ISPA INTERNET SERVICE PROVIDERS' ASSOCIATION

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Independent Communications Authority of South Africa

Per email: CTRreview@icasa.org.za

DISCUSSION DOCUMENT ON THE REVIEW OF PRO-COMPETITIVE CONDITIONS IMPOSED ON LICENSEES IN TERMS OF THE CALL TERMINATION REGULATIONS, 2014

1. ISPA refers to the "Discussion Document on the review of the pro-competitive conditions imposed on licensees in terms of the Call Termination Regulations, 2014" ("the Discussion Document") and to the Authority's invitation to comment thereon.
2. The submission is structured so as to foreground a general submission prior to responding to the questions raised by the Authority in the Discussion Document.

The utility of the call termination regulatory framework and the implications of pro-competitive regulation

3. ISPA submits that the current approach to regulating call termination is outdated and of limited utility in achieving its own expressed objective of promoting competition, particularly in the local market for fixed voice calls.
4. The Authority makes the preliminary finding that competition in mobile and fixed termination markets "will be ineffective in the absence of regulation" and that the following market failures continue to exist:
   - 4.1. A lack of provision of access.
   - 4.2. The potential for discrimination between licensees offering similar services.
   - 4.3. A lack of transparency
   - 4.4. Inefficient pricing.
5. The current approach as reflected in the preliminary views expressed in the Discussion Document is simply more of the same.
6. The call termination regulatory framework is further limited in that it acts almost in isolation as a pro-competitive remedy relating to the provision of voice services.

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6.1. Carrier pre-selection: the Authority has washed its hands of its obligations relating to the pro-consumer remedy of carrier pre-selection as required under section 42 of the ECA. In the absence of a market inquiry under Chapter 10 of the ECA into call origination – a simple enough exercise given the work done on call termination – the work done to date is wasted.

6.2. Portability of non-geographic numbers: a basic pro-competitive remedy in the fixed market – will only become possible in March 2022. This is an almost unbelievable 12 years after geographic number portability was introduced. The delay is indefensible and has chilled competition, allowing continued dominance by the incumbent fixed line operator in servicing high-value subscribers.

6.3. Toll-free rates: ISPA has previously submitted that toll-free calls are a special case of voice call interconnection and that the applicable wholesale rates should fall within the call termination regulatory framework. It is therefore disappointing that the Discussion Document does not even seek to canvass whether such rates should be included in the framework or to gather relevant data from licensees.

6.4. Geographic market definition: The 2017 amendments to the geographic market definition have also – as set out below – made it substantially more difficult to enter the market and compete as a South African voice services provider.

7. ISPA submits that regulating in a pro-competitive manner should explicitly recognise the asymmetries in the abilities of larger and smaller operators to provide detailed information as requested in the questionnaire forming part of this review process and to lobby the regulator. There is little evidence that the Authority appreciates this and the 2017 geographic market definition amendment – undertaken without proper appreciation of its regulatory impact based – is a case in point where smaller operators:

7.1. Do not have the volume and level of information available to incumbent operators.

7.2. Do not have the resources and systems to extract summaries and details of the information that they have relative to the dedicated teams situated within incumbent operators.

7.3. As interconnection seekers do not with to risk their livelihood through conflict with the interconnection provider.

8. The Authority's basic premise that nothing material has changed in the voice market since a proper market review was done in 2010 is unsustainable and promotes check-box regulation. ISPA submits that if the Authority is going to continue to intervene in these markets it must do so with the necessary rigor and undertake a full market review to inform its actions.

Regulation 3 - Market definitions

Product market definition

Question 1 Do you agree with the Authority's preliminary conclusion on the product market definition? Please explain the reasons for your answer and provide the relevant factual or other evidence supporting your views.

9. ISPA has no specific submissions.

Geographic market definition

Question 2: Do you agree with the Authority's preliminary conclusion on the geographic market definition? Please explain the reasons for your answer and provide the relevant factual or other evidence supporting your views.

10. ISPA records its continued objection to the Authority's decision to redefine the fixed and mobile voice call termination markets to exclude internationally originated voice calls.

