 7 days timelines is even more as it makes the Promotion lose its relevance</p> <p>Seeking and waiting for tariff approvals for 14 days is detrimental to business practices. It is like controlling all operations of the business. The 14 days makes the business decision to revise tariff lose its relevance</p>		The period for any tariff approval will be fourteen (14) days. The period gives the Authority adequate time to assess the information.
19(3)	A tariff for promotional offer may be available for a period not longer	The Authority should also come up with Regulations pertaining cessation or cancellation of the promotions during the		The regulation has been revised to regulate

	<p>than ninety days from the date of approval by the Authority.</p>	<p>offered period</p> <p>We also feel that 90 days is not enough for a promotion. We propose this to be extended to a maximum of 190 days</p> <p>Thirdly, there should be regulations on licensees who copy the promotions run for competitors...there should be a period which does NOT allow the competitors to copy and paste the promotions for other licensees</p>		<p>cancellation of promotions.</p> <p>The period will remain at 90 days so that promotion offers do not replace existing pricing plans on the market.</p> <p>Copying of promotions - the Authority will not at the moment intervene on this issue and will allow market forces to determine the issue.</p>
20	<p>Tariffs submitted to the Authority for approval by a dominant licensee</p>	<p>How will the authority determine dominant player and what is the definition of excessive or predatory pricing?</p>		<p>The Authority will issue guidelines on determination on dominant players</p>
22(2)	<p>In the case of the specific forms of anti-competitive behavior considered in regulation 15, the Authority may consider and,</p>	<p>if the authority will impose pricing caps this will stifle innovation and competition. How will the authority determine excessive pricing, predatory</p>		<p>The regulations provides for definitions of excessive pricing, predatory pricing and</p>

	where reasonable and proportionate, impose the following remedies in addition to or in the alternative to (1) - ...	pricing and margin squeeze? Can the authority provide an acceptable profit margin as a guide for consultation with the industry before implementation of these regulations		margin squeeze. Furthermore the guidelines on determination on dominant players will provide the assessment criteria for determining the same.
23	A person who commits an offence under these Regulations for which no punishment has been provided for in these Regulations shall, upon conviction, be liable to a fine of K5, 000,000	We suggest that this has to be revised and reworded to include "a maximum of..." (to apply in all other regulations (Dominance, Tariff, Infrastructure sharing, etc)). We note that not every miss warrants a fine. The Regulations should not instill fear on licensees.		Proposal accepted. The Authority has other regulatory sanctions at its disposal that may be applied depending on circumstances of the case.
Schedule 1 (13)	The name, position and contact details of the staff member in the applicant's organization; and	The authority should clarify why they would require all the names for the applicant's organisation? What purpose would that serve? May be the request should be for only key decision makers involved in the process.		The provision does not require all the names of staff in the applicant's organization. Only the details of the person submitting the application on behalf of

				the applicant will be required.
Schedule 2 (a)	Excessive Pricing	The authority should define what constitutes "super normal profits"? And it will be unfair to compare profits in similar markets "since the cost of operational might significantly be different. A fair approach should look at both the unique costs and the respective profits		Supra normal profits is self-explanatory and what will be deemed as above normal profits will depend on the circumstances of the case. Additionally the schedule has provided guidance on how the Authority will determine excessive pricing including using cost studies.
Schedule 2 (b)	Predatory Pricing (i)	The Authority should define what constitutes "unreasonably low price" to avoid subjectivity		Unreasonably low price is also self explanatory and will depend on the circumstances of the case. Additionally the schedule has provided guidance on how the Authority will determine predatory pricing.
Schedule 2 (c)	Margin Squeeze (i)	The authority should define acceptable margin		The schedule has provided guidance on how the Authority will determine Margin squeeze.

Schedule 2 (d)	Tying & bundling (v)	How will the Authority determine that a bundle will likely lead to, or has the purpose of causing, a significant reduction in effective competition?		The schedule has provided guidance on how the Authority will determine Tying and bundling.
Schedule 2 (e)	Price discrimination (i)	The Authority should define when price discrimination is anti-competitive to avoid any ambiguity.		The schedule has provided guidance on how the Authority will determine price discrimination as anti-competitive.

