



**BOTSWANA COMMUNICATIONS REGULATORY  
AUTHORITY ENFORCEMENT GUIDELINES**

**1<sup>st</sup> JULY 2016**

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## INTRODUCTION

1. The Botswana Communications Regulatory Authority (Herein referred to as Authority) is a regulatory body established under the Communications Regulatory Authority Act, 2012 (Herein referred to as the Act), to regulate telecommunications, Internet and Information and Communications Technologies, radio communications, broadcasting, postal services and for matters related or connected or incidental thereto.
2. The Authority's functions include, but are not limited to, issuance and renewal of licenses, type approvals of electronic communication equipment and management of frequency spectrum.
3. The Authority is further mandated, inter alia, to ensure safe, reliable, efficient and affordable services in the regulated sector of telecommunications, broadcasting and postal services throughout Botswana. In doing this, the Authority is expected to balance the roles of regulation as well as protection and promotion of the interests of consumers, purchasers and other users of the services in the regulated sectors. This is espoused in Section 5 (2) (d) of the Act which provides that the Board shall monitor and seek ways to improve the efficiency of the communications sector and services provided by the Authority, both for the benefit of consumers and licensed operators in the regulated sectors.
4. The Authority undertakes to continuously monitor the performance of the communications sector. The process of monitoring is necessary for the systematic observations on the sector activities in order to determine the level of performance and compliance in relation to provisions of the Act, Regulations issued thereunder or those requirements and conditions that have been set by the Authority.

5. The Authority is duly vested with enforcement powers such as imposing administrative sanctions to ensure compliance and making redress orders for breaches of relevant conditions under the Act, Regulations issued thereunder or any licence, Directive issued by the Authority.
6. Good practice requires the Authority to have clear guidelines on enforcement action in instances where there is non-compliance with the Act, Regulations issued thereunder or any licence, Directive issued by the Authority These enforcement guidelines will assist the Authority in making decisions of enforcement.
7. The aim of these guidelines is to bring clarity and consistency to the Authority's enforcement processes. These guidelines are also published as part of the Authority's commitment to transparency in communications regulation.

## **INTERPRETATION**

8. In these Guidelines unless otherwise inconsistent with the context, the following expression or word will bear the meaning assigned to them below:
  - 8.1 “**Act**” means the Communications Regulatory Authority Act No. 19 of 2012;
  - 8.2 “**Alleged Defaulter**” means any person who is accused or alleged to have contravened an applicable provision of the Act, Regulations issued under the Act or any licence, Directive issued by the Authority;
  - 8.3 “**Authority**” means Communications Regulatory Authority established by the Act;
  - 8.4 “**Complaint**” means a notification of an alleged contravention;
  - 8.5 “**Contravention**” means non-compliance with or the

infringement of any of the provisions of the Act, Regulations issued under the Act or any licence, Directive issued by the Authority;

- 8.6 **“Day”** means a business day, being any day which is not a Saturday, Sunday or declared as a public holiday in the Republic of Botswana;
- 8.7 **“Defaulter”** means any person who has contravened an applicable provision of the Act, Regulations issued under the Act or any licence, Directive issued by the Authority;
- 8.8 **“Enforcement Action”** means any steps or processes taken by the Authority to ensure compliance with any of the provisions of the Act, Regulations issued under the Act or any licence, Directive issued by the Authority;
- 8.9 **“Guidelines”** means the enforcement guidelines set out in this document;
- 8.10 **“Investigation”** means the process of investigating an alleged contravention which is undertaken by the Authority in terms of these guidelines;
- 8.11 **“Investigation Notice”** means a notice issued by the Authority in terms of paragraph 19 of these guidelines;
- 8.12 **“Licence”** means any licence duly granted by the Authority in terms of the Act and includes subsisting licences that were granted prior to the commencement of the Act which remain in force at the time of an investigation;
- 8.13 **“Licensee”** means the holder of a licence;
- 8.14 **“Monitoring”** means the powers of the Authority to monitor compliance or infringement of any of the provisions of the Act, Regulations issued under the Act or any licence, Directive issued by the Authority;
- 8.15 **“Month”** means a period of 28 consecutive days;

