

The Federal Democratic Republic of Ethiopia
DIGITAL ETHIOPIA FOUNDATIONS PROJECT

Title: Local Expert with Expertise in Ethiopian Competition Law
Ref. No: MINT/DE/IC/C-21-3/21
Organization: Ethiopian Communications Authority (ECA)
Project: Ethiopia Digital Foundations Project
Location: Addis Ababa
Duration: 3 months
Salary: Attractive/Negotiable
Expected Start Date: AUG 2021

TERM OF REFERENCE (TOR)
(CONSULTING SERVICES – INDIVIDUAL CONSULTANT)

“ETHIOPIA: A LOCAL EXPERT WITH EXPERTISE IN ETHIOPIAN COMPETITION LAW TO PROVIDE ASSISTANCE TO THE ETHIOPIAN COMMUNICATIONS AUTHORITY (ECA) IN CONDUCTING A MARKET REVIEW AND A DETERMINATION OF SIGNIFICANT MARKET POWER [SMP]”

The Ethiopian Communications Authority (ECA) is one of the beneficiaries of the World Bank funded *Digital Ethiopia Foundations Project* (P171034), which is implemented by a project implementation unit in the Ministry of Innovation and Technology (MInT) of the Government of the Federal Democratic Republic of Ethiopia (FDRE). The *Digital Ethiopia* project aims to increase the inclusiveness and affordability of digital services and digital job creation in Ethiopia .

The ECA is seeking to employ a team of Individual Consultants (up to four) to provide technical assistance in support of the telecom reform process. Specifically, these terms of reference are for a local expert with expertise in Ethiopian competition law to assist ECA in conducting a Market Review and making a determination of **Significant Market Power (SMP)** in the provision of telecommunication network infrastructure and the operation of telecommunication services in Ethiopia. This is in line with the Communications Services Proclamation No. 1148/2019, which gives ECA the power to conduct a determination of which licensed operators are exercising SMP ¹ in particular parts of the telecommunications market.

A. BACKGROUND

Following the Proclamation in 2018, Ethiopia has embarked on the journey of reconstructing incumbent by injecting competition into a formally monopoly market. In a Policy Options paper for Ethiopia’s telecommunications sector adopted in September 2018, the Government has determined that the market for telecom services in Ethiopia is to be opened progressively to competition, starting with cellular services and internet. The introduction of private participation in Ethio Telecom would be carried out in parallel with the market liberalization process.

¹ As defined in Proclamation No. 1148/2019, the Significant Market Power (SMP) indicates “*the ability to materially affect the price or supply in the relevant market for communications service as a result of either control over essential facilities or used of a person’s position in the market*”.

Three important steps in this process of progressive liberalization taken so far are the establishment of ECA as an independent sector regulator in September 2019, the award of a second license to the Global Partnership for Ethiopia in June 2021, a consortium led by Safaricom (Kenya), and the launch of a call for expressions of interest in the partial privatization of the incumbent operator, Ethio Telecom, on June 15 2021, with 40 percent of its assets due to be sold to a strategic partner.

During the process of awarding the second license, GPE was unable to reach agreement with Ethio Telecom on key issues, such as interconnection rates, and fees for infrastructure sharing and co-location. Accordingly, ECA made an interim determination of the rates that would apply. As part of this decision, ECA undertook to carry out a formal determination of SMP within 90 days of the issue of the license award, which took place on June 8, 2021. Thus, ECA is seeking to recruit additional expertise from up to four individual consultants to assist with this task. As a rough guide, these individual consultants may comprise:

- An international expert with expertise in telecom law and regulation;
- An international expert with expertise in the economics of telecommunications;
- A local expert with expertise in Ethiopian law on competition;
- A local expert with expertise in market analysis.

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The Communications Proclamation sets out the basis on which ECA may intervene, as required. This determination of SMP allows ECA, *inter alia*, to oblige the SMP operator to provide co-location (Article 44.1) and sharing of active and passive infrastructure (Article 44.7) to other licensed operators that so request it. Similarly, the Proclamation gives ECA the mandate to require operators with SMP to publish their tariffs (Article 45.3) and to submit them for approval (Article 45.4). In each case, ECA is encouraged to conduct public stakeholder consultations in its determination (Articles 34-37) and there is a process of review and appeal (Articles 38-40).

In addition to the Communications Proclamation, the ECA issued, on July 9, 2021, the Telecommunications Competition Directive No. 798/2021 – see: <https://eca.et/wp-content/uploads/2021/07/Telecommunications-Competition-Directive-No.-798-2021-English.pdf>. The Directive sets out the procedures to be followed in the designation of SMP including the conduct of a market review, the determination of relevant markets, the assessment of market power, anti-competitive practices, the regulation of mergers and acquisitions, and remedies and sanctions.

