

**MEMORANDUM
OF
UNDERSTANDING**



COMPETITION AUTHORITY

AND



BOTSWANA COMMUNICATIONS REGULATORY AUTHORITY

OCTOBER 2014

THIS MEMORANDUM OF UNDERSTANDING is made
this.....^{20th} day of ^{JANUARY}..... Two Thousand and
^{Fifteen}
mm ~~Fourteen~~ and is intended to reflect the position reached by the **BOTSWANA**
COMMUNICATIONS REGULATORY AUTHORITY (hereinafter
referred to as "BOCRA"), and the **COMPETITION AUTHORITY** (herein
after referred to as the "Competition Authority") - and collectively
hereinafter referred to, in context, as "the Parties").

WHEREAS BOCRA is established under section 3 of the Communications
Regulatory Authority Act of 2012 ("the Communications Act"), for the
regulation of the communications sector in Botswana, comprising
telecommunications, internet and information and communication
technologies, radio communications, broadcasting, postal services and any
other matter incidental thereto;

AND WHEREAS BOCRA, in terms of section 89 of the Communications
Act, has the responsibility to refer to the Competition Authority all issues
relating to competition which may arise in the course of the discharge of its
functions;

AND WHEREAS the Competition Authority is established under section 4
of the Competition Act of 2009 with the responsibility of prevention of, and
redress for, anti-competitive practices in the economy, and the removal of
constraints on the free play of competition in the market;

AND WHEREAS- Sections 25, 26(1), 27(1), 30(1), 32(1) and 52(1) of the
Competition Act describe and define all economic or commercial activities

that may be entered into through arrangements or agreements by enterprises or businesses in any commercial sector and are deemed anti-competitive practices under the Competition Act;

AND WHEREAS- Under section 73 of the Competition Act, the Competition Authority and other sector regulators shall establish a mechanism through which they can maintain regular contact regarding the exercise of their respective responsibilities;

NOW THEREFORE, the Parties agree to conclude this Memorandum of Understanding as follows:

1. BASIS OF THIS UNDERSTANDING

- a) BOCRA has the mandate for dealing with technical and economic regulation in the Communication sector and its role among others covers the following areas which may have an impact on competition:
 - i. Tariff regulation – BOCRA regulate the tariffs of the regulated services in order to ensure prices are cost oriented, no price discrimination, no margin squeezing, avoid predatory pricing, minimize the bundling of service abuse, avoid cross-subsidization etc.
 - ii. Licensing (Market Entry) – Various licenses are issued to communication service providers under the CRA Act. Some of

the licenses are issued through a competitive process while others are issued in non-competitive process. BOCRA may limit the number licensees due to the policy direction or where the resources such as spectrum are limited. The monitoring of compliance to the terms and conditions of licence is the responsibility of BOCRA. Mergers and acquisition requiring involving licensed operators will require approval by BOCRA of approval.

- iii.* Interconnection Disputes – service providers are required to interconnect and BOCRA has the authority of dealing with disputes relating to technical conditions and interconnections charges
- iv.* Consumer Complaints – BOCRA is required to protect and promote the interest of consumers particularly in respects prices, quality and variety of services and availability of services throughout the country. Complaints on the provision of communication services will be handled BOCRA.
- v.* Spectrum management – radio frequency spectrum is a finite and limited resources and it is managed to ensure that there is no interference among various services. The number of market players for some communication services may be limited due to the unavailability of the radio frequency spectrum. The radio frequency spectrum licence is not transferrable unless

authorized by BOCRA. All mergers and acquisition which involves the radio licences will require BOCRA approval.

- vi. Type approval – BOCRA type approves communication equipment to be used in the country.
- b) Communication is the crucial and only vehicle by which government, public corporations, private businesses and individuals conduct their daily business and personal affairs with one another and between themselves and the wider world.
- c) The Communications sector is highly competitive and diversified as it comprises postal services, broadcasting, radio communications, internet technology, information technology, communication technology and telecommunications.
- d) Based on the foregoing, the Parties conclude this MoU on the following basis:
 - i. That the provision of communication services is regulated under the Communications Regulatory Authority Act , 2012 and that there is competition in the sector among service providers for customers and markets. The need to gain customers by competitors may lead to predatory pricing as in the lowering of subscription charges or connection charges, and collusive dealings. Service providers may divide markets and customers among themselves when selling their products or providing services.

- ii.* That the communications sector is growing at a fast rate in Botswana and is likely to attract investors in the form of acquisitions, and therefore, there is a need to ensure that all mergers and acquisitions are effected within the spirit of the competition laws of Botswana. The growth of the sector is likely to lead to some of the players in the market gaining economic power and this sometimes breeds abuse of dominance if they find themselves in a dominant position.
- iii.* Competitive service provision by some communications enterprises, which may require tendering, may lead to bid-rigging. The setting of user rates, subscription fees and connection rates may lead to collusive dealings. Certain acquisitions taking place in the same industry may not be pro-competition. There is a strong likelihood of those already in the market barring others from entering the industry and those with financial strength using their might to edge others out of the market. Others may enter into arrangements tailored to restrain others from trading or even so to discriminate against them.
- iv.* It is against the backdrop of a realisation that BOCRA has the mandate of regulating the communication sector that it is prudent that, the Parties enter into a cooperation agreement in specific areas of information sharing and investigation of anti-competitive practices in this industry.