- 8.16 “**Offence**” means any contravention which constitutes an offence under the Act or the Regulations issued under the Act;
- 8.17 “**Person**” means a legal person, and includes natural and juristic person;
- 8.18 “**Regulations**” means any regulations made by the Minister in terms of the Act and includes Industry Regulations issued by the Authority in terms of the Act;
- 8.19 “**Regulated Sector**” means any sphere of activity within the telecommunications, broadcasting and postal service sectors which includes the installation of telecommunications networks; the installation and operation of radio-communication equipment; the provision of postal services; the converging of electronic technologies and the provision of internet services;
- 8.20 “**Regulated Supplier**” means any supplier of goods or services in the regulated sectors whose activities fall within the scope to be regulated by the Authority.

## **APPLICATION AND STATUS OF THE GUIDELINES**

9. These Guidelines –

9.1. Take effect from 1<sup>st</sup> July 2016;

9.2. Will be reviewed and amended in the light of further experience and developing law and practice. Any such amendments will –

9.2.1 be made following a stakeholder consultative process;

9.2.2 come into effect prospectively with effect from a date published by the Authority;

9.3. Are not substitute for any legislation but merely set out the Authority’s general approach to enforcement in the areas covered by these guidelines;

9.4. Do not;

9.4.1 apply to complaints made by a consumer(s) which are subject to the “Complaints Handling Procedures” available on the Authority’s website at <http://www.bocra.org.bw/registering-complaints>. However, in a situation where the Authority has received a number of complaints in relation to a similar issue, the Authority may decide to investigate such complaints on a generalised basis and will follow these guidelines in conducting that investigation.

## **REGULATORY PRINCIPLES**

10. The Authority has established a particular set of regulatory principles, providing a distinct statement of its approach to regulating the communications sector.

11. In exercising its powers in terms of these guidelines, the Authority will adhere to its regulatory principles which include, but are not limited to:

11.1 acting promptly and concisely;

11.2 taking regulatory decisions in an open, transparent, accountable, proportionate and objective manner;

11.3 not showing any undue preference to any person, body or organisation;

11.4 ensuring that its interventions are evidence based, proportionate, consistent, accountable and transparent in both deliberation and outcome;

## **ENFORCEMENT PROCEDURES**

### **Initiating a complaint for an alleged contravention**

12. A complaint for an alleged contravention may be initiated by any of the following parties who has any reasonable grounds to believe that any licensee has contravened or failed to comply with an applicable provision of the Act, Regulations issued thereunder or any licence, Directive issued by the

Authority:

- 12.1 The Authority, acting of its own accord;
- 12.2 Any regulated supplier; and
- 12.3 Any person or entity which has vested interest in the matter or in the regulated sector.

**Submitting a notification of an alleged contravention (“complaint”)**

- 13. A complaint must be submitted, in writing, to the Authority within sixty (60) days of the complainant becoming aware of an alleged contravention. However, the Authority may accept or receive a complaint lodged after sixty (60) days.
- 14. The complaint must be addressed to the Director responsible for Compliance and Monitoring.
- 15. The complaint must set out clearly the following:
  - 15.1 The name and contact details of the complainant;
  - 15.2 The name of the alleged defaulter, or if it is unknown, as many identifying details as are available in order to assist the Authority to identify the defaulter;
  - 15.3 The relationship between the complainant and the alleged defaulter, if any;
  - 15.4 The facts and evidence illustrating the nature, extent and duration of the alleged contravention and the circumstances in which the alleged contravention took place and other supporting evidence;
  - 15.5 The legal basis for the complaint, including the applicable provision of the Act, Regulations issued thereunder or any licence, Directive issued by the Authority;



- 15.6 Details of any relief being sought; and
- 15.7 Any other relevant information;
- 16. The Authority reserves its right not to accept a complaint that does not meet the submission criteria in paragraph 15 above. However the Authority will not apply the submission criteria in a bureaucratic way, and will consider the circumstances on a case-by-case basis. Therefore the Authority may waive the requirement for a complaint to meet some of the requirements in paragraph 15 above to the extent that it is not reasonable to expect the Complainant in question to provide such information/material.

