



ETHIOPIAN COMMUNICATIONS AUTHORITY

LAWFUL TARIFFS DIRECTIVE

DRAFT FOR STAKEHOLDER CONSULTATION

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LAWFUL TARIFFS DIRECTIVE

WHEREAS, Article 6 (2) of the Communications Service Proclamation No. 1148/2019 (the “Proclamation”), confers on the Ethiopian Communications Authority (the “Authority”), the power to implement policies for communications services;

WHEREAS, Article 6 (6) of the Proclamation grants to the Authority, the power to regulate tariffs relating to communications services;

WHEREAS, Articles 45 (5) of the Proclamation gives power to the Authority to issue directives to establish the standards and procedures by which the Authority shall determine the lawfulness of tariffs filed by Telecommunications Operators with significant market power;

WHEREAS, Article 46 (1) of the Proclamation confers on the Authority the power to review and control tariffs of any licensed Telecommunications Operator and to develop directives for setting tariffs in order to ensure that such tariffs are lawful;

NOW, THEREFORE, the Authority hereby issues this Lawful Tariffs Directive.

PART I

SHORT TITLE, DEFINITIONS, OBJECTIVE, AND SCOPE OF APPLICATION

1. Short Title

This Directive may be cited as the Lawful Tariffs Directive No. 9/2020.

2. Definitions

Words and phrases used in this Directive shall have the meaning and application given to them in the Proclamation No. 1148/2019. In this Directive, unless the context otherwise requires:

- 1) **“Active Infrastructure”** means the elements or components on the active layer of a Telecommunications Network, including, but not limited to, antennas, switches, servers, databases, radio access nodes, and transmission equipment.
- 2) **“Authority”** means the Ethiopian Communications Authority established under the Communications Service Proclamation No. 1148/2019.
- 3) **“Collocation”** means the placement of network equipment or systems which are used for service provision by a Telecommunications Operator together with network equipment or systems installed at premises of other Telecommunications Operator at a technically feasible location on the basis of agreement reached between them.
- 4) **“Controlled Tariff”** means a tariff for a service or a bundle of services, where the Authority has determined that the Telecommunications Operator providing those services holds significant market power in a relevant market for those services.
- 5) **“Controlled Retail Tariff”** means a tariff of a Retail Service provided by a Telecommunications Operator which has been found to hold significant market power in a relevant market for the Retail Service.
- 6) **“Days”** means calendar days.

- 7) **“Downstream Operation”** means the business operations of a Vertically Integrated Operator that concerns with the supply of Retail Services, as if the supply of Retail Services, were carried out by a legally separate entity.
- 8) **“Downstream Retail Cost”** means the cost of the Downstream Operation.
- 9) **“Infrastructure Sharing”** means various kinds of arrangements to share an infrastructure sharing and collocation provider’s active and passive infrastructure, including, but not limited to, the sharing of network elements, systems, equipment, facilities, premises or rights of way, with an infrastructure sharing and collocation seeker, subject to an agreement between the parties.
- 10) **“Margin Squeeze”** means the occurrence when an SMP Operator in a relevant retail market, sets its retail tariff such that, the difference between the retail tariff and the wholesale tariff of the corresponding Wholesale Service, would not allow an efficient retail competitor to sustain a competing service.
- 11) **“Notifying Party”** means a Telecommunications Operator that submits a written notification to the Authority seeking approval to introduce or change a Controlled Tariff.
- 12) **“Passive Infrastructure”** means infrastructure that is not part of the active layer of a Telecommunications Network, including but not limited to, sites, buildings, shelters, towers, masts, poles, ducts, trenches, electric power supply, and air conditioning.
- 13) **“Predatory Pricing”** means unlawful act of setting prices low in an attempt to eliminate the competition.
- 14) **“Retail Service”** means a Service that is provided directly to the public but not to another Telecommunications Operator.
- 15) **“SMP Operator”** means a Telecommunications Operator that has been determined by the Authority to hold significant market power in a relevant market.
- 16) **“Vertically Integrated Operator”** means a Telecommunications Operator that provides Wholesale and Retail Services.
- 17) **“Wholesale Service”** means a Telecommunications, Collocation, or Infrastructure Sharing Service, that is provided to another Telecommunications Operator.

3. **Objective**

The Objectives of this Directive are to:

- 1) Provide clarity on the rules and procedures the Authority shall follow to assess the lawfulness of tariffs, intervene to set tariffs, or review the tariffs, of any Telecommunications Operator, in accordance with Articles 45 and 46 of the Proclamation.
- 2) Provide clarity on the rules Telecommunications Operators shall follow to notify the Authority, when required, about changing or introducing new tariffs.

