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National Information and Communications Technology Act 2009

NOTICE OF MAKING OF REGULATORY INSTRUMENT UNDER THE *NATIONAL ICT ACT, 2009*

I, **Kila Gulo-Vui**, Chief Executive Officer (CEO) of the National Information and Communications Technology Authority (also referred to as NICTA), by virtue of the powers conferred under by Section 213 and 218 of the *National ICT Act, 2009* (the Act), and all other powers enabling me, hereby give notice to the making of the following regulatory instrument: Wholesale and Retail Services Guidelines produced by NICTA, pursuant to the Act.

1. Introduction

- 1.1 These Guidelines have been made by the National Information and Communication Technology Authority (NICTA) under Section 218 of the *National Information and Communications Technology Act 2009* (the Act) to explain how NICTA is interpreting the distinction between wholesale and retail ICT services in the Act and the consequences for the way in which Licensee Operators are required to conduct their services businesses.
- 1.2 NICTA intends to follow these Guidelines when regulating matters that require firm distinctions between wholesale and retail services. However, on occasion, circumstances may arise that possibly warrant NICTA adopting a different approach. If such circumstances arise NICTA may depart from the approach reflected in these Guidelines and will explain in writing its reasons for doing so.

Notice of making of Regulatory Instrument Under the *National ICT Act 2009*—continued**Need for these Guidelines**

- 1.3 NICTA has received requests from various industry stakeholders over a period of time about the need to “better” or “more clearly” define wholesale services and distinguish them from retail services. In addition, various industry stakeholders have suggested ways and means by which NICTA might augment the definitions in the Act.

Overall position adopted in these Guidelines

- 1.4 In these Guidelines, NICTA adopts a position that may be summarised as follows:
- (a) The Act clearly and exhaustively defines the terms ‘wholesale service’, ‘wholesale customer’, ‘retail service’ and ‘retail customer’ in the Interpretation section, Section 4;
 - (b) It is not for NICTA to augment the definitions in the Act with additional criteria that the Parliament has not seen fit to include;
 - (c) The approach to wholesale/retail differentiation in the Act is fully in accord with international practice on the way the distinction is described overseas;
 - (d) In principle, some of the alternative approaches that have been suggested are not sustainable in any case;
 - (e) It is open for a licensed operator to be vertically integrated and to provide both wholesale and retail services, and unless they specifically provide otherwise, network operator licences authorise the provision of both wholesale and retail services; and
 - (f) Licensed operators have obligations when they provide wholesale services that are different to their obligations when they provide retail services.

Commencement Date

- 1.5 These Guidelines commence on the date it is published in the *National Gazette*.

2. Definitions of ‘wholesale’ and ‘retail’ in the Act

- 2.1 Section 4, the Interpretation section of the Act includes the following definitions:

‘Retail service’ means an ICT service that is supplied to a retail customer.

‘Retail customer’ means a person that is not a wholesale customer, including an operator licensee in circumstances where that operator licensee acquires an ICT service for that operator licensee’s own personal use rather than to facilitate the supply of an ICT service by that operator licensee.

‘Wholesale service’ means –

- (a) an ICT service that is supplied to a wholesale customer; and
- (b) for the purposes of Part VI of this Act only [dealing with Interconnection and Wholesale Access], includes –
 - (i) a service that facilitates the supply of such an ICT service (excluding intellectual property where it is not an integral but subsidiary part of that ICT service), where that service is supplied, or is capable of being supplied, by an operator licensee to a wholesale customer; and

Notice of making of Regulatory Instrument Under the *National ICT Act 2009*—*continued*2. Definitions of ‘wholesale’ and ‘retail’ in the Act—*continued*

- (ii) the supply of access to, or use of, a site on which any facility is located, but only to the extent –
 - (A) that the site is owned, occupied or controlled by the network licensee that has the facilities right in respect of that facility; and
 - (B) that network licensee has a legal right (whether conditional or unconditional) to use that site; and
 - (C) the facility may be used to supply a network service.

‘Wholesale customer’ means an operator licensee, but excluding circumstances where that operator licensee acquires an ICT service for that operator’s licensee’s own personal use rather than to facilitate the supply of an ICT service by that operator licensee.

The Act makes it clear that the terms ‘wholesale’ and ‘retail’ are exclusive. If, in the context of a particular ICT service supply transaction, a service is a wholesale service, it cannot be at the same time a retail service. Also, if, in the context of a particular ICT service supply transaction, a customer is a wholesale customer, the customer cannot be for the same transaction a retail customer.

