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LEGAL NOTICE NO. 125 OF 2016

SWAZILAND COMMUNICATIONS COMMISSION ACT, 2013

(Act No. 10 of 2013)

SWAZILAND COMMUNICATIONS COMMISSION (CONSUMER PROTECTION) REGULATIONS, 2016

(Under Section 54)

In exercise of the powers conferred by Section 54 of the Swaziland Communications Commission Act, 2013, the Minister for Information, Communications and Technology makes the following Regulations –

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Citation and commencement

1. (1) These Regulations may be cited as the Swaziland Communications Commission (Consumer Protection) Regulations, 2015.

(2) These Regulations shall come into force on the date of publication in the Government gazette.

Interpretation

2. (1) In these Regulations, unless the context otherwise requires –

“Act” means the Swaziland Communications Commission Act, 2013;

“advertisement” has the meaning assigned to it in the Fair Trading Act, 2001;

“alternative dispute resolution procedure adjudicator (ADR adjudicator)” means a person appointed by the Commission to resolve disputes out-of-court;

“Appeals Board” has the meaning assigned to it in the Act;

“business premises” in relation to a supplier means –

(a) any immovable retail premises where the activity of the supplier is carried out on a permanent basis,
or

(b) any movable retail premises where the activity of the supplier is carried out on a usual basis;

“consumer” has the meaning assigned to it in the Competition Act, 2013;

“data” has the meaning assigned to it in the Electronic Communications Act, 2013;

“digital content” means data which is supplied through an electronic communications network or an electronic communications service;

“durable medium” means paper or email, or any other medium that –

- (a) allows information to be addressed personally to the recipient;
- (b) enables the recipient to store the information in a way accessible for future reference for a period that is long enough for the purposes of the information; and
- (c) allows the unchanged reproduction of the information stored;

“electronic commerce” has the meaning assigned to it in the Act;

“electronic communications network” has the meaning assigned to it in the Electronic Communications Act, 2013;

“functionality” in relation to digital content includes region coding, restrictions incorporated for the purposes of digital rights management, and other technical restrictions;

“goods and services” means goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption;

“identifiable person” means a person who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to that person’s physical, physiological, mental, economic, cultural or social identity;

“personal data” means any information relating to an identified or identifiable natural person (‘data subject’).

Scope

- 3. (1) These Regulations apply to business and to consumer electronic commerce.
- (2) These Regulations are not applicable to transactions between individuals acting in a non-business capacity.

Objectives

- 4. The objectives of these Regulations are to regulate –
 - (a) fair business practices;
 - (b) advertising and marketing;
 - (c) disclosure of the identity and location of suppliers;
 - (d) disclosure of the terms and conditions of contracts;
 - (e) the implementation of mechanisms for concluding contracts for the establishment of fair and effective procedures for handling complaints and resolving disputes;
 - (f) the adoption of privacy principles;
 - (g) the use and disclosure of information about payment; and
 - (h) security and authentication mechanisms;

Compliance with these Regulations

5. Any business engaging in electronic commerce directed at consumers or any business or industry association whose members engage in electronic commerce directed at consumers shall comply with the provisions of these Regulations.

Existing laws and regulations

6. (1) These Regulations are in addition to and not a replacement for other obligations that may exist as a result of consumer protection in terms of other laws, codes of conduct and regulatory mechanisms.
- (2) Compliance with the requirements of this Regulation does not exempt a business from compliance with any other such obligations.
- (3) In the event of an inconsistency with any existing law, that law will take precedence over the provisions of the Regulations.

Fair business practices

7. (1) A Supplier shall adopt fair business practices when dealing with consumers.
- (2) In particular sections 4, 5, 7, and 10-19 of the Fair Trading Act of 2001 which prohibits suppliers from engaging in any conduct that amounts to –
- (a) engaging in misleading or deceptive conduct generally;
 - (b) misleading the public in relation to goods or services;
 - (c) making false representation in respect of goods or services in connection with the supply of goods or services or with promotions;
 - (d) engaging in misconduct in relation to the forgery or false application of trademarks;
 - (e) offering of gifts and prizes with the intention of not providing them as offered;
 - (f) trading, supplying or arranging for the supply of trading stamps or stamp schemes;
 - (g) engaging in bait advertising;
 - (h) inducing another to engage in referral selling;
 - (i) demanding or accepting payment without intending to supply the goods or services as ordered;
 - (j) making misleading representations regarding certain business activities;
 - (k) the use of harassment or coercion in relation to the supply of or payment for goods and services;
 - (l) promoting or operating a pyramid scheme; and
 - (m) importing goods bearing false trade descriptions or false trade marks
- shall apply with necessary modifications to any supplier offering electronic commerce in Swaziland.