- 3) Prevent Telecommunications Operators from charging unlawful tariffs for their services.

4. Scope of Application

- 1) This Directive applies to tariffs of Telecommunications, Collocation, and Infrastructure Sharing services.
- 2) For the avoidance of doubt, Infrastructure Sharing services, include Active and Passive Infrastructure sharing.
- 3) This Directive applies to all Telecommunications Operators in the Federal Democratic Republic of Ethiopia. However, some provisions, when specified, are only applicable to operators with significant market power in a relevant market.

PART II ROLE OF THE AUTHORITY

5. Role of the Authority

- 1) The Authority shall:
 - a) Endeavor to increase the transparency and ensure the lawfulness of tariffs from all Telecommunications Operators;
 - b) Provide a high degree of certainty on the standards and procedures, to assess and set lawful tariffs; and,
 - c) Review from time to time, the lawfulness of tariffs from Telecommunications Operators with significant market power; and set the tariffs of services, when needed, to ensure their lawfulness.
- 2) The Authority may:
 - a) Direct a Telecommunications Operator with significant market power, to delay the effectiveness of any tariff in a relevant market, until the Authority has approved it, in accordance with Article 45 (4) of the Proclamation; and,
 - b) Intervene on its own instance, or when requested by a party, to determine the lawfulness of tariffs of any Telecommunications Operator, and if required, set tariffs to ensure their lawfulness, in accordance with Article 46 of the Proclamation.

PART III GENERAL PRINCIPLES OF LAWFUL TARIFFS

6. General Principles of Lawful Tariffs

- 1) Pursuant to Article 45 (1) of the Proclamation, all Telecommunications Operators shall charge lawful tariffs, which shall be, just, reasonable, and not unduly discriminatory among users or classes of users.

- 2) Tariffs shall be publicized or disclosed in a transparent way, so that a buyer shall have full information about one-off charges, recurring charges, and discounts.
- 3) Tariffs shall reflect the underlying costs of providing a product or service.
- 4) Tariffs of similar Retail Services, sold under similar terms and conditions, shall be similar among buyers or classes of buyers.
- 5) A Vertically Integrated Operator that provides a similar Wholesale Service to itself and to another operator, shall provide that service under similar terms and conditions.

**PART IV
FILLING AND APPROVAL OF CONTROLLED TARIFFS**

7. Filing and Approval of Controlled Tariffs

- 1) A tariff for a service or a bundle of services, shall be deemed a Controlled Tariff, if the Authority has determined that the Telecommunications Operator providing the service, holds significant market power in a relevant market for the service.
- 2) A Telecommunications Operator shall notify the Authority, and seek approval, whenever it intends to introduce or change a Controlled Tariff. Such notification shall apply also to the non-price terms that amount to a material change in the resulting tariff.
- 3) Upon receiving a written notification pursuant to Sub-Article 2 of this Article, the Authority shall have fifteen (15) days to either:
 - a) Approve the filed tariff; or
 - b) Request further information to the Notifying Party before making a decision; or
 - c) Do not approve the filed tariff.
- 4) The Notifying Party shall not implement the filed tariff unless it has been approved by the Authority.
- 5) The Authority may, at its own instance, extend the time to review the filed tariff for an additional fifteen (15) days.
- 6) If the Authority does not respond to the notification within the fifteen (15)-day period, or within the extended time, if applicable, such tariff shall be deemed approved, and the Notifying Party may implement the filed tariff immediately.
- 7) The Notifying Party shall publish the approved tariff on its website no later than seven (7) days after the tariff has been approved.
- 8) Where the Authority does not approve a filed tariff, it shall either:
 - a) Instruct the Notifying Party that the filed tariff may not be implemented; or

- b) Initiate a proceeding to set the Controlled Tariff to ensure their lawfulness pursuant to Article 46 of the Proclamation, this Directive, and any applicable Directive adopted by the Authority.
- 9) Notwithstanding any provision in this Directive, the approval of a Controlled Tariff does not exempt a Notifying Party from complying with the anti-competitive practices' provisions in Article 48 of the Proclamation, or any applicable Directive adopted by the Authority

