

14 July 2017

**Independent Communications Authority of South Africa**

**For attention of The Chairperson: Priority Markets Committee**

Per email: [prioritymarkets2017@icasa.org.za](mailto:prioritymarkets2017@icasa.org.za)

Dear Sir / Madam

**Questions of clarity: ICASA Notice to conduct priority markets study**

1. ISPA refers to the "Notice to conduct priority markets study" published in Government Gazette 40945 ("**the Priority Markets Notice**") and sets out below questions of clarity for consideration and response by the Authority.

**Questions of clarity**

2. Is the Authority of the view that it is required by the provisions of the ECA and/or any related legislation to undertake or complete the process contemplated in the Priority Markets Notice before it can commence an investigation under section 67(4) of the Electronic Communications Act 36 of 2005 ("**the ECA**") into any specific market?
3. Would it be legally permissible to conduct the priority markets study process and an investigation into a specific market under section 67(4) of the ECA in parallel?
4. What is the position of the Authority with regard to the policy direction issued by the Minister of Telecommunications and Postal Services ("**the Minister**") to the Authority "to prioritize the commencement and conclusion of an inquiry and the prescription of regulations as contemplated in section 67(4) of the Electronic Communications Act to ensure effective competition in broadband markets"?
5. Is it the position of the Authority that the market for wholesale mobile broadband services and/or the retail market for mobile broadband services is/are not (a) priority market(s)?

**Context**

6. The Priority Markets Notice states as follows:

*1.4 In order to exercise its powers in terms of section 67(4) of the ECA to conduct market reviews and make regulations imposing pro-competitive conditions on licensees which have significant*

*market power in those markets or market segments where there is ineffective competition, and thus a market failure, the Authority considers that it is appropriate to undertake a process to identify broad markets and market segments in the electronic communications sector and to assess which of those markets or market segments are susceptible to ex ante regulation.*

*1.5 Of those markets or market segments which are considered to be susceptible to ex ante regulation, the Authority will make a determination as to which or those markets or market segments are considered to be priority markets in relation to which the Authority plans to initiate market reviews in terms of section 67(4) of the ECA in due course. The identification of priority markets in this manner is envisaged in the Guideline for Conducting Market Reviews which was published by the Authority in March 2010.*

*1.6 In conducting this inquiry, the Authority is exercising its power in terms of section 4B(1)(e) of the ICASA to conduct an inquiry with regard to the exercise of its powers, functions and duties in terms of section 67(4) of the ECA. The findings made by the Authority at the conclusion of the inquiry will inform the exercise in due course of the Authority's powers in terms of section 67(4) of the ECA when the Authority conducts market reviews in relation to specific identified priority markets.*

## **ISPA's position**

7. ISPA's view is that:

- 7.1. The Authority is not obliged to identify priority markets prior to commencing an investigation under section 67(4) of the ECA.
- 7.2. ISPA notes that the Authority in the above-quoted excerpt does not state that it is obliged by law to first undertake a study into priority markets: rather it is the case that the Authority "considers it appropriate" to do so.
- 7.3. It is evident, in any event, that a priority market exists as identified in the Ministerial Policy Direction to the Authority published in Government Gazette 39781 on 4 March 2016, titled "Policy Direction to the Independent Communications Authority of South Africa on effective competition in broadband markets and the reduction of data costs" ("**the Broadband Competition Policy Direction**").

7.4. This Direction states:

**2. Policy Direction**

*2.1 The Authority is hereby directed, in terms of section 3(2) of the Electronic Communications Act, 2005 (Act No. 36 of 2005) to prioritize the commencement and conclusion of an inquiry and the prescription of regulations as contemplated in section 67(4) of the Electronic Communications Act to ensure effective competition in broadband markets.*

7.5. It is already clear that the Authority is not acting with the urgency called for in the Broadband Competition Policy Direction.

7.6. ISPA understands that the Authority is required only to consider policy directions issued by the Minister, and that it is not required as a matter of law to implement such policy directions. If this is the position of the Authority – which seems apparent given the delay since the Broadband Competition Policy Direction was gazetted and the fact that the Authority now wishes to conduct an inquiry into priorities – then it is also bound by law to provide reasons for its position.

7.7. ISPA refers further to the “Guideline for Conducting Markets Reviews” issued by the Authority on 8 March 2010 (“**the Market Review Guidelines 2010**”)<sup>1</sup>. The purpose of the Market Review Guidelines 2010 was “to provide stakeholders with an outline as to how the Authority intends to implement the provisions encompassed in the ECA aimed at enhancing competition”<sup>2</sup>.

7.8. The Market Review Guidelines highlight the identification of priority markets as the first step in the market review process, and sets out the basis on which the Authority will identify such markets as follows:

*Step 1: Priority Markets*

*The Authority will identify priority markets based on observable trends in the South African electronic communications sector, the need to regulate at the source of the potential problem as well as consideration of government policy objectives.*

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<sup>1</sup> Available at

<https://www.icasa.org.za/Portals/0/Regulations/Working%20Docmuents/Market%20Analysis/Guidelines/Guideline%20for%20Conducting%20Market%20Reviews.pdf>

<sup>2</sup> Market Review Guidelines 2017, para 1.1 , p4

- 7.9. ISPA's view is that – given the Broadband Competition Policy Direction and the clear priority attributed to the issue of high mobile data costs by the Minister, Parliament and consumers – the Authority would be able to identify the relevant markets as being priorities in line with its own requirements without the need for a priority markets study process.
- 7.10. ISPA notes that no process to determine priority markets was undertaken prior to the investigation undertaken by the Authority in terms of section 67(4) into the markets for mobile and fixed call termination rates in 2010. The process for defining these markets formed part of the section 67(4) process and not part of a separate process.

#### **Conclusion**

8. We thank the Authority in advance for its consideration of the above.

Regards

ISPA Regulatory Advisors