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GENERAL NOTICE

Independent Communications Authority of South Africa

General Notice

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GENERAL NOTICE

NOTICE 335 OF 2008



INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA

REGULATIONS PURSUANT TO SECTION 67(4)(a) 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) 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

or Private Bag X10002

Pinmill Farm: Block B

Sandton

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

REGULATIONS FOR THE DEFINITION OF THE RELEVANT MARKET

1. Introduction

- 1.1 Section 67(4) of the Electronic Communications Act No. 36 of 2005 ("the Act") requires the Authority to

"...prescribe regulations defining the relevant markets and market segments, as applicable, that pro-competitive conditions may be imposed upon licensees having significant market power where the Authority determines such markets or market segments have ineffective competition."

- 1.2 The prescriptive nature of section 67(4) requires the Authority to undertake an analysis of the particular relevant markets or market segments ("relevant markets") and ascertain whether or not such relevant markets are characterized by effective or ineffective competition and to determine which licensees possess significant market power ("SMP"). In the event that such relevant markets are characterised by ineffective competition and that a licensee possesses SMP, the Authority may impose various pro-competitive conditions.
- 1.3 The Authority is of the view that the conceptual approach to the definition of the relevant market definition must be specified so as to provide the framework of the manner in which the Authority is to undertake the definition of the relevant market.

2. Conceptual framework for the definition of a relevant market

- 2.1 The conceptual framework adopted by the Authority in defining the relevant market is consistent the approach adopted by numerous regulatory authorities. This approach entails the delineation of the

relevant markets through the conceptual framework of the “*hypothetical monopolist test*”. Simply put, this test attempts to measure the effect of a certain price increase on the customers of a given hypothetical monopolist.

2.2 This requires an identification of the narrowest possible market and considers whether or not it would be profitable for the hypothetical monopolist which is profit maximising, to impose a “small but significant, non-transitory increase in its price” (“SSNIP”). Assuming that consumers are likely to respond to such a price increase by considering alternative substitute products, the analysis entails the identification of such products that would serve as competitive constraints to the unilateral increase in price by the hypothetical monopolist. In the event that substitution is viable, such an increase in price is likely to be unprofitable and consequently the market boundary must be expanded to include such substitute products. Furthermore, the analysis also entails the identification of those producers or suppliers who would be in a position to offer such substitute goods or services.

2.3 While the SSNIP test provides a conceptual framework for conducting a market definition exercise, the Authority is cognisant that there are also other numerous quantitative or analytical tools which may assist to sustain the conceptual framework of the SNNIP test. Such tools include, among other things:

2.3.1 Critical Loss Analysis,

2.3.2 Price Correlation Analysis,

2.3.3 Price Elasticity Analysis, and

2.3.4 Diversion Ratio Analysis.

2.4 The following regulatory authorities have adopted this conceptual framework in undertaking a market definition exercise:

2.4.1 The South African Competition Commission and the Competition Tribunal (“Competition Authorities”);

2.4.2 The European Commission;

2.4.3 The New Zealand Commerce Commission;

2.4.4 The Bundeskartellamt;

2.4.5 The Australian Competition and Consumer Commission (“ACCC”);

2.4.6 The Canadian Competition Bureau;

2.4.7 The Irish Competition Authority;

2.4.8 The United Kingdom Competition Commission;

2.4.9 The United Kingdom Office of Fair Trading (“the OFT”), and

2.4.10 The United States Department of Justice and the Federal Trade Commission (“the Agencies”).

3. Information and data required for market definition

3.1 The Authority shall adopt a flexible approach to empirical data which may be used for the purposes of determining the appropriate contours of a relevant market. To undertake such a process effectively, the Authority submits that it would be inappropriate to adopt a hierarchical and rigid approach regarding differing sources of data and information

and the nature of such data or information.

4. The concept of a relevant market

- 4.1 The definition of the relevant market has reference to both the product and geographic dimensions. It is important to note that “a relevant market” for the purpose of competition analysis has an economic context which differentiates it from the ordinary meaning of the word. A “relevant market” is that area of close substitution and competition between one or more licensees for the products or services rendered, which, in the presence of an appropriate incentive, may induce substitution from the perspective of the consumer.

5. The relevant product or service market

- 5.1 In defining the relevant market, the Authority shall primarily concern itself with identifying the competitive constraints which are faced by licensees considered to be actual or potential competitors to the hypothetical monopolist. The purpose of defining a relevant market is to further ascertain those licensees which are effectively competing with each other and which are capable of constraining each other's respective market conduct. Moreover, defining markets enables the identification of those licensees which, in exercising some competitive constraints, are capable of ensuring that a licensee is unable to conduct itself to an appreciable extent independent from its competitors, its customers and the market.

