

The Electronic and Postal Communications (Online Content) Regulations, 2020

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Introduction

In July 2020, the Tanzania Communication Regulatory Authority (the TCRA) issued the Electronic and Postal Communications (Online Content) Regulations, 2020 (the Regulations), which are now in force and revoke the Electronic and Postal Communications (Online Content) Regulations, 2018 (the 2018 Regulations).

In this legal alert, we have analysed the implications of the Regulations on issues relating to:

1. Which stakeholders the Regulations apply to
2. License categories
3. Restrictions on prohibited content
4. Complaint handling and liability
5. The Cyber Crimes Act, 2015

While the Regulations in large part mirror the 2018 Regulations, there are a handful of changes that are particularly important for stakeholders, users of online content and licensed and non-licensed hosts and providers of online content services. The expansive description in the Regulations of what constitutes prohibited content coupled with the potential liability that may attach for failure to comply with certain directives requires stakeholders to carefully assess their practices and procedures from a compliance perspective. Although the Regulations are an improvement on the 2018 Regulations, in terms of offering clarity on certain previously vague provisions, they still leave several key questions open to interpretation.

Who do the Regulations Apply to?

The Regulations apply to users¹, online content service providers², internet service providers, and application services licensees³. The regulations also apply to 'any other related online content,' which extends the scope of application to all online content that is accessible to or by the public, whether for a fee or otherwise, and which is intended for consumption in or originated from Tanzania.

Although the application of the Regulations is quite broad, it is interesting to note that the introduction of a new definition of 'content' carves out private communications. The Regulations define 'content' to mean information in the form of speech or other sound, data, text or images whether still or moving except where transmitted in private communications.

In addition, whereas the 2018 Regulations did not define 'online content providers,' the Regulations have defined 'online content service' to mean content broadcasting to the public through internet websites, application software, forums, blogs, weblogs, microblogs, public account, instant messaging tools, online live streaming, aggregators and other related platforms. The addition of this definition finally offers clarity as to what constitutes an online content service. In line with the definition of 'content,' which carves out private communications, we note that the definition of online content service also expressly refers to content 'broadcasting to the public,' suggesting that the legislative intent is not to cover private communications.

License Categories

The Regulations prohibit a person from providing 'online content services' without obtaining a license from the TCRA. Four categories of licenses have been introduced:⁴

- a. licences predominantly for provision of news and current affairs issued to an online content service provider whose content covers news, events and current affairs;
- b. licences predominantly for provision of entertainment content issued to an online content service provider whose content covers music, movies, series, plays, drama, comedy, sports and any other related entertainment content;
- c. licences predominantly for provision of education and religious content issued to an online content service provider whose content covers religious information and content that aims at educating; and

¹ Under the Regulations, 'users' means a person or legal entity accessing online content whether by subscription or otherwise.

² Under the Regulations, 'online content service provider' means a person who provides online content service.

³ Under the Regulations, 'application services licensee' means a licensee of the TCRA in the category of application services license limited to only the provisions of online content or facilitation of online content producers.

⁴ For the purpose of the licensing categories, 'predominant' means content not below 85 percent of the licensed category measured every week.

- d. simulcasting⁵ licences issued to mainstream broadcasters with national coverage rights.

The specific license categories, the list of documents that must accompany the application (tax identification number, tax clearance certificate, national identity card, etc.), and the application form and fee schedule set out in the First and Second Schedules of the Regulations, respectively, suggest that the Regulations are aimed at requiring local online content service providers to be registered with the TCRA. Although the licensing provisions do not appear to extend to foreign online platforms such as YouTube or Twitter, which as far as we are aware are not registered with the TCRA, the Regulations do still impose certain obligations on such entities to the extent that their content is accessible to or by the Tanzanian public. How the Regulations would practically apply to such international entities remains unclear.

