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GENERAL NOTICE

Independent Communications Authority of South Africa

General Notice

333 Electronic Communications Act (36/2005): Regulations pursuant to section 67 (4) (d) 3 30848

GENERAL NOTICE

NOTICE 333 OF 2008



INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA

REGULATIONS PURSUANT TO SECTION 67(4)(d) OF THE ELECTRONIC COMMUNICATIONS ACT NO. 36 OF 2005 (THE ACT)

1. The Independent Communications Authority of South Africa ("the Authority") hereby gives notice in terms of section 4(4) of the Electronic Communications Act No. 36 of 2005 ("the Act") of its intention to prescribe regulations in terms of section 67(4)(d) of the Act and section 4(3)(j) of the Independent Communications Authority of South Africa Act No. 13 of 2000 as amended ("The ICASA Act").
2. Interested persons are invited to submit written representations on these draft Regulations by no later than **16h00 on 5 May 2008**, by post, hand delivery, facsimile transmission, or electronic transfer (in Microsoft Word or PDF) for the attention of:

Thamsanqa TM Kekana

ICASA

164 Katherine Street

Pinmill Farm: Block B

Sandton

or

Private Bag X10002

Sandton

2146

Fax: (011) 321-8233

Telephone: (011) 321-8542

E-mail: tkekana@icasa.org.za; cc mnkopane@icasa.org.za

3. Persons making written representations are requested to indicate if they wish to make oral submissions in the event that the Authority decides to conduct oral hearings in terms of section 4(6) of the Act, the duration thereof not to exceed one hour.
4. All written representations submitted to the Authority pursuant to this notice will be made available for inspection by interested persons at the Authority's library and copies of such representations may be obtained on payment of the prescribed fee.
5. At the request of any person who submits written representations pursuant to this notice, the Authority will determine whether such representations or any portion thereof is confidential in terms of section 4D of the ICASA Act. If the request for confidentiality is refused, the person making the request will be allowed to withdraw such representations or portion thereof.
6. With respect to written representations or portions thereof determined to be confidential in terms of paragraph 5 above, ICASA may direct that the public or any member or category thereof, shall not be present while any oral submissions relating to such representations or portions thereof are being made; provided that interested parties must have been notified of this intention and allowed to object thereto. The Authority will consider the objections and notify all interested parties of its decision.
7. The final regulations will be published in the Government Gazette.

**PARIS MASHILE
CHAIRPERSON**

Prescription of the methodology declaring licensees to be in possession of significant market power pursuant to section 67(4)(d) of the Electronic Communications Act No. 36 of 2005

1. Introduction

- 1.1 The Independent Communications Authority of South Africa (“the Authority”) is required to promulgate regulations in terms of section 67(4) of the Act, defining the relevant markets and market segments, as applicable, that pro-competitive measures may be imposed upon licensees having significant market power (“SMP”) where the Authority determines such markets or market segments have ineffective competition. In particular, and with regards to the declaration of licensees as possessing SMP, section 67(4)(d) of the Act requires the Authority to promulgate regulations which detail the factors which the Authority must consider in declaring a licensee to be in possession of SMP, taking into consideration the factors detailed in section 67 (5) of the Act.
- 1.2 Section 67(5) of the Act details the factors which the Authority must consider in declaring a licensee to possess SMP in a relevant market or market segment
- 1.3 The Authority is of the view that the factors to be considered in declaring a licensee to possess SMP are mutually exclusive and may individually suffice in the declaration of a licensee as possessing SMP. However, where determining whether or licensee possesses SMP, the Authority shall evaluate all the factors detailed in section 67(5) of the Act so as have a comprehensive perspective of the presence, or possession of SMP by a licensee in a relevant market.

2. Designation of significant market power

- 2.1 The Authority is of the view that a licensee which has been declared to possess SMP has the capacity to conduct itself to an appreciable extent independently of the market, its customers and its competitors. Such a licensee possesses the capacity to exercise market power in a relevant

market, and is capable of distorting the conditions of competition is a relevant market or neighbouring, associated or related market.

- 2.2 The factors detailed at section 67(5) serve to outline the structural position of a licensee in a relevant market which would possess the capacity to conduct itself to an appreciable extent independently of the market, its customers and its competitors. Further elaboration on the contours of the factors detailed in section 67(5) follows below:

3. Dominant position as amounting to significant market power

The concept of dominance

- 3.1 Section 1 of the Act defines dominance as

“...having the same meaning given to that term in section 7 of the Competition Act.”