- 2.2 The Act also makes clear that whether a service is a wholesale service or not depends, firstly, on the classification of the customer, and secondly, on the purpose to which the customer uses the service.
- 2.3 A service can only be a wholesale service if supplied to a wholesale customer, and a wholesale customer must be an operator licensee. The clear consequence of this is that if a customer does not have a current operator licence issued under the Act by NICTA at the time of an ICT service delivery, the service involved cannot be regarded as a wholesale service.
- 2.4 Secondly, as the definition of ‘wholesale customer’ makes clear, an operator licensee is not acting as a wholesale customer where ICT services are purchased for its own personal use rather than to facilitate that operator licensee’s provision of ICT services to other customers.
- 2.5 The definitions in the Act are intended to be complete. Importantly, they do not leave room for additional criteria to be added by NICTA. At least two kinds of additional criteria have been suggested by interested parties to NICTA, namely:
 - a. Adding technical characteristics in the case of specific wholesale services; and
 - b. Including minimum purchase levels or capacity levels for a service to be a wholesale service.
- 2.6 There may well be some services that are only available as wholesale services – that is, where only operator licensees would seek to have the service and the services are only used as inputs to ICT services provided, in turn, by those operator licensees. An example of this would be voice call termination service. However, such situations are rare. Most services that are capable of being sold as retail services to end users are also capable of being sold as wholesale services to other operator licensees for resale by them. Therefore, adding technical characteristics, as suggested in Section 2.6a above, does not create a basis for differentiating wholesale and retail services.

Notice of making of Regulatory Instrument Under the *National ICT Act 2009*—*continued***2. Definitions of ‘wholesale’ and ‘retail’ in the Act—*continued***

- 2.7 An example that comes within Section 2.7*b* above, is to include a minimum capacity level in the description of wholesale internet service. However, such an inclusion would not prevent services above the chosen threshold from being retail, nor prevent those below it from being wholesale, if the current requirements in the Act remain in force.
- 2.8 In summary, the only questions to ask to determine if a service is a wholesale service are: (1) to whom is it being sold? and (2) what is the purchaser using it for?

3. Operator Licensing

- 3.1 Neither the Act nor the National Information and Communications Technology (Operator Licensing) Regulation 2010 require that NICTA should grant operator licences that permit retail-only or wholesale-only services to be provided.
- 3.2 It is not only permitted but, in most cases, desirable that operators should be able to operate in both retail and wholesale markets. An example is in relation to interconnection or terminating access services. All network operators provide retail services to end users who subscribe to a network connection. Sometimes the services provide voice communications. In order to enable their subscribers to send calls to and receive calls from subscribers connected to other networks, network operators must negotiate with other network operators for interconnection, a wholesale access service. Therefore, network operators in these circumstances provide both retail and wholesale services.
- 3.3 Another circumstance in which an operator with a predominantly retail services business model might become a wholesale provider is where it decides to sell excess capacity to another operator if the opportunity arises. The sale would be in of a wholesale service. Other examples include where an operator licensee allows another operator licensee to access or use its sites on which facilities are located, or shares space on its towers.
- 3.4 If an applicant for an individual licence sought a licence that was restricted to wholesale only or retail only, this would be considered by NICTA, and, if necessary, special conditions could be included in the licence. This has not happened to date, and it is difficult to conceive of circumstances in which an applicant might seek a restriction of this kind.

4. Licensee obligations when providing retail and wholesale services

- 4.1 All operator licensees have the obligations and duties outlined in the Act and in the National Information and Communications Technology (Operator Licensing) Regulation 2010. In addition, the requirements of the Standard and Special Conditions of Individual Licences Rule, 2011 may also apply. The obligations apply in relation to the provision of retail and wholesale services, unless stated otherwise.
- 4.2 If a wholesale access service is declared by the Minister in accordance with Section 130 of the Act (or deemed to be declared under Section 131 of the Act), then access providers who supply those declared services are required to comply with obligations in relation to the services, in terms of:
- a.* non-discrimination, (Section 136);

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- b.* reasonableness of terms and conditions, (Section 126);
- c.* general pricing principles, (Section 134); and
- d.* service specific pricing principles, if these have been determined by NICTA in relation to the service, (Section 135).

4.3 If a retail service has been subject to a Retail Service Determination pursuant to Part VII, Division 2 of the Act (Section 157 and following), then any operator licensee to whom the determination applies shall be subject to the regulation and obligations contained in the determination.