Advertising and marketing

8. A Supplier shall –
- (a) ensure that advertising and marketing material is clearly identifiable as such and can be distinguished from other content, including editorial comments, terms and conditions of contracts and independent product reviews, where this may not be reasonably apparent;
 - (b) ensure that the suppliers of the supplier are identifiable from advertising; and
 - (c) be able to substantiate advertising or marketing claims, where consumers could be reasonably expected to rely upon such claims.

Information on the identification of suppliers

9. (1) A Supplier shall provide consumers with accurate, clear and easily accessible information that is sufficient to enable –
- (a) identification of suppliers involved in a particular transaction; and
 - (b) prompt, easy, and effective communication with suppliers regarding such a transaction.
- (2) The information referred to in subsection (1) shall include –
- (a) the name under which suppliers trades and, where the supplier is a registered company, the name of the company;
 - (b) the physical and postal address of the supplier;
 - (c) e-mail address, telephone number and other contact information where enquiries can be directed;
 - (d) any relevant statutory registration or licence numbers; and
 - (e) whereas supplier publicises its membership of any relevant self-regulatory scheme, business association, dispute resolution organisation or other certification body, the supplier shall provide consumers with appropriate contact details, an easy method of identifying that membership and of accessing the relevant codes of practice of that body.

Contractual Information

10. (1) A supplier engaged in electronic commerce shall provide a consumer with a clear and complete text of the terms and conditions of the contract in a manner that enables consumers to make fully informed decision whether or not to enter into the transaction.
- (2) Information concerning the terms and conditions of a contract shall be clearly identified and distinguished from advertising and marketing material.
- (3) Information shall be clear, accurate, easily accessible, and provided in a manner that gives consumers an adequate opportunity for review before entering into the transaction.
- (4) A supplier shall provide all information online which they are required to provide offline either by law or by any relevant code of practice to which they subscribe.

- (5) Where there is a legislative or other mandatory regime for the disclosure of contractual information, compliance with that regime is sufficient to meet the obligation of these Regulations in relation to the disclosure of that information.
- (6) The manner of providing this information shall allow the consumer to retain a copy of the information.
- (7) All information that refers to costs shall indicate the Swazi currency (lilangeni).

Information on transactions

11. Where applicable and appropriate given the nature of the transaction, the information relating to a particular transaction shall include –
- (a) the functionality, including applicable technical protection measures, of digital content;
 - (b) any relevant compatibility of digital content with hardware and software that the supplier is aware of or can reasonably be expected to have been aware of;
 - (c) mandatory safety and health care warnings that a consumer would get at the offline point of sale;
 - (d) as far as the calculation of the costs payable is concerned either –
 - (i) an itemisation of all costs collected by suppliers, or
 - (ii) where the total cost of a transaction cannot be ascertained in advance, a statement that a total cost cannot be provided and a description of the method that will be used to calculate it, including any recurrent costs and the methods used to calculate them;
 - (e) notice of the existence of other costs to the consumer that are not collected by suppliers, this may include delivery, postage, handling and insurance and, where it would be reasonably known to suppliers, including taxes and other levies;
 - (f) in the case of a contract of indeterminate duration or a contract containing a subscription, the total costs per billing period or (where such contracts are charged at a fixed rate) the total month costs;
 - (g) notice on-going costs, fees and charges and methods of notification for changes of those costs, fees and charges;
 - (h) if limited, the period for which the offer is valid;
 - (i) any restrictions, limitations or conditions of the contract, such as geographic limitations or parental or guardian approval requirement for minors;
 - (j) the terms of delivery;
 - (k) conditions related to termination, return, exchange, cancellation and refunds;
 - (l) details of any applicable cooling-off period or right of withdrawal, including the conditions, time limit and procedure for exercising that right;
 - (m) the circumstances under which the consumer loses the right to cancel;

- (n) any conditions related to contract renewal or extension;
- (o) details of any explicit warranty provisions offered by the manufacturer, supplier, or business;
- (p) details of any after-sales service provided; and
- (q) details of how to access complaints and dispute procedures referred to in regulations 17-18.