- 3.2 In this regard, Section 7 of the Competition Act provides that

“A firm is dominant in a market if –

*it has at least 45% of that market;
it has at least 35%, but less than 45%, of that market, unless it can show that it does not have market power; or
it has less than 35% of that market, but has market power.”*

- 3.3 The Authority acknowledges that the Act equates “dominance” with SMP. Section 7(a) of the Competition Act prescribes dominance on a statistical basis by having recourse to the quantification of the market share in the possession of a firm. Furthermore, and consistent with jurisprudence, the Authority is of the view that the prescription of dominance by section 7(a) of the Competition Act amounts to an irrefutable ascription of dominance. That is to say, that there exists no latitude to countenance the ascription of dominance in the event that a firm possesses a market share of 45% or more in the relevant market.

- 3.4 It is the Authority's view that the ascription of dominance in section 7 of the Competition Act excludes considerations pertaining to behavioural dominance and is solely concerned with the ascription of structural dominance. However, designating a firm to be in a dominant position by virtue of section 7(a) of the Competition Act, in itself denotes that such a firm possesses the capacity to conduct itself to an appreciable extent independently of the market, its customers and competitors. That is say, that the Competition Act ascribes structural dominance with the capacity of a firm to exercise market power through the possession of a market share of at least 45% in the relevant market.

4. Information or data for the calculation of market shares

- 4.1 In calculating market share for the purpose of designating dominance within the meaning of the Act, the Authority shall have recourse to the guiding principles set out in the Department of Trade and Industry, "Determination of Threshold Notice".¹ Such guiding principles ascribe the respective valuation of assets and annual turnover of entities relative to the total size of the proposed relevant market.

5. Financial Statements

- 5.1 The Authority shall calculate the valuation of assets and the annual turnover of licensees in accordance with the South African Generally Accepted Accounting Practice ("G.A.A.P."). Financial statements used as a basis for calculating assets or turnover of a firm –

5.1.1 Must be the firm's audited financial statements, if, -

(i) In terms of any law, the firm is required to produce such statements, or

(ii) the firm has audited statements for the relevant period, and

5.1.2 Otherwise, must be prepared in accordance with G.A.A.P.

¹ General Notice No. R 1942 in Government Gazette No. 20388, 20 August 1999.

6. Valuation of assets

6.1 The asset value of a firm at any time is based on the gross value of the firm's assets as recorded on the firm's balance sheet for the end of the immediately previous financial year. In particular –

6.1.1 The asset value equals the total assets less any amount shown on that balance sheet for depreciation or diminution of value; The assets include all assets on the balance sheet of the firm including any goodwill or intangible assets included in the balance sheet;

6.1.2 No deduction may be taken for liabilities or encumbrances of the firm, and

6.1.3 Assets in the Republic of South Africa include all assets arising from activities in the Republic.

6.2 If, between the date of the financial statements being used to calculate the asset value of a firm, and the date on which that calculation is being made, the firm has acquired any subsidiary company, associated company or joint venture not shown on those financial statements, or divested itself of any subsidiary company, associated company or joint venture shown on those statements, then the following items must be added to the calculation of the firm's asset value if these items should in terms of G.A.A.P. be included in the firm's asset value:

6.2.1 The value of those recently acquired assets, and

6.2.2 Any asset received in exchange for those recently divested assets.

6.3 The following items may be deducted in calculating the firm's asset value if these items were included in the firm's asset value:

6.3.1 The value of those recently divested assets at the date of their divestiture, and

6.3.2 Any asset that was shown on the balance sheet and was subsequently used to acquire the recently acquired asset.

7. Calculation of annual turnover

7.1 The annual turnover of a firm is the gross revenue of that firm from income in, into or from the Republic of the South Africa, arising from the following transactions and events as recorded on the firm's income statement for the immediately previous financial year:

7.1.1 The sale of goods;

7.1.2 The rendering of services, and

7.1.3 The use by others of the firm's assets yielding interest, royalties and dividends.

7.2 When calculating turnover the following amounts may be excluded:

7.2.1 Any amount that is properly excluded from gross revenue in accordance with G.A.A.P.;

7.2.2 Taxes, rebates, or any similar amount calculated and paid in direct relation to revenue, as for example, sales tax, value added tax, excise duties, and sales rebates, may be deducted from gross revenue, (and revenue excludes gains arising from non current assets and from foreign currency transactions).