11. As previously highlighted to the Authority in submission, presentations and meetings, this has resulted in:

    11.1. A rapid escalation in the termination rates charged for internationally originated voice traffic, which are completely divorced from cost. As a response there has been an escalation in termination charges paid by local licensees to foreign operators.

    11.2. Fraud through grey routes and arbitrage and, increasingly, new methods of exploiting arbitrage opportunities.

    11.3. A large number of billing disputes as incumbent operators apply unregulated termination rates to traffic which they regard as not being locally originated. There is a lack of clarity on how to define international origination: is this to be done based on source CLI or by source IP or through some other mechanism? There is no uniformity in approach adopted between incumbent providers, with at least one changing its internal view on this issue since the 2017 amendments came into force.

    11.4. The suspension of voice interconnection by an incumbent based on back-billing for voice calls which such incumbent has unilaterally declared to be internationally originated.

    11.5. Incumbent operators moving toward disallowing aggregation of voice traffic and transiting of voice traffic.

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11.6. Smaller operators having to find ways to staff for revenue assurance and fraud detection, noting that the incumbent providers have dedicated personnel (more so since the 2017 amendment to the geographic market definition).

12. The net effect is that it has become riskier and more expensive for legitimate smaller players to enter into the voice industry in South Africa.

13. In ISPA's view an unsupportable disjunct has arisen between strict cost-based regulation for domestically originated calls and the complete decoupling of termination rates for internationally originated calls from the cost of providing the termination service.

13.1. The Authority notes that prior to regulation in 2010, there was a maximum mobile termination rate of R1.25 ex VAT per minute. No distinction was drawn based on the location of the origination of the call.

13.2. Subsequent to the 2017 geographic market definition amendment, incumbent licensees now charge more than 25 times the regulated rate. This is well in excess of the R1.25 which the operators chose as a rate prior to 2010.

13.3. These rates are clearly completely delinked from the cost of providing the service.

13.4. Furthermore, there is a substantial differential between fixed and mobile termination rates for internationally originated calls. This is clearly not based on any cost-based consideration (and ISPA refers here to its arguments relating to fixed mobile convergence set out below).

Operator	Termination rate for internationally originated calls	% greater than termination rate for domestically originated calls
Telkom	R1.64	2 633%
Vodacom	R2.60	2 788%
MTN	R2.49	2 666%

14. The Authority advances the following rationale for its 2017 amendment:

The Authority's preliminary view is that deregulating the international termination market is in the best interest of the country as SA licensees are given pricing freedom to charge reciprocal rates in order to minimise or mitigate exploitation of SMP by licensees in other jurisdictions. The Authority is also of the view that this approach is the best option for SA given that the Authority does not have legislative powers to directly control the international termination rates charged by terminating licensees for voice calls that originate in SA. While the Authority is mindful that reciprocity might not necessarily deliver the *preferred low international termination rates, the Authority's view is that the impact of high international termination rates on licensees' revenue and traffic volumes as well as the prevalence of OTT services in the international calling market should disincentivise licensees from charging high international termination rates*

14.1. This is demonstrably incorrect: given the rates set out in the table above licensees are clearly not being disincentivised from charging high international termination rates by the impact of such rates on their revenue or by the prevalence of OTT services which consumers can switch to.

14.2. This does not mean, however, that there has not been substantial adoption of these OTT services in response to the excessive rates set.

14.3. The global market takes its lead in respect of South Africa from the rates set by our incumbent providers.

14.3.1. Where a large differential exists in the rates between licensees servicing the same number types, international wholesale transit providers will set rates at the highest prevailing rate for SMP licensees serving a number type. This is done to mitigate the risk of losses arising from arbitrage fraud.

14.3.2. Where a non-SMP licensee attempts to set a materially higher rate, the international market will block calls to the relevant number range because of the high risk or arbitrage fraud.

14.3.3. Where a non-SMP licensee attempts to set a materially lower rate, the international market tends to retain the higher (SMP) rate and to absorb the resulting profit (rather than creating a specific rate point for the relatively trivial traffic and revenue from that non-SMP licensee).