Annex 2 – Communications (Tariff) Regulations 2021

TARIFF REGULATION, 2021

TARIFF REGULATION, 2021

ARRANGEMENT OF REGULATIONS

Regulation

1. Citation
2. Interpretation
3. Tariff approval
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FIRST SCHEDULE

INFORMATION TO BE SUBMITTED BY A LICENSEE FOR APPLICATION
FOR TARIFF APPROVAL

SECOND SCHEDULE

POTENTIAL FORMS OF ANTI-COMPETITIVE BEHAVIOUR
BY DOMINANT LICENSEES

GOVERNMENT NOTICE NO. ...

COMMUNICATIONS ACT

(Cap. 68:01)

COMMUNICATIONS (TARIFF) REGULATIONS, 2021

IN EXERCISE of the powers conferred by section 200 of the Communications Act, I, GOSPEL KAZAKO, Minister of Information, make the following Regulations—

Citation 1. These Regulations may be cited as the Communications (Tariff) Regulations, 2021.

Interpretation 2. In these Regulations, unless the context otherwise provides—

“dominant licensee” means a licensee who has a status of a dominant market player as defined under section 3 of the Act;

“framed tariff” means a tariff that is determined by The Authority and imposed on a dominant licensee for a wholesale or retail electronic communications service, and may include a price caps in terms of 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 services by a subscriber which enables that subscriber to pay in arrears for services used, on the terms and conditions set out in that subscriber’s contract with a licensee;

“prepaid” means the method of payment for services by a subscriber which requires the subscriber to pay in advance, and which enables a subscriber to top up or recharge using vouchers or cash, or as specified by a licensee;

”promotional offer” means a tariff that operates only for a limited maximum period specified in its terms of time, subject to regulation 16;

“relevant market” means a discrete electronic communications service market that has been formally determined by the

Authority for the purpose of these Regulations or otherwise under Part IV of the Act;

“tariff” means any or all prices, rates, or charges whether prepaid or postpaid and applied in relation to any electronic communications service; and

“zero-rate”, in relation to an electronic communications service, means the use of the service whose provision does not entitle the service provider to impose a charge on anyone, and “zero rating” shall be construed accordingly.

Tariff approval

3. (1) Unless specifically exempted in writing by the Authority under regulation 14, no tariff may be charged or payment sought from a subscriber unless the tariff has first been approved by the Authority.

(2) A tariff submitted to the Authority for approval shall adhere to the conditions prescribed under section 74 of the Act.

(3) For the purposes of section 74 of the Act, a setting or revision of a tariff shall be deemed “discriminatory” if the revision results in —

(a) treating similar classes of subscribers or similar services differently unless any such difference can be justified with reference to the type of class; or

(b) different treatment of wholesale subscribers or retail businesses of the licensee as compared to the affiliates of the licensee.

(4) For the purpose of this regulation, “setting or revising a tariff” shall entail increasing, decreasing or changing of any of its tariff.

Timeframes for tariff submission

4. (1) A licensee shall submit for approval, its tariff to the Authority at least—

(a) twenty one days prior to the effecting of that tariff, where the licensee is a not a dominant licensee; and

(b) twenty eight days prior to the launch of that tariff, where the licensee is dominant licensee.

(2) Without prejudice to the timeframes set out in subregulation (1)—

(a) the tariff may not be launched for that period unless it is approved earlier by the Authority; and

(b) the tariff shall be submitted in writing under cover of a letter stating that the tariff complies with the provisions of regulation 3(2), and signed by an authorised representative of the licensee and accompanied by the information set out in the First Schedule hereto.

Additional information

5. (1) The Authority may seek additional information if the circumstances of the application, the tariff or of the service suggest that such information is reasonably required to enable the Authority make its decision.