- v. The MoU does not limit BOCRA or the Competition Authority from taking any steps to establish other MoUs with any other relevant institutions that may be of assistance to their mandates.
- vi. This MoU does not affect the independence of the Parties nor does it limit their powers or jurisdiction.

3. SCOPE OF COOPERATION AND INFORMATION SHARING

- a) This MoU is concluded in order to establish the manner in which the Parties will interact and cooperate with each other with the understanding that the laws applicable to each of them are different, but complementary.
- b) The Parties shall endeavor to inform each other in advance of regulatory changes or other material events that may have a significant impact on their joint operations or activities as herein described.
- c) Areas of coordination, cooperation or information sharing shall include, but not limited to:
 - i. providing each other with useful information on an investigation when requested by the other party or proactively by any party without a request being made;
 - ii. assisting each other with investigation, research and analysis of cases that one party may be engaged in;

- iii.* joint training sessions for employees of the Parties
- iv.* consulting each other on a regular basis on matters of mutual interest;
- v.* seeking clarification from each other on any media reports that may be related to matters connected with or incidental to this MoU;
- vi.* availing to each other non-confidential information of an investigation and results thereof;
- vii.* appearing in court or other judicial and quasi-judicial bodies as expert witness or to provide evidence in relation to their specific competency, or jointly prosecute an offence of mutual interest;
- viii.* where a party seeks the assistance of the other in a case to provide evidence in any proceedings before court, the fees for the appearance of any officer as a witness shall be as per the witness tariffs prescribed by Government.

4. OBLIGATIONS OF THE PARTIES

a) Obligations of the Authority

To the extent possible, and within the spirit of Article 2 of this MoU, the Competition Authority will endeavor to assist BOCRA with information, which may include but not necessarily be limited to:

- i.* collusive dealing in all its forms by enterprises involved in telecommunications, internet, communication and information technologies, radio communications, broadcasting and postal services;
- ii.* abuse of a dominant position by an enterprise or enterprises involved in the communications industry;
- iii.* mergers or acquisitions that are not pro-competition; and
- iv.* any agreements or arrangements that have the effect of substantially preventing competition in the communications industry.

b) Obligations of BOCRA

To the extent possible, and within the spirit of Article 2 of this MoU, BOCRA shall endeavor to assist the Competition Authority with information regarding issues that may affect competition in the communications services sector, which may include but not necessarily be limited to:

- i.* providing any information that may assist in the assessment of any acquisition or merger of any service provider or enterprise regulated by it;
- ii.* providing any information relating to the market conduct of any enterprise or service provider regulated by it where allegations of abuse of dominance are raised;

- iii.* providing any information relating to connection charges, subscription fees, user charges, product standards and specifications, geographic markets, market shares and the type and nature of each product or service in the sector;
- iv.* providing information in connection with any collusive conduct between enterprises regulated by it.

5. REQUESTS FOR INFORMATION

- a) To the extent possible, all requests for information shall be in writing and signed by the Chief Executive Officers of the Parties or their designated officers, and shall specify:
 - i.* the information sought by the requesting party;
 - ii.* a general description of the matter which is the subject of the request and the purpose for which the information is sought; and
 - iii.* the desired time period for reply and, where appropriate, the urgency thereof.
- b) In urgent situations, the Parties will endeavor to notify each other of the urgent situation and communicate information to the other as would be appropriate in the particular circumstances, taking into account all relevant factors, including the status of the efforts to address the urgent situation. During urgent situations, requests for information may be made in any form, including orally by designated

officers, provided such communication is confirmed in writing at an opportune time.

- c) Where an action by any party to this MoU requires any other governing body, the usual extra-ordinary processes to arrange for ad hoc or special meeting shall be followed with the urgency the matter would deserve.
- d) Where joint investigations are carried out, the Parties shall consult each other before either of them issues a media release.

6. HANDLING OF CONFIDENTIAL INFORMATION

- a) Any confidential information shared pursuant to this MoU shall be used only for lawful regulatory purposes.
- b) Each party shall endeavour to maintain public confidence in terms of whistle-blowers and other sources of information, which shall not be unnecessarily disclosed to any party and cooperation in any way shall not be expected to be dependent on knowledge of the source of the information.
- c) Where confidential information is required by a judicial or quasi-judicial organ, the disclosure shall be made in conformity with the direction given by the presiding decision maker/adjudicator and the rules that generally govern their sittings.