Restrictions Relating to Prohibited Content

Prohibited Content

The Regulations define prohibited content more broadly than the 2018 Regulations. The Third Schedule to the Regulations sets out detailed descriptions of what constitutes prohibited content for the purposes of the Regulations (Prohibited Content, with such descriptions falling into the following categories:

- i. sexuality and decency
- ii. personal privacy and respect to human dignity
- iii. public security, violence and national safety
- iv. criminal activities and illegal trade activities
- v. health and public safety
- vi. protection of intellectual property rights
- vii. respect to religion and personal beliefs
- viii. public information that may cause public havoc and disorder
- ix. use of bad language and disparaging words
- x. false, untrue (misleading content)

It is important for online content users, online content service providers, internet service providers, application services licensees and online content hosts to familiarise themselves with the Third Schedule to ensure compliance with the Regulations.

⁵ 'Simulcasting' means broadcasting content of a mainstream media on an online platform. An 'online platform' means any internet outlet where people can get news, entertainment, education, religious or other related information such as online television, radio, social media and blogs.

Obligations on Licensees and Non-licensees

The Regulations unequivocally subject licensees, subscribers and users of online content to content-related restrictions. Understandably, the requirements applicable to licensees are more onerous and licensees are subject to several obligations, including ensuring that online content is safe, secure and does not contravene the provisions of any written law, using moderating tools to filter Prohibited Content, taking corrective measures for objectionable or Prohibited Content, and ensuring that Prohibited Content is removed immediately upon being ordered by the TCRA. Subscribers and users of online content, on the other hand, are responsible and accountable for the information they post in an online forum, social media, blog and any other related media. The Regulations also expressly provide that all persons are prohibited from publishing any Prohibited Content.

A strict reading of the Regulations seems to suggest that 'online content hosts'⁶ do not fall within the category of 'online content service providers' and accordingly are not subject to the TCRA's licensing requirements. Online content hosts would, however, still be required under the Regulations to adopt a code of conduct for hosting contents and to ensure that Prohibited Content is removed upon notification by the TCRA or affected party. Based on the foregoing, it is our interpretation that even foreign online platforms that may not be subject to TCRA's licensing requirements but may be considered online content hosts, could technically still be held liable for Prohibited Content on their platforms which is not removed upon notification. How such notification would be enforced against a foreign online platform remains unclear.

Removing Prohibited Content

As we have highlighted above, the Regulations require online content service providers and online content hosts to remove Prohibited Content upon notification. It is imperative for stakeholders to clearly understand who is authorised to issue the notification (referred to more generally as a 'take down request' (TDR)) and on what grounds, the form in which the TDR needs to be issued and served and the procedures for responding to and/or removing content, as well as potential liability for failure to comply.

⁶ 'Online content host' means any server that hosts or provides access to online accessible content which may include file transfer protocol servers, telnet servers, web hosting companies and web servers.

We have set out below a high-level summary of these considerations, followed by a more in-depth analysis in the next section covering what constitutes unlawful content and the complaint handling procedures prescribed in the Regulations.

Recipient of TDR	Issuer of TDR and Grounds for Issuance	TDR Issuance and Response/ Removal Procedures	Potential Liability for Failure to Remove Content
Licensees (online content service providers)	Issuer: TCRA Grounds: Prohibited Content	Format of TDR: Not prescribed Service of TDR: Not prescribed Recipient's Response: Prohibited Content to be removed 'immediately' upon being ordered by TCRA	Suspension or revocation of license; upon conviction liable to a fine of not less than TZS 5 million (approx. USD 2,160) or imprisonment for a term of not less than twelve months or both;
	Issuer: Content committee Grounds: Where the content committee determines that a breach is committed under the Regulations	Format of TDR: Not prescribed Service of TDR: Not prescribed Recipient's Response: Removal of the content	receipt of a warning letter from the content committee; and/or issue an apology to the public and the victim of complained content
	Issuer: Any person Grounds: In relation to any matter connected with Prohibited Content	Format of TDR: Not prescribed Service of TDR: Not prescribed Recipient's Response: 12 hours to resolve a user-initiated complaint	
Licensees (application services licensee)	Issuer: TCRA or affected party Grounds: Prohibited Content	Format of TDR: Not prescribed Service of TDR: Not prescribed Recipient's Response: Within 2 hours notify its subscribers to remove the Prohibited Content and if the subscriber fails to remove Prohibited Content within 2 hours, the licensee shall suspend or terminate the subscriber's access account	Same as above
Non-licensees (e.g. online content host)	Issuer: TCRA or affected party Grounds: Prohibited Content	Format of TDR: Not prescribed Service of TDR: Not prescribed Recipient's Response: Prohibited Content to be removed upon notification by the TCRA or affected party	Same as above except suspension or revocation of license would not be applicable