14.3.4. <u>In practice, a non-SMP licensee is prevented from competing by setting lower rates</u>. International operators do not want lots of specific granular routes: their response to lower rates is to not only retain the higher (SMP) rate but also to group all of the non-SMP operators into "SA alternative" or "SA other operators" <u>at a rate higher than SMP rates</u>.

14.3.5. <u>It follows further that smaller licensees are now not able to compete with international OTT services</u>.

14.3.6. The net result, practically, is that local (e)SMP licensees leverage their dominance to dictate the rates applicable for international calls to fixed and/or mobile destinations.

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Smaller operators cannot compete as this structure effectively penalises them if they set lower rates.

14.3.7. In ISPA's view this is market failure. Moreover, it is a market failure created by the Authority through its 2017 amendments to the geographic market definition.

15. A rate differential of 2700% will always attract fraud. If a rate differential is to be applied, ISPA submits that the cost of terminating internationally originated calls must be capped if levels of fraud are to be reduced.

16. A compromise position may be that adopted in the European Union (EU)[1], which provides for a framework of rates that it flexible enough to accommodate different country practices[2]. The central principle is reciprocity and – in a local context – the framework could regulate at the following levels:

16.1. Maximum rates for locally originated calls

16.2. Maximum rates for internationally originated calls

16.2.1. Calls from countries that prescribe maximum rates equal to or less than the SA prescribed maximum rate (where the local maximum applies)

16.2.2. Calls from SADC countries that have agreed on reciprocity in respect of rates

16.2.3. Calls from countries that do not prescribe a maximum rate or which prescribe a maximum rate higher than the SA prescribed maximum rate (where no local maximum applies, or the maximum is reciprocal to the higher foreign rate).

17. As a minimum course of action, ISPA agrees with Telkom that a regulatory impact assessment should be undertaken to better understand and address the impact of the 2017 amendment. This should have been done prior to the amendment being effected, but at this stage the assessment should ascertain:

17.1. Whether there is evidence for the contention by the Authority that the 2017 amendment has resulted in increased inflows of foreign currency and had a positive impact on the balance of payments. As things stand this is an unsubstantiated view adopted on the basis of lobbying from

[1] Commission Delegated Regulation (EU) 2021/654 of 18 December 2020 supplementing Directive (EU) 2018/1972 of the European Parliament and of the Council by setting a single maximum Union-wide mobile voice termination rate and a single maximum Union-wide fixed voice termination rate, into force July 2021, available from https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32021R0654

[2] See https://digital-strategy.ec.europa.eu/en/news/eu-wide-voice-call-termination-rates-become-applicable-today and the useful FAQ available from https://digital-strategy.ec.europa.eu/en/faqs/maximum-fixed-and-mobile-termination-rates-question-and-answers. Interestingly the EU is prescribing fixed termination rates (EUR0.07 / ZAR1.24 by 2022) substantially higher than mobile termination rates (EUR0.02 / ZAR0.35 by 2024).

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MTN. Intuitively, other jurisdictions react to increased charges from SA operators by reciprocating with increased charges: the impact on balance of payments is neutral.

17.2. Whether there is evidence showing the impact of the 2017 amendment on competition in the local voice markets.

17.3. An assessment of rates charged by international providers prior and subsequent to the 2017 amendment, with particular attention to popular destinations such as SADC countries and the UK.

17.4. The extent to which the 2017 amendment has enabled fraud and an unwinnable arms race against illegal providers exploiting a 2 700% pricing differential.

17.5. Whether there is room for a more nuanced approach including an assessment of whether a maximum rate should be prescribed for terminating international voice calls and, if so, how this should be calculated.

18. Ideally this would be considered under a full market review such as ISPA is calling for, rather than a separate regulatory impact assessment process.

Fixed and Mobile Convergence

Question 3 Do you agree with the Authority's preliminary conclusion on fixed and mobile convergence? Please explain the reasons for your answer and provide the relevant factual or other evidence supporting your views.

19. The Authority's preliminary position acknowledges some convergence between fixed and mobile services in terms of services, technology and numbering, but not to the extent that these services are provided in the same market.

20. ISPA disagrees with the Authority's assessment to the extent that fixed and mobile voice convergence is not starting to occur but rather is demonstrably advanced. This should be reflected in converging wholesale call termination rates.