(2) Where the Authority requires submission of additional information under this regulation, unless the Authority otherwise requires, such information shall be submitted within seven days of making such request.

Tariff approval

6. The Authority may, in writing, grant an application for tariff approval with or without conditions as the Authority may determine appropriate.

Rejection of an application

7. The Authority may reject an application for tariff approval where—

(a) the tariff does not comply with regulation 3(2);

(b) the tariff is not submitted in accordance with regulation 4;

(c) the tariff relates to a service in a relevant market in which the Authority has declared the licensee submitting the tariff to be a dominant licensee and the tariff does not comply with anti-competitive pricing prohibitions under these Regulations;

(d) the licensee fails to provide the additional information required under regulation 5; or

(e) in the opinion of the Authority, the grant may not advance the objects of the Act or the welfare of consumers.

Communication of decision

8. (1) The Authority shall, within fourteen days from the receipt of an application for tariff approval, communicate to an applicant, a decision made on an application.

(2) The timeframe prescribed in subregulation (1) shall not apply where the Authority has requested additional information under these Regulations:

Provided that the decision made shall be communicated within fourteen days from the receipt of the additional information.

- | | |
|---------------------------------|---|
| Tariff register | <p>9. The Authority shall maintain a register for all approved tariffs which shall be open to the public on such conditions as the Authority may determine.</p> |
| Review of approved tariffs | <p>10. (1) The Authority may review an approved tariff and may require the submission of any information which the Authority deems necessary for such review.</p> <p>(2) Where the Authority intends to review a tariff under sub-regulation (1) it shall notify the licensee affected by the review in writing and give the licensee at least 14 days to respond to the review.</p> |
| Confidentiality | <p>11. All information submitted to the Authority in support of a proposed tariff shall be treated as strictly confidential, until the Authority approves the tariff and the licensee publishes it.</p> |
| Determination of framed tariffs | <p>12. (1) The Authority may frame one or more tariffs pursuant to section 78 of the Act, where, in the view of the Authority, there is a likelihood of material risk of harm to competition or to consumer welfare.</p> <p>(2) Where subregulation(1) applies, the tariffs for services of a licensee that are provided on a wholesale or retail basis in a relevant market in which that licensee is dominant, shall be framed by the Authority as follows—</p> <p>(a) the Authority shall construct and maintain network cost models for such wholesale or retail services as the Authority may consider to be relevant markets in order to determine the tariffs to be framed for dominant licensees and the dominant licensees shall provide complete and verifiable cost data to the Authority for this purpose; and</p> <p>(b) the Authority shall frame the tariff under paragraph (a) with reference to internationally recognised costing models, taking into account the costs incurred by the licensee but allowing the licensee a reasonable rate of return for a period not longer than three years from the date on which the framed tariff is first applied to the service in the relevant market.</p> |

(3) In exercising the powers under this regulation, the Authority may construct and maintain cost models to inform other regulatory pricing decisions pursuant to sub-regulation (1).

Zero-rated tariffs

13. (1) The Authority may determine that a particular electronic communications service be zero-rated.

(2) Before determining any electronic communication service to be zero rated, the Authority shall publish a notice to that effect in the *Gazette* for public comments and allow not less than thirty days from the date of the publication to give an opportunity to any person with an interest in the matter to make representations.

(3) Where the Authority determines that a particular electronic communication service be zero-rated in accordance with subregulation (1), the Authority shall publish a notice in the *Gazette*.

(4) Without prejudice to the generality of the subregulation (1), the tariffs for voice calls to emergency service numbers shall be zero-rated.

(5) Where a licensee offers a zero-rated data service, the data used by the subscriber shall not be counted for the purposes of any data cap or other limitation that applies to the services to which the subscriber has subscribed.

Promotional offer

14. (1) The provisions of regulation 3 shall apply to a tariff for a promotional offer.

(2) A licensee shall file the tariffs for promotional offers with the Authority for approval at least fourteen days prior to the launch of the promotional offer.

(3) A tariff for promotional offer may be available for a period not longer than ninety days from the date of approval by the Authority.