B. OBJECTIVES OF THE ASSIGNMENT

The overall objective of this assignment is to assist the authority to develop a consistent regulatory practice for the ECA to conduct a market review and to impose SMP remedies when a lack of effective competition is caused by the dominance of one or more operators. ECA should conduct a market review, and based on this analysis, the consultants should propose simple, flexible, technology-neutral regulatory decisions that serve to drive long-term sector growth.

Specifically, the consultants contracted for the assignment will be expected to conduct a competition law review and to develop the SMP guidelines with a good guidance on the parameters² that could be tracked to assess the level of competition in a given market, or sub-market. ECA should be able to carry out its duties related to the analysis of markets susceptible to *ex ante* regulation and the assessment of significant

² In particular, effective competition can be measured by numerous indicators, such as price levels, quality of products and services, variety and choice, the level of investment and innovation among others.

market power under the Ethiopian regulatory framework. As part of this process, ECA will expect to conduct one or more public stakeholder consultations. The consultants will be expected to assist with this process and the development of SMP guidelines. The consultants will also liaise with the team working on the analysis of price caps, under a related study.

C. SCOPE OF SERVICES

The service required under this assignment include market research and analysis; legal advice and technical support.

Task 1: Market Review:

The starting point of any analysis should be a market review of the telecommunications market and a segmentation into relevant sub-markets (for instance, mobile, fixed, satellite, mobile money, wholesale fiber, telecom agents, device sales etc). Research also needs to be carried out into possible competition law that prohibit, in certain circumstances, agreements which prevent, restrict or distort competition . The terms used in relation to these provisions and the concepts relevant to their application should be considered. There are also barriers of a legal nature, as in particular spectrum policy can affect new market entry. The SMP determination should follow the methodology set out in the Telecommunications Regulation Directive. The activities under this task should include, but not be limited to:

- Conducting data collection to characterize the relevant markets for retail and wholesale telecommunications services; considers that agreements may be regarded as anti-competitive, in conjunction with legal instruments, competition law of Ethiopia
- Conducting data analyses, defining relevant retail and wholesale markets, for the purpose of identifying operators with significant market power (SMP);
- Drafting a report on relevant market definitions for the purpose of designation of operators with SMP; how the ECA could apply and enforce competition law in telecom market
- Advising ECA on public consultations for this report.

This market analysis should take into account demand-side and supply-side substitutability from the end-user's perspective over the review period, based on existing market conditions and their likely evolution as competition takes hold. In assessing whether an operator has SMP, the consultants, working as a team, and consider past and present data in their analysis when such data is relevant to the developments in that market over the next review period. In this respect, both static and dynamic considerations should be reflected by the consultants in the market analysis, with a view to imposing appropriate regulatory remedies in the event of market failure. The aim should be to promote competition and contribute to the development of Ethiopian market.

Task 2: Recommendations on designation of Significant Market Power

Based on the market review conducted under Task 1 above, the consultants should further assist the ECA in the designation of market power. Tasks to be conducted include, but would not be limited to:

- Based on the designation of markets conducted under Task 1, assisting ECA in identifying operators with SMP, with single or collective market power; in particular how to apply and enforced competition law in particular cases should be investigated.
- Considering types of anti-competitive agreements.
- Providing recommendations for remedies for operators with SMP. In determining whether an agreement has an appreciable effect on competition, provisions may be applied by the ECA. These

potential remedies should be based on regulatory principles set out in Proclamation and the Competition Directive.

- Advising ECA on public consultations for this proposed designation of SMP;
- Drafting a final report and determination of relevant telecommunication markets and designation of operators with SMP. Scope of provisions, terms used in the provisions and the concepts relevant to their application should be dealt with in SMP Guideline.
- Advisory as needed on consultation of report and designation of SMP operators.

Based on this designation of SMP operators, the consultants shall assist the authority to determine whether the market is prospectively competitive in the absence of wholesale regulation, thus direct and indirect competitive constraints should be taken into account, irrespective of whether these constraints result from networks, services or/and applications. In this work, the consultants should work closely with the team working on price caps and other possible remedies.

D. KEY TASKS

Research and assessment need to be carried out to measure the market power of licensed operators. The market power can be measured based on various factors. The relevant parameters in this assessment will include market share, related economies of scope, potential to provide inputs, etc. In parallel, the market share can provide a useful first indication for the ECA. SMP is currently held by one company in the market (single dominance) in Ethiopia (rather than collective/joint dominance). However, there are some market segments, such as rural mobile communications or wholesale fiber, where there are some additional players, such as Hidasie Telecom, Ethiopian Railways Corporation and Ethiopian Electric Power. Experience suggests that the higher the market share and the longer the period of time over which it is held, the more likely it is that it constitutes an important preliminary indication of SMP.

The study should pay attention to the ability of a new entrant to increase its market share quickly and reflect on whether the market is competitive and whether entry barriers can be overcome within a reasonable timeframe.