7.3 If, between the date of the most recent financial statements being used to calculate the turnover of a firm, and the date on which that calculation is being made, the firm has acquired any subsidiary company, associated company or joint venture not shown on those financial statements, or divested itself of any subsidiary company, associated company or joint venture shown on those financial statements:

7.3.1 The turnover generated by those recently acquired assets must be included in the calculation of the firm's turnover if this turnover should in terms G.A.A.P. be included in the turnover of the firm, and

7.3.2 The turnover generated by those recently divested assets in the immediately previous financial year may be deducted from the firm's turnover if this turnover was included in the turnover of the firm.

7.4 In the event that the financial statements used as a basis for calculating turnover or the turnover included pursuant to regulation 7.3.2 are for more or less than twelve months, the values recorded on those statements must be pro-rated to the equivalent of twelve (12) months.

8. Control of essential facilities as amounting to significant market power

8.1 An essential facility is defined in the Act as:

"...an electronic communications facility or combination of electronic communications or other facilities that is exclusively or predominantly provided by a single or limited number of licensees and cannot feasibly (whether economically, environmentally or technically) be substituted or duplicated in order to provide a service in terms of this Act."

8.2 With regards to the characterisation of an essential facility, the Authority shall have regard to the Regulations prescribed from time to time by the Authority pursuant to section 43(8) of the Act. These Regulations prescribe the electronic communications networks, electronic communications facilities and associated electronic communications facilities which have been determined by the Authority from time to time as constituting an essential facility within the meaning of the Act.

8.3 The Authority is of the view that the exercise of effective control over an essential facility by a market participant inherently confers upon such a market participant the capacity to exercise market power and engage in unilateral market conduct or behaviour which may be exclusionary and discriminatory. The purpose of the assessment of whether a market participant exercises effective control over an essential facility is to discern the degree to which the control of an essential facility serves to confer to such a market participant the capacity to exercise market power.

9. Vertical relationship which harms competition as amounting to significant market power

- 9.1 The evaluation of the vertical integration which may harm competition concerns an examination of the extent to which, as a result of vertical integration, a licensee possesses the capacity to conduct itself to an appreciable extent independently of the market, its customers and competitors. Furthermore, the manner in which the nature of vertical integration may harm competition is where such vertical integration enables a licensee to leverage its market position in an upstream relevant market so as to distort the conditions of competition in a downstream relevant market, within which the market participant also operates.
- 9.2 The Authority is of the view that the manner in which vertically integrated market participants may distort the conditions of competition in the downstream relevant market is through raising their respective rivals' costs, cross-subsidisation between products and services offered in the upstream relevant market and the downstream relevant market, and bundling and tying of products and services.
- 9.3 In evaluating the nature and extent of vertical integration, the Authority is of the view that the relevant upstream market and the relevant downstream market must be delineated and the degree of effective competition prevalent in both markets must be discerned. Furthermore, the Authority is of the view that the degree of direct and indirect structural integration of market participants operating in the upstream relevant market and downstream relevant market must be considered.
- 9.4 In addition, the Authority shall consider the existence of any structural links which may amount to cross-directorship, cross-ownership and any long-term contractual arrangements between market participants operating in the upstream relevant market and the downstream relevant market.

10. Procedures for the declaration of a licensee as possessing SMP

- 10.1 The declaration that a licensee possesses SMP in a relevant market shall be preceded by a process of defining the relevant market in accordance with the Regulations promulgated by the Authority pursuant to section 67(4)(a).
- 10.2 In declaring a licensee to possess SMP, the Authority shall cause a notice to be published in the Gazette detailing the following:
- 10.2.1 A draft determination with a factual finding of the relevant market within which the licensee operates, and
- 10.2.3 A draft determination with a factual finding that a licensee possesses SMP, having taken into consideration the factors detailed in section 67 (5) of the Act as elaborated upon within these Regulations;
- 10.3 The Authority shall cause a notice to be published in the Gazette detailing the draft determination for a period of thirty (30) days and solicit written comments from interested parties.
- 10.4 Upon request, the Authority may extend the period within which the submission of written comment must reach the Authority.
- 10.5 The Authority shall within thirty (30) days of receiving written comments pursuant to regulation 10.3 publish the final determination in the Gazette.
- 10.6 The final determinations issued by the Authority are binding upon the licensees and such licensees may not have recourse to the Complaints and Compliance Committee regarding any aspect of the final determination.
- 10.7 A final determination issued by the Authority shall not preclude a licensee from instituting an action before a competent court of law.
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