(4) The same promotional offer shall not be offered more than once in a period of six months and the periods during which it is available shall not run consecutively.

(5) A Licensee shall notify the Authority in writing at least seven days before discontinuing or cancelling any promotional offer.

Billing
arrangements

(6) The Authority shall take into account positions of any other regulatory body which has an interest in the terms of 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.

15. (1) A licensee shall provide to its consumers a timely, clear and concise statement of charges and on regular basis.

(2) In relation to post-paid customers, the statement referred to in subregulation (1) shall reflect—

(a) the total charges specifying the cost of service;

(b) due date of payment before late charges are incurred;
and

(c) any other information deemed necessary by the Authority.

(3) In relation to a pre-paid customer, the statement referred to in subregulation (1) shall be in form of a notification which shall include—

(a) cost of call;

(b) duration of call;

(c) airtime balance; and

(d) any other information deemed necessary by the Authority.

(4) A licensee shall not bill its consumer for any charges which it has not disclosed to the consumer in its published tariff or terms and conditions or for services that have not been sought for by the consumer.

(5) A licensee shall establish appropriate procedures to ensure that consumer bills are accurate and the amount due after deducting any credits, discounts or similar adjustments is not higher than the amount which represents the true extent of the services actually provided by the licensee to the consumer.

(6) Without prejudice to the generality of the foregoing subregulations, the licensee shall at all times maintain in operation such a billing process that facilitates compliance with these Regulations.

(7) A licensee shall keep billing records as may be necessary or as may be determined by the Authority for the purpose of satisfying the requirements of this regulation:

Provided that nothing in this regulation shall require the licensee to retain any records for not less than five years from the date on which they were generated.

(8) The Authority shall have the right to inspect and independently verify the licensee's billing process for purposes of ensuring compliance with this regulation.

(9) Where the Authority provides written notice to the licensee that it is exercising its right under this regulation, the licensee shall cooperate with the Authority by making available, for a reasonable period, appropriate personnel with knowledge of the billing process and provide all back up and support documentation and other information that the Authority may deem fit.

Bundled voice
and SMS
services

16. (1) A licensee shall send voice bundle and SMS bundle usage depletion notifications via SMS, push notification or any applicable means to consumers when their usage reaches 50%, 60%, 70%, 80%, 90% and 100% .

(2) A licensee shall provide consumers who are on post-paid plans with an option to buy additional voice service or SMS services at any time.

(3) Where a consumer who is on a post-paid or combo bundles plan and whose voice and SMS service are depleted does not buy additional voice services or SMS services, a licensee shall provide such consumer with an option not to access the relevant depleted services and allow such consumer access to emergency services, customer care services, incoming voice calls, incoming SMSs and any other free services.

Data bundle
services

- 17.** (1) A licensee shall ensure that a consumer is-
- (a) sent data bundle usage depletion notifications via SMS, push notification or any other applicable means when usage reaches 50%, 60%, 70%, 80% , 90% and 100%;
 - (b) provided with an option to buy additional data bundles via the USSD platform, push notification, or any other applicable means at any time;
 - (c) not defaulted onto out of bundle data charges upon depletion of data bundles; and
 - (d) provided an option via SMS, push notification, USSD or any other applicable means at any time to opt-in to out-of-bundle usage charges.

(2) Where a consumer does not opt-in to out-of-bundle data charge as per subregulation (1)(d), a licensee shall not permit any out-of-bundle data usage by a consumer until such time that a consumer purchases new data bundles or consents to be charged out-of-bundle data rates via USSD, SMS, push notification or any other applicable means.

Data services: roll over of unused data and transfer of data

18. (1) A licensee shall provide a consumer with an option to roll over unused data before expiry date of the bundle.

(2) In the event of unused data being rolled over, a licensee shall, in the first instance, apply data usage against the rolled over data until that data is fully depleted, and thereafter against the newly allocated data.