Resale Services

- 4.4 Some services are effectively the same service in terms of technical characteristics and take on their wholesale or retail nature depending on the whether they are sold to wholesale or retail customers, as defined.
- 4.5 As already noted, some wholesale services can be resold to retail customers, and these are effectively resale services. In Section 4 of the Act a resale service as defined as meaning “a wholesale service acquired by an applications licensee that is capable of being resupplied by that applications licensee as a complete retail service without the applications licensee making any significant changes to the wholesale service”.
- 4.6 Section 134(1)(b) of the Act provides that “... the price of access to ... a declared service that is a resale service should be set by RMAC, where this results in pricing that is consistent with the cost recovery principle ...”. RMAC is defined under Section 134(2) of the National ICT Act as follows:

"RMAC" means a "retail minus avoidable cost" pricing methodology in which NICTA has regard to the following factors –

- (*a*) where the access provider offers the benchmark retail service at more than one price point, the starting retail price should be calculated as the weighted average of the retail price points for that benchmark retail service, where the weights are based on the number of units sold by the access provider; and
 - (*b*) the avoided costs deducted from that starting retail price should reflect the costs that the access provider would reasonably avoid by not retailing that benchmark retail service; and
 - (*c*) any other factors that NICTA considers relevant, to the extent that such factors are consistent with the cost-recovery principle, the efficiency objective, and Subsections (*a*) and (*b*) of this definition.
- 4.7 A broadband capacity service, if declared under Section 130, is a good example of a wholesale access service that may, without significant change, be resold as a retail service. Transmission services, if declared under Section 130, would also be good examples of resale services. These are only two examples from many services capable of resale without significant change.

Notice of making of Regulatory Instrument Under the *National ICT Act 2009*—continued**Expectations of service providers**

- 4.8 It is incumbent on providers of declared wholesale access services (including wholesale access services that incorporate components that consist of declared wholesale access services) to determine if a resale service is being sold as a wholesale service or as a retail service, taking into account the definitions set out in the Act and discussed in these Guidelines. If providers of a declared wholesale access service is in any doubt, or should reasonably have any doubt, about the matter, they should seek further guidance from NICTA.
- 4.9 If, after appropriate enquiries, the operator licensee providing the service concludes, or should have concluded, that the customer was a retail customer then the pricing terms that should be applied must include the avoidable costs associated with retail operations for the service in question.
- 4.10 Where an operator licensee sells a declared wholesale access service which is also a resale service to a retail customer at a price which is at or below the wholesale price, or does not include in the retail price a reasonable allowance for the avoidable retail costs that are attributable to the sale, then NICTA will refer the matter to the Independent Competition and Consumer Commission (ICCC) to determine whether action should be taken against the operator licensee for anti-competitive conduct such as margin squeeze, or in relation to any consumer complaints relating to the services offered.

5. Changes in NICTA operator licensing practice

- 5.1 Until now, it has generally not been NICTA's practice to make rigorous enquiries of applicants for operator licences, and for applications licences in particular. NICTA's practice to date has been based on the notion that the Act seeks to facilitate the licensing of operators who meet the basic eligibility requirements, and to encourage increased competition in and the development of ICT markets in ONG.
- 5.2 However, NICTA has received complaints that many operator licensees are not providing services to retail or other customers, but are using their licensed status to gain the benefit of wholesale service prices and conditions, at the expense of genuine operators.
- 5.3 These guidelines therefore record a change of licensing practice that has already been put into effect by NICTA, namely:
- a. NICTA will require all applicants for new operator licences, and especially for applications licences, to provide evidence of an intention to supply ICT services to third party customers, including, if required by NICTA, a formal certification by the applicant that it has such an intention within a reasonable period of commencement of operation as a licensee.
 - b. NICTA will assess all existing licensees at a time of its choosing to determine whether existing operator licensees, especially applications licensees, are: providing ICT services to third party customers and that they are not obtaining services at wholesale price and other terms for their own use.



Notice of making of Regulatory Instrument Under the *National ICT Act 2009—continued*

5. Changes in NICTA operator licensing practice—*continued*

- c. NICTA will take action under the Act to cancel or revoke licences if the licensees are not providing ICT services in accordance with their licences, and also initiate other action to impose sanctions and penalties as appropriate in the circumstances, and in accordance with the procedures that are set out in the Act.

Dated this 16th day of May, 2023.

K. GULO-VUI,
Chief Executive Officer, NICTA.