- d) While information exchanged may be used by any party in their enforcement activities, the use of such information should not breach the confidentiality clauses of the party that disclosed the information.
- e) All information provided pursuant to this MoU will remain the property of the Party providing such information.
- f) This MoU shall be a public document and thus may be quoted by any party to this MoU.
- g) The sharing of confidential information pursuant to this MoU is done in reliance upon the foregoing assurances and shall not confer any legal privileges to any person, other than to the Parties to this MoU.
- h) Unless otherwise expressly stated, all information sought or exchanged shall be deemed to be usable by the receiving party according to the legal framework establishing them.

8. ESTABLISHMENT OF JOINT WORKING COMMITTEE

- a) A Joint Working Committee ("the Committee") constituted by representatives of the Parties as nominated by the Parties shall be established pursuant to this MoU and shall function on an on-going basis.

b) Functions of the Committee shall include:

- i.* management and facilitation of meetings and cooperation and consultation in respect of matters dealt with by each party in terms of this MoU;
 - ii.* proposing when necessary, any amendment to, alteration of or addition to this MoU;
 - iii.* advisory services to the senior management of the Parties on issues affecting efficient and effective cooperation and implementation of this MoU and solutions thereto; and
 - iv.* any matter connected with or incidental to this MoU .
- c) The Parties will consult with each other at least quarterly to discuss matters relating to regulation of competition in the communication sector.

9. IMPLEMENTATION AND ENFORCEMENT

It shall be incumbent upon the Chief Executive Officers of the Parties to this MOU to ensure that each party carries out its obligations as agreed, and commits to undertaking to implement where reasonably possible, the commitments under this MoU.

10. SHARING RESOURCES

The Parties may, under certain circumstances, share each other's available resources in order to bring the provisions of this MoU into full effect; provided such a process is reasonable, shall not compromise the respective security of the parties and does not contravene any statute with which the two Parties must conform.

11. STATUTORY LIMITATIONS

- a) The provision of, or request for, information under this MoU may be denied:
 - i. where compliance would require a party to act in a manner that would violate the applicable law;
 - ii. under circumstances where there is an imminent risk to national security or other overriding public interest; or
 - iii. when compliance with a request or provision of information would interfere with an ongoing investigation in circumstances where prejudice to the investigation is likely to outweigh the adverse effects of denying the information.
- b) No provision of this MoU shall give rise to the right on the part of any person, entity or government authority other than the Parties herein, directly or indirectly, to obtain any information or to challenge the execution of a request for information under this MoU.

12. VARIATION OF THE MoU

Any variation of this MoU shall have no legal effect and shall not be binding on the parties unless reduced to writing and signed by persons authorised to act on behalf of the parties.

13. COMMENCEMENT OF THE MoU

This MOU shall come into force on the date on which it is signed by persons authorised to act on behalf of both Parties.

14. DURATION OF THE MoU

This MoU shall remain in force until it is changed or repealed by both Parties hereto, acting jointly or by each of the Parties with prior 3 months' notice to the other Party .

15. DOMICILIUM CITANDI ET EXECUTANDI

The Parties choose the following addresses as their respective *domicilium citandi et executandi* for purposes of this MoU:

**BOTSWANA COMMUNICATIONS REGULATORY
AUTHORITY**

Plot 50671 INDEPENDENCE AVENUE

PRIVATE BAG 00495, GABORONE.

TEL: +267 395 7755/ 3685500

FAX: +267 395 7976

E MAIL: ce@bocra.org.bw

CONTACT PERSON: The Chief Executive Officer

THE COMPETITION AUTHORITY

PLOT 28, MATSITAMA ROAD

PRIVATE BAG 00101, GABORONE

TEL: +267 393 4278

FAX: +267 312 1013

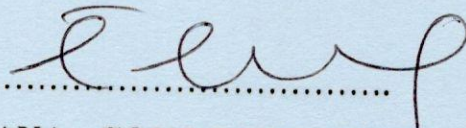
E MAIL: CA@competitionauthority.co.bw

CONTACT PERSON: The Chief Executive Officer

AS WITNESS THE HANDS OF THE DULY AUTHORISED
REPRESENTATIVES OF THE PARTIES THE DAY AND YEAR
FIRST BEFORE WRITTEN

THARI G. PHEKO

SIGNED by:



For and on behalf of the BOTSWANA COMMUNICATIONS
REGULATORY AUTHORITY

In the presence of

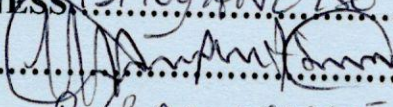
WITNESS.....

Name.....

Address.....

Position.....

ISHOGANETSE KEPALATSWI

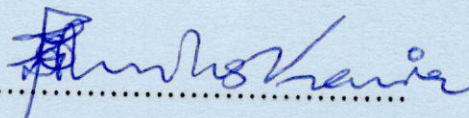


P/BAG 00495, GABORONE

DEPUTY CHIEF EXECUTIVE - Regulatory Affairs

THULA G. KAIRA

SIGNED by:



For and on behalf of the COMPETITION AUTHORITY

In the presence of

20/01/2015

WITNESS.....

Name.....

Address.....

Position.....

DUNCAN T. MOROSI

P/BAG 0001, GABORONE

DIRECTOR - LEGAL & ENFORCEMENT