PART V
PRICING PRINCIPLES

8. Pricing Principles for Wholesale Services with Controlled Tariffs

- 1) Controlled Wholesale Tariffs are tariffs of Wholesale Services provided by a Telecommunications Operator which has been found to hold significant market power in a relevant market for those services.
- 2) Lawful, Controlled Wholesale Tariffs shall be:
 - a) Cost-oriented; and
 - b) Not unduly discriminatory.
- 3) To assess whether a Controlled Wholesale Tariff is cost-oriented, the Authority shall use, either,
 - a) A forward-looking incremental cost methodology, or
 - b) An international benchmark of relevant Wholesale Tariffs.
- 4) When assessing or setting a Controlled Wholesale Tariff based on a forward-looking incremental cost methodology, the Authority shall apply the following principles:
 - a) Forward-looking costs shall refer to the costs an efficient operator would incur to provide a given service.
 - b) The cost basis shall be established by using any of the following cost modelling methods:
 - i. Fully allocated costs; or
 - ii. Long-run incremental cost (LRIC); or
 - iii. Long-run incremental cost plus (LRIC+), which allows for joint and common costs.
- 5) When assessing or setting, a Controlled Wholesale Tariff based on international benchmarks, the Authority shall use data from:
 - a) Countries that have used a forward-looking incremental cost methodology to set the tariff of a comparable service; and
 - b) Countries that can reasonably be regarded as comparable to Ethiopia.

- 6) Notwithstanding any provision in Sub-Articles 3 through 5 of this Article, where the Authority has been unable to obtain reliable information to assess or set a Controlled Wholesale Tariff by using any of the options provided in Sub-Articles 4 and 5 of this Article, the Authority may consider a settlement free approach to set such tariff, if:
 - a) The provider of the Wholesale Service receives a comparable Wholesale Service from the other party to an agreement; or
 - b) If the Authority has determined the settlement free approach to be reasonable.
- 7) A Controlled Wholesale Tariff shall be deemed unduly discriminatory, if a provider of the corresponding Wholesale Service, charges a different rate to different operators, for similar services provided under similar terms and conditions, unless this can be justified by differences in costs or expected costs, of providing the services.
- 8) A Controlled Wholesale Tariff shall be deemed unduly discriminatory, if a Vertically Integrated Operator providing the corresponding Wholesale Service, self-supplies its Downstream Operation at a lower cost than it charges other operators for that same Wholesale Service.
- 9) When assessing the cost of self-supplying the relevant Wholesale Service referred in Sub-Article 8 in this Article, the Authority shall apply the forward-looking incremental cost methodology from Sub-Article 4 in this Article, to impute costs to the self-supplied Wholesale Service.

9. Pricing Principles for Retail Services With Controlled Tariffs

- 1) A Telecommunications Operator which has been found to hold significant market power in a relevant market for the Retail Service shall submit its Controlled Retail Tariff for review by the Authority.
- 2) When the Authority reviews a filed Controlled Retail Tariff, or intervene to set a Controlled Retail Tariff to ensure its lawfulness, the tariff shall pass either the non-predatory test or the margin squeeze test, and in addition, be not unduly discriminatory.
- 3) When assessing whether a Controlled Retail Tariff passes the non-predatory test, the Authority shall consider the following:
 - a) Predatory pricing occurs when an SMP Operator in a relevant market deliberately incurs losses, or forego profits in the short term, with the intention of foreclosing, or be likely to foreclose, a competitor or potential competitor, to strengthen or maintain its market power.
 - b) To assess whether a Controlled Retail Tariff is predatory, or likely to be predatory, the Authority shall consider whether the tariff, for the corresponding service, or service bundle, is below cost. If a tariff is equal or above cost, then the tariff passes the non-predatory test.

- c) The Authority shall use the SMP Operator's current year costs, or where available, regulatory accounting costs, subject to reasonable adjustments if these are from a prior year, as the source of information to calculate the cost of a service.
 - d) The Authority shall use any of the following cost modeling methods to establish the cost basis:
 - i) Fully allocated cost; or
 - ii) Long-run incremental cost (LRIC); or
 - iii) Long-run incremental cost plus (LRIC+), which allows for joint and common costs.
- 4) When assessing whether a Controlled Retail Tariff passes the margin squeeze test, the Authority shall consider the following:
- a) A margin squeeze occurs when an SMP Operator in a relevant retail market, sets its retail tariff such that, the difference between the retail tariff and the wholesale tariff of the corresponding Wholesale Service, would not allow an efficient retail competitor to sustain a competing service. This situation is more likely to occur, when an SMP Operator in the retail market is vertically integrated and supplies an essential input to a competitor in the retail market.
 - b) To assess whether a margin squeeze exist, or is likely to exist, the Authority shall assess whether there is a positive margin between the retail tariff and the cost of providing the Retail Service. A tariff passes a margin squeeze test if the difference between the retail tariff and the cost is positive.
 - c) To calculate the cost of the Retail Service, the Authority shall take into account the cost of the necessary input purchased in the wholesale market, plus the Downstream Retail Cost.
 - d) To calculate the cost of providing a Retail Service, the Authority may use, the Downstream Retail Cost of the vertically integrated SMP Operator as a proxy for the Downstream Retail Cost of an efficient retail competitor.
 - e) The Authority shall use the SMP Operator's current year costs, or where available, regulatory accounting costs, subject to reasonable adjustments if these are from a prior year, as the source of information to calculate the Downstream Retail Cost of the vertically integrated SMP Operator.
 - f) The Authority shall use any of the following cost modelling methods to establish the cost basis of a Retail Service:
 - i) Fully allocated cost; or
 - ii) Long-run incremental cost (LRIC); or
 - iii) Long-run incremental cost plus (LRIC+), which allows for joint and common costs.