6. Demand substitutability

- 6.1 The relevant product or services market comprises all those products and/or services which may be regarded from a demand perspective as being interchangeable or substitutable due to their intrinsic characteristics, functional qualities, price and their perceived utility. An analysis of the interchangeability or substitutability of products or

services must be discerned from the consumer's perspective. This is so, since the SSNIP analysis conceives the anticipated reaction from the demand perspective of the consumers in the event that a price increment of between 5 – 10% is effected by a hypothetical monopolist. It is this anticipated reaction by consumers that will guide the Authority in discerning whether or not there exist other actual competitors or products which are capable of providing or rendering similarly interchangeable or substitutable product or service.

7. Price discrimination and the definition of the relevant market

7.1 In defining the relevant market, the Authority shall consider the extent to which, or the potential for licensees to price discriminate between customers. Where a significant proportion of customers are likely to be subjected to price discrimination, the Authority shall consider whether or not it would be appropriate to define additional and discrete relevant markets. Such an exercise will be guided by the following considerations, inter alia:

7.1.1 The particular uses for the products or services;

7.1.2 Whether or not there exists a defined and distinct group of customers, and

7.1.3 Whether or not such defined and distinct groups of customers are captive to such products or services. Captivity of sales may be characterised through high switching costs being a significant deterrent to substitutability.

8. Factors to be considered when defining the relevant product or services market

8.1 In defining the relevant product or service market, the Authority is of the view that the following factors must be considered:

8.1.1 The degree of product differentiation,

8.1.2 The chain of substitution between differentiated goods or services, and

8.1.3 The existence of common pricing constraints.

9. Product differentiation

9.1 The Authority is cognisant of the commercial imperatives of licensees differentiating their respective products or services. Differentiation may take place through:

9.1.1 Technical specifications;

9.1.2 Branding;

9.1.3 Packaging;

9.1.4 Warranties, and

9.1.5 Distribution channels.

9.2 On the basis of such differentiation, the respective products or services may vary to the extent that consumers may consider them to be effective substitutes and therefore belonging to the same product market. The Authority shall therefore have recourse to any factor which may be indicative of some degree of differentiation in ascribing

whether or not products or services are differentiated or undifferentiated.

9.3 The Authority shall consider such products or services to be sufficiently undifferentiated where consumers determine their purchasing decisions or patterns predominantly on the observable price at the point of purchase (undifferentiated product or service markets).

9.4 The Authority considers differentiated products or services to be those which customers determine their purchasing decisions or patterns on the premises of the inherent characteristics of the products or services and their respective prices, and where each product or service offering amounts to an imperfect substitute for another product or service offering.

9.5 The Authority is aware of the inherent challenges in engaging in precise delineation of the relevant product or service market. This is because the different products or services may vary in the degree to which they amount to perfect substitutes. In these circumstances, the Authority shall consider the extent to which the respective differentiated nature of the products or services serve to impose competitive constraints on each other. As a guiding principle, the less such products or services serve as perfect substitutes, the more likely that such products would impose lesser competitive constraints on each other.

10. Chain of substitution with differentiated products or services

10.1 The Authority is mindful that there may exist a chain of substitutes, in which the more widely positioned or spaced the products or services, the less closely they act as substitutes. The converse may hold, where the more closely spaced such products or services are, the more likely that such products or services may impose competitive constraints on each other. Furthermore, there may not exist an obvious break in the

chain of substitutability, and therefore no obvious point at which the relevant market may be sufficiently determined.

10.2 In undertaking market definition with differentiated products or services, the Authority shall have recourse to the following:

10.2.1 The relative positioning of the products or services in the market;

10.2.2 Consumer preferences;

10.2.3 The cross-elasticity's of demand between the products or services, and

10.2.4 The scope for product re-positioning and new entry.

10.3 In seeking to sustain the market definition where products or services are differentiated, the Authority may have recourse to the following, including but not limited to:

10.3.1 Any marketing studies concerning the relevant market which may serve to reveal consumer preferences regarding the different characteristics of the products or services, and the ability for those characteristics individually to command price premiums and consumer switching patterns between such products or services;

10.3.2 Consumer surveys which reveal consumer preferences, consumption patterns and consumer willingness to switch between different products or services in response to a change in price;

10.3.3 Analyses of the technical similarities and dissimilarities between the respective products or services, and

10.3.4 Scanner data which provides data on consumer purchasing choices relative to a range of brands, prices and promotional activities.

10.4 In the event that the above sources of information are unavailable, the Authority may rely on other pertinent sources of information, including benchmarking exercises and the Authority's own research and observations regarding consumer behaviour and consultations with the relevant market participants.

11. Common pricing constraints

11.1 In defining the relevant product and geographic market, the Authority shall consider the existence of a common pricing constraint across a particular category of customers, particular category of services or particular geographic catchment areas. Furthermore, the Authority shall consider the extent to which the existence of a common pricing constraint across potentially differentiated geographic catchment areas serves to contribute to such catchment areas as constituting the same relevant geographic market.