### **Screening of complaints**

- 17. As soon as practicable after receiving a complaint, the Authority will screen the complaint in order to decide whether to investigate an alleged contravention and in so doing, the Authority may either -
  - 17.1 refuse to investigate an alleged contravention, in which case the Authority will inform the Complainant in writing of its decision and reasons, close its file and take no further action on the matter; or
  - 17.2 decide to investigate the complaint, in which case the Authority will issue an investigation notice in terms of paragraph 19 below. Subject to paragraphs 46 to 49 below, the Authority reserves its right not to issue an investigation notice where it considers that alerting the licensee under investigation might prejudice the investigations.
- 18. At the time of screening a complaint, the Authority will consider relevant factors, including but not limited to whether:
  - 18.1 the complaint falls within the scope of the applicable provision of the Act, Regulations issued thereunder or any

- licence, Directive issued by the Authority;
- 18.2 the complaint falls outside the prescriptive timeline of sixty (60) days and the Authority has declined to accept or receive it;
  - 18.3 the complaint is frivolous or vexatious;
  - 18.4 the complainant has provided any evidence to support allegations;

### **Investigation notice**

19. The investigation notice will be sent to the alleged defaulter within seven (7) days from the date of concluding the screening process.
20. The investigation notice will:
  - 20.1.1 be in writing and set out the nature of the alleged contravention and the relevant information that the alleged defaulter may need to know in order to meet the case being made against it, including the information and materials referred to in paragraph 15 above; and
  - 20.1.2 set out details of the Authority's representative(s) who will be the main point of contact throughout the investigation.
  - 20.1.3 set out provisional timelines for the key steps of the investigation. The provisional timeline will be set on a case by case depending on the type and complexity of the investigation.

### **Authority's right to issue a public notice regarding the investigation**

21. The Authority reserves the right to issue a public notice to inform the public about the launched investigation where such notice would be in the public interest, unless such publication would adversely affect the investigation. Prior to issuing the public notice, the Authority will invite the alleged

defaulter to show cause why such public notice should not be made.

22. Where the Authority has made an investigation public, the alleged defaulter is entitled to publish a statement relating to the investigations but such statement shall not contain the merits of the investigations.

### **Opportunities to make representations**

23. The alleged defaulter shall submit its written representations within twenty (20) days of receipt of the investigation notice or such further period as the Authority may determine. The Authority may, at the request by the alleged defaulter, exercise its discretion to extend the prescribed time period for submission of written representations.
24. If the Authority considers it necessary, or if the alleged defaulter so requests, the Authority may also afford the alleged defaulter an opportunity to make oral representations.
25. An alleged defaulter may appoint legal representatives or other experts who it considers useful or necessary to assist and/or represent it. The findings or reports of any experts brought before the Authority by any alleged defaulter shall not be binding on the Authority.

### **Information requests**

26. In order to conduct the investigation effectively, the Authority may request information that it deems relevant to an alleged contravention and necessary for the purposes of the Authority's investigation.
27. The requested information should be accurate information and must be made available to the Authority within the period specified by the Authority when making the request for information. The Authority may only agree to an extension of the deadline where the alleged defaulter

adequately demonstrates the need for such extension.

28. Meetings with licensees under investigation may be held as part of information gathering.
29. Failure to comply with lawful notices to produce documents or information will be taken seriously and therefore licensees are expected to respond within the set timelines to the information request served upon them.

### **Industry Experts appointed by the Authority**

30. The Authority may appoint experts to provide analysis or expert advice if it considers this necessary to facilitate its investigation provided that –
  - 30.1 the alleged defaulter will have an opportunity to comment in writing and/or orally on any such analysis or advice; and
  - 30.2 the Authority will remain responsible for the investigation and decide on the complaint;

### **TREATMENT OF CONFIDENTIAL INFORMATION**

31. Any written information provided to the Authority in the course of its investigation will be treated as confidential.