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

19. (1) A licensee shall, upon request, provide any post-paid or pre-paid consumer with an itemized bill as follows in respect of the following services-

(a) voice and bundled voice calls: specifying for each call, date, time, duration, recipient number and cost;

(b) SMS and bundled SMS: specifying for each SMS, date, time, recipient number and cost;

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

(2) A Licence 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;

(b) within 21 days from the date of the request where the information is more than three months old.

(3) A licensee shall ensure that calls which are zero-rated to its consumers, including calls to emergency lines, shall be identified in its consumer's itemized bills.

Itemised bill

Prohibitions on anti-competitive pricing by dominant licensees

20.— (1) Tariffs submitted to the Authority for approval by a dominant licensee shall not—

(a) contain any exclusive or tying conditions, such that provision of the service to which the tariff relates is

conditional on the subscriber taking up other services from any source;

- (b) result in margin squeeze, as set out in the Second Schedule hereto, which may hinder a wholesale customer from competing fairly with retail services of the licensee or its affiliates after allowance for the retail costs of a reasonably efficient operator;
- (c) contain reserved or unexpressed terms and conditions, or terms to be applied at the discretion of a dominant licensee; and
- (d) involve predatory or excessive pricing, as set out in the Second Schedule hereto, which is anti-competitive in intent or likely effect.

(2) In addition to the requirements under subregulation (1), where the application relates to a tariff for a retail service, the tariff shall—

- (a) be described in a clear and unambiguous manner so that a subscriber may determine from the information provided in the tariff description how the tariff is to be applied and the liability for payment that will arise under the tariff; and
- (b) not contain any service bundles if the components of the bundle cannot also be obtained by the dominant licensee's subscribers separately from one another.

(3) Pricing that may be considered to be anti-competitive includes, without limitation, pricing that is significantly above the cost to provide the services, or significantly below the cost to provide the services.

Exemptions

21.— (1) The Authority may, in writing, exempt, with or without conditions, an undertaking or a class of undertakings from complying with any obligation under these Regulations.

(2) The following classes of undertakings shall be deemed to have been exempted—

- (a) the operation of a data centre; and
- (b) the operation of an internet café.

Regulatory
sanctions

22.— (1) Where a licensee fails to comply with these Regulations, The Authority may issue one or more of the following orders—

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

(2) In the case of the specific forms of anti-competitive behaviour considered in regulation 15, the Authority may consider and, where reasonable and proportionate, impose the following remedies in addition to or in the alternative to (1)—

- (a) excessive pricing: impose a price cap based on the tariff that would yield a normal profit;
- (b) predatory pricing: impose a price floor on the licensee in relation to the service in which the predatory pricing took place;
- (c) margin squeeze: oblige the licensee to keep a minimum margin between the wholesale and retail tariffs in future or accept enforceable undertakings to this effect;
- (d) anti-competitive bundling and tying: oblige the licensee to keep a minimum discount justified by cost savings that may be permitted within the bundle; and

(e) anti-competitive price discrimination: any of the foregoing or any other remedy that appears to be appropriate having regard to the circumstances.

Offences and
General penalty

23. Any person who fails to comply with these Regulations commits an offence and shall, upon conviction, be liable to a maximum fine of K5,000,000.00.

FIRST SCHEDULE

(reg. 4(2)(b))

INFORMATION TO BE SUBMITTED BY A LICENSEE FOR APPLICATION FOR TARIFF APPROVAL

1. Name of the applicant;
2. Identification of the tariff, with 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);
3. Whether the Tariff is wholesale or retail;
4. Market segment addressed by the Tariff and any limitations on the availability of the Tariff to any segment or category of customers;
5. Purpose of the 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;
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, the proposed start and end date of the tariff;
9. Detailed terms and conditions relating specifically to the proposed Tariff which are additional to or different from the applicant's general terms and conditions of service;
10. in the case of applications relating to tariffs for new services, express confirmation that 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 and cancellation of tariffs, express confirmation that all existing subscribers shall be notified on at least one billing cycle or 30 calendar days, whichever period is longer (details of arrangements for such notification, and migration plan to be provided with the application);
12. The name, position and contact details of the staff member in the applicant's organization; and
13. Any other relevant information deemed necessary by The Authority.