(3) where applicable, that the consumer will have to bear the cost of returning the goods in case of cancellation, and if the goods, by their nature, cannot normally be returned by post, the cost of returning the goods.

Conclusion of contract

12. (1) A supplier shall implement mechanisms that allow an opportunity for the consumer to –
- (a) review and accept or reject the terms and conditions of the contract;
 - (b) identify precisely the product or service consumers intend to purchase or avail;
 - (c) identify and correct any errors or modify the order, and
 - (d) retain a record of any purchase or order, transaction confirmation, acceptance of any offer they make.
- (2) A supplier shall promptly send the consumer a confirmation that the contract has been concluded on a durable medium.
- (3) The confirmation shall include all the information referred to in regulation 11, unless the supplier has already provided that information to the consumer on a durable medium prior to the conclusion of the distance contract.
- (4) If the contract is for the supply of digital content and the consumer has given the consent and acknowledgement referred to in regulation 13, the confirmation shall include confirmation of the consent and acknowledgement.
- (5) Subject to regulation 13, the confirmation shall be provided within a reasonable time after the conclusion of the contract, but in any event –
- (a) not later than the time of delivery of any goods supplied under the contract, and
 - (b) before performance begins of any service supplied under the contract.
- (6) For the purpose of sub-regulation (5), the confirmation is treated as provided as soon as the supplier has sent it or done what is necessary to make it available to the consumer.

Supply of digital content in the cooling-off period

13. (1) A consumer is entitled to cancel without any reason and without penalty any transaction and any related credit agreement for the electronic supply of digital content within seven days after the date of conclusion of the contract.
- (2) Under a contract for the electronic supply of digital content, the supplier shall not begin the supply of the digital content before the end of the cooling-off period unless –

- (a) the consumer has given express consent to the supply of the digital content; and
- (b) the consumer has acknowledged that the right to cancel the contract under sub-regulation (1) will be lost.
- (3) The consumer ceases to have the right to cancel such a contract if the consumer has given the consent and acknowledgement required by sub-regulation (2), and the electronic delivery of the digital content has begun before the end of the cooling-off period.
- (4) The consumer bears no cost for supply of the digital content, in full or in part, in the cooling-off period, if –
 - (a) the consumer has not given prior express consent as required by sub-regulation 2(a); or
 - (b) the consumer has not given acknowledgement as required by sub-regulation 2(b); or
 - (c) the supplier failed to provide confirmation as required by regulation 12(4).

Privacy

- 14. (1) A supplier shall respect consumers' privacy in collecting and handling consumers' personal data.
 - (2) A supplier may collect, collate, process or disclose any personal data pertaining to a consumer if –
 - (a) the consumer consents;
 - (b) it is necessary for the conclusion or performance of a contract to which the consumer is a party;
 - (c) the supplier is obliged by law to collect, collate, process or disclose the personal data;
 - (d) doing so protects a legitimate interest of the consumer;
 - (e) it is necessary for the proper performance of a public law duty to a public body;
 - (f) it is necessary for pursuing the legitimate interests of the supplier of a third party to whom the information is supplied.
 - (3) A supplier may not electronically request, collect, collate, process or store personal data which is not necessary for the lawful purposes for which the personal information is required.
 - (4) A supplier shall disclose in writing to the consumer the specific purpose for which any personal data is being requested, collected, collated, processed or stored.
 - (5) The supplier may not use the personal information for any other purpose than the disclosed purpose without the express written permission of the consumer, unless the supplier is permitted or required to do so by law.
 - (6) The supplier shall, for as long as the personal data is used and for a period of at least one year thereafter, keep a record of the personal data and the specific purpose for which the personal data was collected.
 - (7) A supplier may not disclose any of the personal data held by it to a third party, unless required or permitted by law or specifically authorised to do so in writing by the consumer.

(8) The supplier shall, for as long as the personal data is used and for a period of at least one year thereafter, keep a record of any third party to whom the personal data was disclosed and of the date on which and the purpose for which it was disclosed.

(9) The supplier shall delete or destroy all personal data which is no longer in use in terms of sub-regulation (6) unless the supplier is permitted or obliged by law to retain the personal data.