### **DECISION OF THE AUTHORITY**

33. After the expiry of the period allowed for the representations the Authority will consider all of the information, evidence and representations submitted to it and make its decision. The decision of the Authority shall be final and binding.
34. The decision of the Authority shall be in writing and shall be in communicated to both complainant and alleged defaulter.
35. The Authority has set a non-statutory target to pronounce its decision made in accordance with paragraph 33 and 34 above within two (2) months after the expiry of the period

allowed for the representations. The set target may be extended if the Authority reasonably views that it needs a longer period to make its decision.

36. When an investigation has been made public on opening, then the Authority may also publish its closures. This is to say that findings of contravention or enforcement actions may also be published. Similarly, if the case is closed with no finding of a contravention, the Authority will also make this finding public.
37. The Authority reserves the right to make public any of its decisions, even though the investigation may not have been made public on opening.

### **APPEAL OF THE AUTHORITY'S DECISION**

38. Any person aggrieved by a decision made by the Authority in terms of these guidelines may appeal to the High Court of Botswana within six (6) weeks of delivery of the decision, or within any extended period as the Authority may determine.

### **ENFORCEMENT ACTIONS**

39. Subject to the provisions of the Act, Regulations issued thereunder or any licence, Directive issued by the Authority, the Authority will exercise its discretion to take enforcement action it considers appropriate in the circumstances. A range of enforcement actions available to the Authority are as follows:
  - 39.1 Issue of warning letters;
  - 39.2 Impose civil penalties/fine;
  - 39.3 Suspend, revoke, or vary the terms of a licence issued under the Act;
  - 39.4 Issue of directions (Orders) aimed at preventing or rectifying a contravention;
  - 39.5 Refer to the prosecuting authority any matter in which the

Authority is of the view that criminal offence has been committed under the Act;

39.6 Refer the matter to the Competition Commission in accordance with Section 89 of the Act.

### **Warning letter**

40. Where, upon conclusion of investigations, there are findings that a licensee is contravening or has contravened any provision of the Act, Regulations issued thereunder or any licence, Directive issued by the Authority Act, the Authority may issue a warning letter to the defaulter requiring the defaulter to take such steps to comply with the condition as may be specified or to take steps to remedy the consequences of the contravention within a particular time frame stipulated in the warning letter.

41. This is an action that the Authority may take in response to contravention where a warning is considered a sufficient response.

### **Civil Penalties/fine**

42. The Authority may impose civil penalty or fine for enforcement purposes, however the Authority will not impose a civil penalty or fine which exceeds the maximum penalty stipulated in the Act.

43. Any civil penalty or fines imposed by the Authority pursuant to these guidelines shall become due and payable by the defaulter person within ninety (90) days from the date of the decision made by the Authority or within any other period prescribed by the Authority.

### **Suspension, revocation of the licence or variation of the terms of a licence issued under the Act**

44. When deciding whether to suspend, vary the terms of or revoke a licence issued under the Act, the Authority will

adhere to Section 83(4) to Section 83(7), Section 86(1) and Section 86 (2) of the Act.

45. In exercising the powers to revoke, suspend a licence or vary terms thereof, the Authority shall issue a notice inviting the alleged defaulter to show cause why its licence should not be suspended, varied or revoked. The Authority shall then publish a notice of such suspension, variation or revocation in two consecutive issues of the Gazette and newspapers circulating in Botswana.