Complaint Handling and Liability

User-flagged Unlawful Content

A key question arising in relation to TDRs is whether liability only attaches if clearly unlawful content isn't removed and if so, who is authorised to determine whether the content is in fact clearly unlawful?

Online service providers have millions (and in some cases billions) of subscribers and users. The social benefit of subscribers or users being able to flag or report certain content is undeniable; however, it poses a practical challenge for the service provider. For example, if a user flags or reports certain content as unlawful, the online content service provider or host may not be in a position to determine whether the content in question is, in fact, unlawful or not (whereas a court or competent authority, such as the TCRA, would be). Would a service provider in that instance still be liable for failing to remove user-flagged content that is not clearly unlawful?

Although the Regulations do not directly address this question, we have analysed the two levels of complaint handling in the Regulations, which are detailed below, and our view is that users are not authorised to determine whether the content is in fact clearly unlawful.

Under the Regulations, the first level of the complaint process authorizes any person to file a complaint to an online service provider, while the second level involves escalating unresolved complaints to the authorities. The Regulations provide that where an online content provider fails to resolve a complaint within twelve hours, the aggrieved person may, within thirty days from the date of filing the complaint, refer the complaint to the TCRA. The process seems to suggest that it would be unlikely for a service provider to be held liable for failing to remove user-flagged content which is not clearly unlawful because that comes under level one (in which a competent authority, such as the TCRA or a court, has not yet decided on the unlawfulness of the content). The liability would therefore likely only attach after a service provider fails to comply with an order from a competent authority, such as the TCRA, rather than a user. In the subsequent section, we have analysed the complaint handling procedures to be followed by the TCRA.

Complaint Handling by a Competent Authority

A welcome addition to the Regulations is a more rigorous process for complaint handling by a competent authority. As outlined above, the Regulations prescribe two levels of complaint handling, which in some cases are similar to the procedure set out in the 2018 Regulations; however, there are some differences. First, the Regulations provide that a person aggrieved by a complaint handling decision of the TCRA may appeal to the Fair Competition Tribunal. The 2018 Regulations did not expressly set out this recourse.

Second, the Regulations provide that where a breach under the Regulations is committed by a licensee, the TCRA may subject the licensee to the content committee. The 2018 Regulations only made reference to the TCRA's obligation to handle a complaint through the content committee procedures and did not touch on

the powers of the content committee itself. It is worth noting that the Regulations do not provide any information on the composition of the committee; however, they do provide that upon determination the content committee may take one or more of the following actions: (i) issue a warning to the licensee; (ii) require the licensee to issue an apology to the public and the victim of the complained content; (iii) order removal of the content; or (iv) impose a fine. It is unclear from the drafting of the law whether the TCRA is also authorised to take the above-mentioned actions. Notably, the Regulations are silent as to whether the decisions of the content committee can be appealed to the Fair Competition Tribunal, in the way that the decisions of the TCRA can be.

A strict reading of the relevant section in the Regulations seems to suggest that the above-mentioned actions are reserved for the content committee; however, our interpretation based on a broad reading of the Regulations in their entirety is that the TCRA may also take these actions. Furthermore, the fact that the TCRA is not required to refer the matter to the committee (the Regulations state that the TCRA may subject the licensee to the content committee) also suggests that either the content committee or the TCRA can make a final determination with regard to a breach of the Regulations.