POTENTIAL FORMS OF ANTI-COMPETITIVE BEHAVIOUR BY DOMINANT
LICENSEES

(a) Excessive Pricing

- (i) Excessive pricing is an abuse where a dominant licensee sets prices that take advantage of its strong position in the market (and the correspondingly weak position of customers and end users) to ensure supra-normal profits. The Authority can examine the licensee's accounts to determine whether over a significant period of time it has earned supra-normal profits from the provision of services in the markets in which it has market power.
- (ii) The Authority can also examine the profits earned by other providers in similar markets subject to effective competition whether in Malawi or in comparable countries, or use cost studies provided by the licensee concerned and the cost outputs of the Authority cost models to determine if the pricing is excessive when compared against long run costs for the services in question.

(b) Predatory pricing

- (i) In general terms a company is said to be pricing in a predatory way when it prices at levels that are unreasonably low, whether because they are below some measure of costs or because they otherwise generate an inadequate rate of return, and where they have the purpose or effect of eliminating, disciplining or otherwise inhibiting the competitive conduct of an existing or potential rival.
- (ii) Tariffs must be in place for a sufficient period to cause competitive damage and it is therefore unlikely that promotional offers that operate for 1 calendar month or less on a non-extendable basis (up to the maximum 3-month period recommended) will have the intention or effect required to be predatory.
- (iii) Where a dominant licensee in a relevant market or a related market seeks to set a Tariff below the cost dictated by the relevant cost standard, it is presumed to be acting abusively and with the intention to abuse its dominance and will therefore be acting unlawfully.
- (iv) Where a dominant licensee in a relevant market or a related market seeks to set a tariff between the cost dictated by the relevant cost standard and its average total cost (which could be its fully allocated costs for the relevant service) and this is or appears to be done as part of a strategy to severely damage or eliminate a competitor the behaviour of the provider will be held to be predatory and therefore unlawful.

- (v) The burden of proof in relation to these cases is on the Authority.
 - (vi) The Authority should take into account initial tariffs of telecommunications services where the service volumes are small and unit costs are high pending effective traction in the market and greater penetration of the service in question.
- (c) Margin squeeze
- (i) Margin squeeze may occur where a vertically integrated licensee – that is, one that operates in the wholesale and retail markets – with significant market player in the relevant wholesale market, sets the margin between its wholesale and retail prices so that a reasonably efficient retail operator would not earn a sufficient margin to be able to compete effectively. Margin squeeze may occur if the dominant licensee increases the tariff for its wholesale service or reduces the Tariff for its retail service, or where it sets a tariff for its wholesale service that discriminates in favour of its own retail business.
 - (ii) Margin squeeze is unlawful if the available margin for an efficient retail competitor is insufficient to sustain effective competition.
 - (iii) The Authority should investigate the costs associated with both the wholesale and retail services involved based on information available from the licensee concerned and from the Authority’s own network cost models.
 - (iv) The Authority may use the retail costs of the licensee concerned as the efficient costs for the purpose of the analysis in the absence of cost data for other operators that can be proven to be reasonably efficient retail operators.
- (d) Tying and bundling
- (i) Tying or bundling occurs when a service is offered by a licensee under the condition that another service is also bought. Mixed bundles occur where the services that are included in the bundle are available separately from the licensee but at higher Tariffs than in the bundle. Pure bundles occur where one or more of the services that are included in the bundle are not available separately from the licensee.
 - (ii) The Authority can decide whether, in the interests of subscribers, to allow pure bundles or not – the Act is silent on this.
 - (iii) Mixed bundles are often accepted when provided by dominant licensees where the price discount implied by the aggregate Tariff of the bundle compared to the sum of the Tariffs of its component services is reasonably reflective of the economies of scope expected to arise from the provision of the services as a bundle.

(FILE NO.)