### **Authority's direction (Orders)**

#### Provisional Order

46. A provisional order may be issued before the Authority concludes its investigation where the Authority has reasonable grounds to believe that there is a contravention.
47. The provisional order may be issued, to require a licensee to do or not to do something to prevent loss or irreparable damage or harm that might arise or that which is considered by the Authority likely to arise before the investigations are concluded. The Authority may also issue a provisional order if the balance of convenience favours the granting of a provisional order.
48. Before issuing a provisional order the Authority may at its own discretion afford the defaulter a reasonable opportunity to consider the allegations against it and to respond either by written and/or oral representations to the allegations made, unless the Authority has reasonable grounds to believe that doing so would defeat the purpose of the provisional order.
49. A person who is subject to a provisional order may file an objection to the provisional order within ten (10) days after service of such provisional order has been effected upon it. In this case, the Authority will consider the objection within a reasonable time depending on the urgency of the matter and either:

- 49.1 Revoke the provisional order if it upholds the objection; or
- 49.2 Extend or uphold the provisional order;

#### Final Order

- 50. If the Authority is satisfied after concluding its investigations that a licensee has contravened an applicable provision of the Act, Regulations issued thereunder or any licence, Directive issued by the Authority Act, it may impose a final order or confirm a provisional order issued in accordance with paragraph 46 and 47 above.
- 51. The Authority however reserves its right to enforce a final order by civil proceedings before a court of competent jurisdiction.

#### **Referral to the Prosecution Authority**

- 52. If, during or at the end of an investigation the Authority discovers that a criminal offence was committed or has reason to believe that a criminal offence is about to or being committed, then the Authority shall have the obligation to report same to the Police.
- 53. The Authority may, at its discretion, elect to notify the wrongdoer prior to reporting the matter to the Police. The fact that a matter has been reported to the Police shall not necessarily have the effect of halting the investigations and ultimate findings by the Authority under civil law.

#### **Referral to the Competition Commission**

- 54. The Authority will refer all issues of competition which may arise in the course of the discharge of its functions to the Competition Commission.

#### **FACTORS TO BE CONSIDERED WHEN DETERMINING ENFORCEMENT ACTION**

- 55. In its enforcement functions, the Authority will consider the most appropriate enforcement action having regard to various factors and it is for this reason that the Authority



does not and has not specified enforcement action applicable to each possible contravention.

56. In determining the appropriate enforcement action to invoke for each particular contravention, the Authority may generally be guided by but not limited to, the following factors and considerations, that is;

56.1 Any written and/or oral representations made to it by the notified provider;

56.2 The gravity and extent of the contravention;

56.3 The degree of harm, injury, discomfort caused or occasioned by such contravention to consumers or other stakeholders in the communications sector;

56.4 The duration of the contravention and whether or not the person who committed the contravention took immediate steps to remedy the contravention soon after having knowledge of the contravention;

56.5 Level of accountability and culpability of the defaulter;

56.6 Whether the contravention was committed knowingly;

56.7 The record of previous contravention by the defaulter;

56.8 The absence, ineffectiveness of internal mechanisms or procedures required to prevent contravention by the person who committed the contravention;

56.9 Any gain made by the person who committed the contravention directly or indirectly arising from such contravention;

56.10 The need to impose a particular enforcement action so as to act as deterrent both to the person who committed such contravention and other persons;

56.11 Non-discriminatory in the imposition of sanctions on different persons for similar contraventions committed in identical circumstances;

56.12 The circumstances under which the contravention occurred;

56.13 Such other factors as the Authority may, from time to time, determine.

57. The Authority may, in the exercise of its enforcement powers, institute civil proceedings in Court against any person for any remedy including injunctive relief, recovery of civil penalty/ fines or specific performance.

### **CORPORATE LIABILITY**

58. Where a licensee commits an offence under the Act, every person who at the time of the commission of such offence was a director, manager or officer of the defaulter may be charged jointly in the same proceedings and where the licensee is convicted of the offence, every such director, manager or officer of the licensee shall be deemed to be guilty of that offence unless he or she proves that the offence was committed without his or her knowledge or that he exercised all due diligence to prevent the commission of the offence.

### **INSTITUTIONAL ARRANGEMENT**

59. For the purposes of having effective enforcement mechanism in place, the Authority has put in place a proper institutional arrangement to deal with enforcement issues.

**ISSUED BY THE BOTSWANA COMMUNICATIONS  
REGULATORY AUTHORITY**