Finally, the Regulations provide that the TCRA must handle complaints filed to an online content service provider in relation to any matter connected with Prohibited Content in accordance with Content Committee Procedures Rules. By comparison, the 2018 Regulations only referred more generally to the obligation of the TCRA to handle complaints through the 'content committee procedures,' and those procedures were not expounded upon. It is unclear whether these rules have been drafted as they are not currently publicly available; however, we are hopeful that they will assist in ensuring a streamlined and balanced complaint assessment and resolution process.

In summary, these provisions serve as a positive first step towards creating comfort that appropriate dispute resolution mechanisms are in place; however, clarifications are required on certain issues highlighted above, in order for stakeholders to have a complete understanding of the implications of these provisions.

Cyber Crimes Act

It is important to note that in addition to the Regulations, the Cyber Crimes Act, 2015 (the **Cyber Crimes Act**) also prescribes online content restrictions and authorises the issuance of TDRs by a competent authority.

The Cyber Crimes Act provides that among other stakeholders, a 'hosting provider'⁷ is not liable for the information stored at the request of a user of the service, "*on condition that the hosting provider immediately removes or disables access to the information after receiving an order from any competent authority or court to remove specific illegal information stored; or upon becoming aware of illegal information stored in means than a competent authority, shall immediately inform the relevant authority.*" For the purposes of this section, the TCRA is the competent authority.

⁷ Under the Cyber Crimes Act, 'hosting provider' means a person who provides an electronic data transmission service by storing information provided by a user of the service.

With regard to 'service providers',⁸ the Cyber Crimes Act provides that a person may, through a take-down notification, notify a service provider of any data or activity infringing the rights of the recipient or a third party, any unlawful material or activity, or any other matter conducted or provided contrary to the provisions of any written law. A service provider who fails to act on a take-down notification received under that section may be charged as the person who initiated the content. Furthermore, any person who communicates a take-down notification to a service provider and the service provider fails to act upon the notification may notify a competent authority of the failure to take-down and the competent authority may take down or order the service provider to act on the take-down notification or take any other measures to resolve the matter.

It is interesting to note that the two levels of complaint handling in the Regulations, are fairly similar to the two levels of complaint handling in the Cyber Crimes Act. Under the Cyber Crimes Act, the first level involves any person providing a service provider with a take-down notification and the second level involves escalating an unaddressed notification to a competent authority. Accordingly, even under the Cyber Crimes Act, liability in relation to unlawful content would likely only attach after a service provider fails to comply with an order from a competent authority.

Finally, whereas the Regulations do not describe the format of a valid TDR, the Cyber Crimes Act expressly provides for the requirements that a TDR must satisfy. A TDR must be in a permanent medium addressed by the complainant to the service provider or its designated agent and must include:

- a. the full names and address of the complainant;
- b. the signature of the complainant;
- c. identification of the right that has allegedly been infringed;
- d. identification of the material or activity that is claimed to be the subject of unlawful activity;
- e. the remedial action required to be taken by the service provider in respect of the complaint;
- f. a statement that the complainant is acting in good faith; and
- g. a statement by the complainant that the information in the take-down notification is to his knowledge true or correct.

Conclusion

In summary, the application of the Cyber Crimes Act is much broader than the Regulations. As a result, even service providers or hosts in the online space that may not be required to be licensed with the TCRA are encouraged to better understand the implications of these laws on their business so that they can take the appropriate steps to ensure compliance.

⁸ Under the Cyber Crimes Act, 'service provider' means a person or party that makes information system services available to third parties.

Key contacts

Should you have any questions on the impact of the Electronic and Postal Communications (Online Content) Regulations, 2020, please do not hesitate to contact [Shemane Amin](mailto:sda@africalegalnetwork.com) or [Dominic Rebelo](mailto:djr@africalegalnetwork.com).



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