(10) A party may use personal information to compile profiles for statistical purposes and may freely trade with such profiles and statistical data, as long as the profiles or statistical data does not constitute personal data.

(11) A supplier shall provide a consumer with clear and easily accessible information online about the way in which they retain and use personal information and personal data.

Payment

15. (1) A supplier shall make available to consumers payment mechanisms that are easy to use and offer a level of security that is appropriate for the method and level of payment.

(2) The supplier shall ensure that the consumer, when placing the order, explicitly acknowledges that the order implies an obligation to pay.

(3) If placing an order entails activating a button or a similar function, the supplier shall ensure that the button or similar function is labelled in an easily legible manner only with the words 'order with obligation to pay' or a corresponding unambiguous formulation indicating that placing the order entails an obligation to pay the supplier.

(4) A supplier shall ensure that consumers have access to information on –

(a) the available methods of making payments;

(b) the security of those payment methods in clear, simple language in order to assist consumers to judge the level of risk in relying on those methods; and

(c) how to effectively use those methods.

(5) A supplier shall implement reasonable measures to update the payment mechanisms they use to ensure the level of security offered is maintained at an appropriate level over time.

Security and authentication

16. (1) A supplier shall –

(a) ensure that consumers have access to information about the security and authentication mechanisms that the business uses in clear, simple language in order to assist consumers to judge the level of risk in relying on those systems;

(b) provide a level of security appropriate for protecting consumers' personal and payment information;

(c) provide appropriate levels of security for identification and authentication mechanisms to be used by consumers;

(d) not encourage consumers to provide confidential information in a manner that is considered insecure; and

- (e) implement reasonable measures to update the security and authentication mechanisms they use to ensure the level of security offered is maintained at an appropriate level over time.

Internal complaint handling mechanisms

- 17. (1) A supplier shall set up and make operational an internal complaint handling mechanism for consumer complaints.
- (2) The internal complaint handling mechanism shall address and respond to consumer complaints and difficulties –
 - (a) within a reasonable time;
 - (b) in a reasonable manner;
 - (c) free of charge to the consumer; and
 - (d) without prejudicing the rights of the consumer to seek legal redress.
- (3) A supplier shall provide clear and easily accessible information to consumers on complaint handling procedures.
- (4) The supplier shall resolve the consumer's complaints within five days of the lodging of the complaint.
- (5) If a consumer is unsatisfied with the resolution provided by supplier's internal complaint handling mechanism, the suppliers shall provide the consumer with information regarding the alternative dispute resolution offered by the Commission.

Alternate dispute resolution (ADR)

- 18. (1) The alternate dispute resolution mechanism shall be accessible, efficient; and, without prejudice to judicial redress.
- (2) The Commission shall appoint ADR adjudicators for the investigation and resolution of any consumer complaints which have been brought to the attention of the Commission in terms of Section 36(1) of the Act.
- (3) The Commission shall appoint qualified persons as ADR adjudicators and an adjudicator shall be a person with a legal background and has knowledge and understanding of the communication industry.

Dispute

- 19. (1) A consumer may initiate a dispute by submitting a complaint in electronic format to the Commission.
- (2) The consumer shall –
 - (a) request that the dispute be subjected to adjudication;
 - (b) provide name, physical address (*a domicilium citandi et executandi* within the Kingdom of Swaziland), email address and telephone and fax numbers, and of any representative authorised to act on behalf of the consumer in the dispute;

- (c) provide details of the supplier including the name and all contact information of the suppliers to enable the Commission to send a copy of the dispute to the supplier as provided for in terms of regulation 20;
- (d) specify, in detail, the facts on which the dispute is based;
- (e) annex any documentary or other evidence, together with a schedule indexing such evidence; and
- (f) submit any other evidence available in electronic form.

Notification of Dispute

20. (1) The Commission shall ensure that the dispute complies with the provisions of those regulations, and that the prescribed fee has been paid.
- (2) If the dispute complies with these regulations, the Commission shall forward a copy of the dispute to the supplier and this date shall be the date of commencement of the dispute.
- (3) If the Commission finds that the dispute does not comply with these regulations, the Commission shall immediately notify the consumer of the nature of the non-compliance.
- (4) The consumer shall within five days correct any non-compliance, failing which the dispute is deemed to have been withdrawn, and can only be cured by the filing of a new dispute.