12. The relevant geographic market

12.1 In discerning the geographic contours of the relevant market, the Authority seeks to ascertain the geographic catchment area within which the effective competitive constraints exist amongst actual competitors. In this regard, the Authority shall consider licensees to be in the same relevant geographic market when the conditions of demand and supply for the goods or services rendered by such licensees are sufficiently homogeneous and which are readily distinguishable and appreciably distinct from conditions of effective competition existing in other geographic catchment areas.

13. Factors to be considered when defining the relevant geographic market

13.1 In defining the relevant product or service market, the Authority is of the view that the following factors must be considered:

13.1.1 Demand interchangeability or substitutability, and

13.1.2 Supply interchangeability or substitutability.

14. Demand interchangeability or substitutability

14.1 The conceptual application of the SNNIP analysis entails a thought experiment as to the likely reaction by consumers of a price increment of between 5 – 10%. Essentially, this postulates the potential switching behaviour of consumers to a small but significant medium to long term increment in price and further seeks to ascertain whether or not there exists other licensees, in other geographic areas, that are capable of constraining the unilateral market conduct of a hypothetical monopolist who effects such a price increment.

14.2 Simply stated, the question to be answered is whether the customers of a particular licensee would consider switching to offerings in other geographic areas in the face of a SNNIP. In the event that switching were sufficient to render the price increment unprofitable due to the corresponding loss of sales or revenues, then the market definition must be expanded to include these geographic areas. This speculative experiment would be continued until such time that such an increment in price would be profitable, at which point, a relevant geographic market can be said to be defined.

15. Supply interchangeability or substitutability

- 15.1 In defining the relevant market, factors related to supply-side substitutability may also be taken into account. This is particularly relevant where licensees are able to effectively switch their service offering in the short term without incurring significant additional costs or risks in response to a SNNIP by a hypothetical monopolist. The Authority may also consider whether or not there exists a profit incentive for a potential competitor to incur such additional costs in responding to a SNNIP by a hypothetical monopolist.
- 15.2 The Authority may also consider the time which a licensee would take in incurring such additional costs and modifying their current service offering so as to adequately position themselves to be an effective competitor to the hypothetical monopolist effecting a SNNIP. It is the Authority's view that the time period required would be between 12 to 18 months.
- 15.3 Additional factors the Authority may consider include, inter alia:
- 15.3.1 Whether or not the additional costs incurred by potential competitors are significant and are sunk;
- 15.3.2 The time period required to effect the necessary modifications and alterations to existing electronic communications facilities and/or electronic communications networks so as to adequately position a potential competitor to effectively compete with a hypothetical monopolist effecting a SNNIP;
- 15.3.3 The technical feasibility of effecting the supply-side substitutability;
- 15.3.4 The marketing costs associated with establishing a credible position in the relevant market, and

15.3.5 The degree to which supply-side substitutability has occurred in the past.

16. Analysis of potential market entrance by a potential competitor and barriers to entry

16.1 In discerning the whether or not there exists any competitive constraints in a relevant market, the Authority considers it pertinent to evaluate the existence of current and potential competitors who are capable of providing or asserting some degree of competitive constraint on the hypothetical monopolist.

16.2 *Likelihood of entry*

16.2.1 The Authority is of the view that the mere likelihood or postulation of entry is an insufficient constraint to a hypothetical monopolist effecting a SSNIP. In order for a potential competitor to effectively constrain a hypothetical monopolist from effecting a SSNIP successfully, such market entry must be likely in commercial terms. In discerning the commercial likelihood of market entry, the Authority will evaluate, *inter alia*, the likelihood that such entrance would be premised on the incentive of a reasonable prospect of attaining satisfactory returns on initial investment.

16.3 *Sufficiency and the extent of entry*

16.3.1 Market entry which occurs at a localised level and relatively low volumes of sales in comparison to the market incumbents is unlikely to exert the type of competitive constraints upon the hypothetical monopolist which would serve to constrain a SSNIP. Similarly, the Authority would consider that small-scale entry or instances where the market entrant supplies and

renders a service to relatively few customers would not be considered as a competitor likely to exert the competitive constraints on the hypothetical monopolist so as to counter the attainment of a SSNIP.

16.4 *Timeliness of market entry*

16.4.1 In order for market entry to be feasible and amount to an effective countervailing constraining effect on a hypothetical monopolist effecting a SSNIP, the Authority is of the view that such entry ought to occur between a period of 18 – 24 months from the postulated date of effecting a SSNIP. The period within which entry ought to occur may vary due to other factors such as licensing decisions to be taken by the Authority as well as, where relevant, the availability of access to the radio frequency spectrum.

17. **Obligation to submit information to the Authority**

- 17.1 Licensees must, from time to time and upon request by the Authority, submit such information that the Authority request for the purposes defining the relevant market.
- 17.2 In requesting information pursuant to regulation 17.1, the Authority shall stipulate the period within which such information must be submitted.
- 17.3 Licensees who fail to adhere to a request for information from the Authority shall be liable to a fine not exceeding R 100 000.00 for each day that the requested information has not been submitted.
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