20.1. The majority if not all of the incumbent operators – fixed and mobile - utilise VoIP technology in their core networks and increasingly carry the majority of calls over their access network with this technology.

20.2. Traditional copper-based voice services are in terminal decline. At the same time, modern "fixed" services are increasingly mobile, offered over cloud switchboard extensions and often accessed through apps installed on the customer's smart phone.

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20.3. Utilizing the underlying mobile data carrier - the electronic communications network service or ECNS provided by the mobile network – means that the "fixed service" effectively falls within the definition of "mobile service" in the Numbering Plan Regulations 2016.

20.4. Shifts in work patterns occasioned by COVID-19 responses demonstrate that voice services have become location independent.

20.5. These trends are all advanced and the accepted distinction in the cost of terminating a mobile as opposed to a fixed call no longer applies or is rapidly evaporating.

20.6. ISPA notes that these views are supported by Telkom, Cell C and other operators.

20.7. The Call Termination Regulations 2014 further require that Telkom, Vodacom and MTN offer interconnection using IP-based protocols.

21. The Authority is further of the view that mobile and fixed services are not effective substitutes and that there is a difference in the cost of terminating fixed and mobile calls which the Authority expects "to diminish over time due to lower incremental cost of terminating a voice call on a mobile network under 5G technology".

22. ISPA disagrees that fixed and mobile services are – in 2022 – being provided in different product markets. As shown above, the distinction and fixed has blurred dramatically and to an extent makes no sense where "fixed services" are available with full mobility and are only "fixed" because of the number assigned to the service.

22.1. In its responses to stakeholder questions of clarity published on 28 June 2021, the following questions and answers appear:

4.1. Question: What criteria should be applied to assess whether a service is provided in a fixed location?

Authority's response: A fixed service is provided to a fixed location, with no handover.

4.2. Question: The definition of Mobile service seems to include Fixed-wireless service. Please clarify the difference between Fixed-wireless and Mobile service and explain what criteria should be applied to assess whether a service is a Mobile service.

Authority's response: Mobile service should exclude Fixed-wireless service. The difference between the two services is in relation to user mobility (mobile or limited mobility) or service hand-over from one base station to another with or without service interruption.

22.2. By these definitions – as per the Numbering Plan Regulations read with the Radio Frequency Spectrum Regulations – the new generation of "fixed" services are "fixed" or "mobile" purely

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according to whether the subscriber chooses to use the service in a fixed (home/office) or mobile (as an app or softphone on a handset) environment.

23. ISPA submits that mobile and fixed services are now more substitutes than complements. They should not be treated as falling in separate markets and this should not form the justification for a pricing differential which has become arbitrary.

24. While the Authority acknowledges some convergence, this is not reflected in the regulatory framework. A review of the differential between prescribed fixed and mobile wholesale termination rates shows no evidence of any convergence in these rates.

	2017	**2018**	**2019**	**2020**	**2021**
Differential between fixed and mobile rates (symmetric)	R0.03	R0.03	R0.03	R0.03	R0.03
Differential between fixed and mobile rates (asymmetric)	R0.07	R0.08	R0.08	R0.07	R0.07

25. ISPA submits that any amendments to the prescribed rates must reflect the actual levels of convergence in the market and the fact that fixed and mobile operators are terminating voice calls using the same technology and with the same associated cost.

26. At the very least the current pricing differential between fixed and mobile termination rates should be reduced to reflect the degree of convergence which the Authority is prepared to acknowledge. The Authority identifies a shift to 5G technologies as being a further driver to convergence but has not recognised that this convergence has already occurred with the shift to 4G technology.

27. ISPA has consistently requested that the Authority justify a position whereby licensees in fixed termination markets should effectively subsidise licensees in the mobile termination markets. ISPA agrees with Telkom that the current call termination rate acts as a constraint on convergence at the expense of fixed line operators due to the asymmetry between fixed and mobile termination rates

28. Given that the current exercise is a forward-looking one, ISPA submits that a future framework and set of prescribed rates must recognise that fixed mobile convergence is far more advanced than the Authority's preliminary position indicates.