In conducting the analyses that are part of this TOR, the consultants will provide an opinion on whether or not their recommendations have any positive or negative impacts on the market; by encouraging regulatory intervention, including limiting the market power of the incumbent operator which may be denying interconnection, imposing price discrimination, pursuing discriminatory pricing, overcoming the threat of predatory pricing and so forth. The study should identify short-term and long-term strategies that would stimulate overall economic growth and generate additional tax revenue. Tasks to be conducted by the consultants should include

- Organising a division of labor among team members and ECA staff;
- Proposing a segmentation of the anti-competitive agreements, the provisions, and related markets, for the purposes of determining SMP;
- Conducting the appreciable effect on competition test, in determining whether prohibition apply, the ECA will take into account the applicable law and territorial scope;
- Reviewing specific market characteristics, such as market development and dominance; taking into account both Supply³ and Demand factors⁴

³ Supply factors may include market structure, project homogeneity, symmetries, degree of innovation, entry barriers, excess capacity) etc.

⁴ Demand factors may include customer characteristics, demand evolution, switching costs and buyer power etc.

- Assessing the implications of the market power using the criterion listed in the Competition Directive;
- Conducting a cost-benefit analysis of potential remedies, providing an evaluation of their strengths and weaknesses, as well as guidance on when, how, and with what data they can be most usefully employed in impact assessment
- Considering the legal exception regime such as withdrawal of block exemptions, Parallel exemption under the Act, or Individual exemptions
- Promoting transparency⁵ in market analysis, by providing more clarity about how each criterion might be applied;
- Studying the consequences of infringement including voidness, financial penalties , third party action;
- Benchmarking market development, based on other indicators in similar economies; deep dive into examples of agreements which might appreciably restrict competition⁶ ;
- Develop SMP Guidelines, a tool to ensure closer alignment between ECA practice and consistency with competition law; Setting clear principles that can be applied in regulation;
- Assisting the Authority in determining whether the market is prospectively competitive in the absence of wholesale regulation, based on the findings of the study ;
- Research on the existence of competitive constraints on the price setting behavior of the service providers concerned, assuming profit maximizing behavior in the core business of operators;
- Assisting the Authority in conducting public stakeholder consultations, and analysing the inputs received from interested parties;
- Performing other tasks related as requested by ECA.

E. DELIVERABLES

The assignment is expected to be delivered in three months from contract signing. The Consultant will deliver the following outputs:

Deliverable	Due Date
Inception Report	Contract Signing + 2 Weeks
Draft report on Task 1 – Market review	Contract Signing + 6 Weeks
Draft report on Task 2 – Recommendations on SMP	Contract Signing + 2 Months
Final consolidated SMP report for the assignment	Contract Signing + 3 Months

In the inception report, the consultant should propose a scope and outline of the research to be conducted. Tasks including the market review, assessment, and recommendations on SMP will be included as an independent chapter “the competition law” in the final consolidated SMP guidelines. The consultant is also expected to work as a team and expected to contribute in producing chapter(s) overarching determination and remedies of SMP in Ethiopia.

F. QUALIFICATIONS & SELECTION CRITERIA

⁵ By reaching a common understanding, monitoring, and detecting possible deviations.

⁶ The types of agreements which have the object or effect of directly or indirectly fixing prices, fixing trading conditions, sharing markets, limiting or controlling production or investment, collusive tendering (bid-rigging), joint purchasing or selling, sharing information, exchanging price information, exchanging non-price information, restricting advertising, setting technical or design standards and Other anti-competitive agreements.

In applying for the consultant positions, candidates should submit an up-to-date CV and a covering letter indicating which of the four positions they are applying for, or which additional skills and expertise they may bring. Applicants for the assignment must demonstrate experience in the following areas:

- Direct work experience in the analysis of SMP in telecommunications and/or related markets;
- A minimum of 5 years of professional experience on issues pertaining to the anti-competitive agreements of telecom markets;
- Experience with the practice of analysis of telecommunications regulation, particularly regarding market dominance;
- Knowledge of recent spectrum licensing processes, especially in Africa;
- Some knowledge of the Ethiopian telecommunications market and its history;
- Experience working in developing countries, preferably in Africa, ideally in Ethiopia itself
- Ability to describe complex knowledge in succinct language and simple terms.
- A degree in law or a relevant discipline.

However, all suitably qualified consultants are welcome to apply and the final composition of the team will reflect the need to mix external expertise with that of ECA's own staff.

G. TERMS OF CONTRACTS AND REPORTING

The duration of the contract will vary according to the role for which each consultant is applying but is estimated at around 30-40 days over a duration of up to three months from the date of contract signature. Ideally, the consultant should spend a majority of this time in-country, health and travel restrictions permitting, and be willing to work during Ethiopian business hours if working remotely.