Response

21. (1) The supplier shall within twenty (20) days of the date of commencement of the dispute submit a response in electronic format to the Commission.
- (2) The response shall –
- (a) respond to the statements and allegations contained in the dispute and detail any grounds to prove that the supplier is not in breach;
 - (b) provide the name, physical address (*a domicilium citandi et executandi* within the Kingdom of Swaziland), e-mail addresses and the telephone and fax numbers of the supplier and of any representative authorised to act on behalf of the supplier in the dispute;
 - (c) identify any other legal proceedings that have been commenced or terminated in connection with or relating to the subject matter of the dispute;
 - (d) annex any documentary or other evidence, together with a schedule indexing such evidence; and
 - (e) submit by any other evidence available in electronic form.
- (3) If the supplier does not submit a response, the ADR panel shall decide the matter based on the dispute contemplated in regulation 19(1).

Reply

22. (1) The consumer may within five days of receiving the supplier's response from the Commission, submit a reply to the Commission.
- (2) The reply referred to in sub-regulation (1) shall be submitted in electronic format.

Impartiality and Independence

23. (1) The Commission shall appoint a DR adjudicator once the time period of the submission of a reply as contemplated in regulation 22(1) has expired.
- (2) The ADR adjudicator shall be impartial and independent and the adjudicator shall disclose to the Commission any circumstances affecting impartiality or independence before accepting an appointment to decide a dispute.
- (3) If at any stage during the dispute, circumstances arise that may affect the impartiality or independence of the ADR adjudicator, then the adjudicator shall promptly disclose such circumstances to the Commission.
- (4) If an ADR adjudicator has disclosed circumstances that may affect the impartiality or independence of the ADR, the Commission shall determine whether an alternate ADR adjudicator should be appointed.

General Powers of the ADR adjudicator

24. (1) An adjudicator shall ensure that the parties are treated with equality and that each party is given a fair opportunity to present its case.
- (2) An adjudicator shall ensure that the dispute is handled as expeditiously as possible.
- (3) An adjudicator shall determine the admissibility, relevance, materiality and weight of the evidence.

Further statements

25. In addition to a dispute, a response, and a reply, the ADR adjudicator may request further statements or documents relevant to the dispute, response or reply from either of the parties.

Default

26. (1) If a party does not comply with any of the time periods established by this ADR procedure or the Commission, the ADR adjudicator shall proceed to a decision on the dispute.
- (2) If a party does not comply with any provisions of or requirement under this procedure or any request from the Commission, the ADR adjudicator may, in the absence of exceptional circumstances, draw such inference therefrom, as the adjudicator considers appropriate.

ADR Adjudicator Decisions

27. (1) ADR adjudicator shall decide a dispute in accordance with the principles of law, on the basis of the dispute, response, and reply, if any, and further statements or documents submitted in accordance with these Regulations.
- (2) The ADR adjudicator shall forward its decision on the dispute to the Commission within 14 days of its appointment under regulation 23(1).
- (3) The decision shall be in writing, provide the reasons on which it is based, indicate the date on which it was rendered and identify the name of the adjudicator.

Appeal

28. (1) Either party shall have the right to appeal a decision made by an adjudicator by submitting a statement of intention to appeal with the Secretary of the Appeals Board.

(2) The procedure before the Appeals Board presented in Section 47 of the Act, shall apply *mutatis mutandis* to appeals in terms of this Regulation.

Burden of proof

29. (1) In case of dispute about the supplier's compliance with any provisions of this Regulation, it is for the supplier to show that the provision was complied with.

Penalties

30. (1) The Appeals Tribunal shall after hearing both parties make an appropriate order and such order shall also include an order as to costs.

(2) The Commission shall publish a list of applicable costs for purposes of sub-regulation (1).

Applicable law and forum

31. (1) Where a supplier specifies an applicable law or jurisdiction to govern any contract or dispute, it should clearly and conspicuously state that information at the earliest possible stage of the consumer's interaction with the supplier.

(2) A supplier or its subsidiary based in Swaziland that enters into a contract with a consumer whom the supplier reasonably believes is resident in Swaziland, based information or address details supplied by the consumer, should specify that the governing law of that contract is the law of Swaziland and that disputes arising under the contract shall be determined by courts or tribunals of Swaziland.

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MINISTER FOR INFORMATION, COMMUNICATIONS AND TECHNOLOGY