29. Once again, this demonstrates the need for a full market review process to be undertaken.

Regulation 4 - Methodology

Question 4 Do you agree with the Authority's preliminary conclusion on the methodology used? Please explain the reasons for your answer.

30. ISPA supports the preliminary conclusion as correct and consistent with prior practice but does not believe that this process was correctly followed when the 2017 amendment to the geographic market definition was finalised.

31. The impact of the amendment was to create additional markets or to separate out markets for terminating internationally originated calls from markets for terminating locally originated calls. This was done without reference to the factors listed in sub-paragraph (a) of regulation 4.

Regulation 5 – Effectiveness of Competition

Question 5: Do you agree with the Authority's preliminary conclusion on the assessment of effectiveness of competition? Please explain the reason for your answer and provide the relevant factual evidence supporting your views.

32. ISPA agrees – for the reasons set out throughout this document – that competition remains ineffective in the market for fixed voice call termination.

Regulation 6 – Significant Market Power (SMP)

Question 6: Do you agree with the Authority's preliminary conclusion on SMP in the Mobile termination markets and Fixed termination markets? Please explain the reason for your answer and provide the relevant factual evidence supporting your views.

33. ISPA agrees with the Authority's preliminary conclusion which is consistent with prior and international best practice.

Regulation 7 – Pro-competitive terms and conditions

Question 7 Do you agree with the Authority's preliminary conclusion on pro-competitive terms and conditions? Please explain the reason for your answer and provide the relevant factual evidence supporting your views.

Obligation to charge cost-based termination rates

34. ISPA supports the continued application of the principle that termination rates should be cost-based as determined through use of the methodology outlined.

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35. ISPA has no specific insight as to whether any further glide path is required but refers to its comments regarding fixed mobile convergence (above) and asymmetry (below).

Asymmetry

36. ISPA does not believe that asymmetry as it currently operates in the fixed call termination market is of any practical value to potential new entrants. The volume of traffic that can be built up in the fixed market in this time is not sufficient for the asymmetry to be of assistance.

37. ISPA's understands that the Authority's preliminary position is that the asymmetry granted to Telkom and Cell C in the mobile call termination market is to fall away. ISPA has consistently objected to the preferential treatment of "new entrants" in the mobile as opposed to fixed call termination market, and accordingly strongly supports this step.

38. Given the persistence of Telkom's dominance in the termination of fixed calls, ISPA calls on the Authority to consider a far more aggressive approach which recognizes that all competition to Telkom combined has less than 10% of the market share for the termination of fixed call minutes, despite 11 years of call termination regulation.

Obligation to publication of a Reference Interconnection Officer ("RIO")

39. ISPA notes the Authority's preliminary conclusion that the obligation on Vodacom, MTN and Telkom to publish a RIO remains relevant, as it ensures that "licensees have sufficient information that they would not have access to if the wholesale voice call termination markets were not regulated".

40. The importance of this rationale is overstated. While the obligation to provide a RIO is found in the existing call termination framework, the obligation to include detailed information in an interconnection agreement is largely contained in the Interconnection Regulations 2010.

41. ISPA supports the RIO publication obligation but requests that the Authority review the manner in which the obligation is formulated.

    41.1. ISPA calls on the Authority to allow for a public participation process in respect of the RIOs to be submitted pursuant to the promulgation of a new set of call termination regulations.

    41.2. It is ISPA's considered view that the Authority is insufficiently rigorous in its consideration of draft RIOs submitted to it for approval. This has become apparent from ISPA's engagement with operators subsequent to ICASA's approval of a new RIO.

    41.3. Clarity is required as to the circumstances under which a licensee with an existing interconnection agreement can be compelled to enter into a revised RIO. This is a matter with major practical implications, particularly if an incumbent operator can unilaterally change the terms of their interconnection agreement.

41.4. In the last two years at least one incumbent operator has brought extensive pressure to bear on smaller providers to sign a revised set of interconnection agreements to the material disadvantage of the latter.

Conclusion

42. ISPA extends its appreciation to the Authority for its consideration of these comments, and trusts that they will be of assistance to the Authority in finalising this process.

43. ISPA confirms its willingness to participate in any hearings the Authority may deem necessary.

Regards,

ISPA Regulatory Advisors