- 5) Undue price discrimination occurs when an SMP Operator in a relevant retail market charges different prices to customers or classes of customers, for similar services sold under similar terms and conditions, unless this can be justified by differences in the cost or expected cost, of providing the relevant service.

PART VI REVIEW OF TARIFFS

10. Review of Tariffs

- 1) Notwithstanding any provision in Article 7 of this Directive, the Authority may, on its own motion, and at any time, or in response to a petition filed by any interested party, initiate a proceeding to review and set any tariff, from any Telecommunications Operator, to ensure its lawfulness, pursuant to Article 46 of the Proclamation, this Directive, and any Directive adopted by the Authority.
- 2) Where the Authority decides to initiate a proceeding to review and set a tariff, it shall follow the pricing principles described in Articles 8 and 9 of this Directive, depending on whether the review is for a wholesale or a retail tariff.
- 3) Where the Authority decides to initiate a proceeding, it shall do so in accordance with the procedure established in Articles 35 through 38 of the Proclamation, and adhere to the following procedure:
 - a) Issue a Public Notice informing interested parties that it is initiating a regulatory proceeding to review and set a tariff to ensure its lawfulness.
 - b) The Public Notice shall be accompanied by a discussion paper, indicating the reason for the tariff review, and the approach the Authority intends to undertake to ensure that the tariff is lawful.
 - c) The Notice shall also include the period within which interested parties may submit comments along with filing requirements, and a timeframe for the public consultation.
 - d) The Authority shall give interested parties no less than thirty (30) days to respond and submit comments.
 - e) After receiving comments from interested parties, the Authority shall have no more than thirty (30) days to respond to the comments received and either:
 - i. respond addressing each comment and render a final determination; or
 - ii. respond addressing each comment, issue a second discussion paper, if needed, and give interested parties no less than thirty (30) days to submit comments, before rendering a final decision.
 - f) The Authority may, at its own discretion, allow more than two rounds of comments from interested parties before rendering a final determination.

**PART VII
ACCOUNT SEPARATION**

11. Accounting Separation

- 1) Where the Authority has determined that a provider of a Wholesale Service has significant market power in a relevant market for a Wholesale Service, and the provider is a Vertically Integrated Operator that also provides Retail Services, the Vertically Integrated Operator shall keep separate accounts, as if the Wholesale Service were in fact carried out by a legally independent company, so as to identify all elements of cost and revenue attributable to such services.
- 2) The Authority may, at its own discretion, adopt Directives prescribing how the account separation referred to in Sub-Article 1 of this Article shall be implemented.

**PART VIII
PUBLICATION OF TARIFFS**

12. Publication of Controlled Tariffs by The Authority

- 1) Any Telecommunications Operator that the Authority determines possess significant market power, in one or more relevant product markets shall publish its tariff on its website.
- 2) The Authority shall publish on its website, or ensure that there is published, adequate and up-to-date information, on all approved Controlled Tariffs.

**PART IX
MISCELLANEOUS PROVISIONS**

13. Confidentiality

To the extent that information provided by Telecommunications Operators pursuant to this Directive, may be confidential, the Authority shall use its reasonable effort to protect the confidentiality of such information.

14. Right of Appeal

Any decision taken or order issued by the Authority pursuant to the provisions in this Directive, is subject to review and appeal in accordance with Articles 38 and 39 of the Proclamation.

15. Enforcement

Failure to comply with the provisions in this Directive or the decisions of the Authority, shall be subject to the enforcement provisions in Article 52 of the Proclamation.

16. Amendment

The Authority may, at any time, when it deems it necessary, and consistent with the provisions of the Proclamation, amend this Directive.

17. Effective Date

This Directive shall come into force on _____, 2020.

DONE AT ADDIS ABABA ON _____ DAY OF _____ 2020

ENGINEER BALCHA REBA

DIRECTOR GENERAL

ETHIOPIAN COMMUNICATIONS AUTHORITY