

24 March 2023

Competition Commission

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2021DEC0018 VODACOM PROPRIETARY LIMITED AND BUSINESS VENTURE INVESTMENTS NO 2213 (PTY) LTD: PROPOSED CONDITIONS (NON-CONFIDENTIAL)

1. ISPA refers to the non-confidential version of the proposed conditions to be applicable to the above merger (“the Proposed Conditions”) as provided by the Commission and sets out below its submissions.
2. ISPA has noted the Proposed Conditions relating to open access, which are in line with the public commitments of the merging parties.

The Proposed Conditions do not provide for SMME ISPs

3. ISPA’s primary concern is that conditions attaching to the proposed transaction should create specific protections and incentives for SMME ISPs entering or seeking to establish themselves as wholesale fibre ISPs.
4. Although the term “SMME” is not defined or used in the Proposed Conditions, the definition utilised by the Commission most recently in its Draft Energy Suppliers Block Exemption 2023 is appropriate:
“SMMEs” means small business, micro business or medium-sized business as defined by the Minister in Government Gazette No. 987 of 12 July 2019 or its successor in title, or business, as the context dictates and as defined by section 1 of the Act
5. The majority of ISPA’s members are SMMEs within the meaning of the definition contemplated above (to be more precise, the majority of members are Small and Micro-Enterprises as defined).
6. It is clear that wholesale access to electronic communications network services offered by the Maziv Group will be critical to the ability of new SMME entrants to enter and establish themselves in the market and for any SMME ISP to grow in the market.
7. ISPA has noted from its members a trend for fibre network operators (FNOs) to impose upfront requirements for wholesale access to their networks. Such requirements include security deposits, minimum revenue commitments and extended contract terms.
8. It is important to note that these requirements may be non-discriminatory in the sense that they apply equally to all access seekers, but in failing to consider the essential differences between such access seekers they can and do discriminate against SMMEs and act as barriers to entry.

9. ISPA notes that clause 5.1 of the Proposed Conditions excludes the application of open-access conditions where a third-party ISP “refuses or fails to adhere to the commercial terms subject to which the services offered”.
10. In ISPA’s view this exception creates the means to foreclose on SMME ISPs: the setting of commercial terms which are unreasonable for SMME providers effectively excludes them from the wholesale market.
11. The Commission has – laudably and loudly – championed the position of SMME and HDP Firms, most recently in its Draft Energy Suppliers Block Exemption 2023.
12. ISPA’s expectation is that the Commission will be consistent in this approach in considering conditions which it may seek to apply to the proposed merger.

Vertical integration

13. Another industry trend is for FNOs to launch their own ISP divisions, creating vertically integrated players where the risk of anti-competitive effect in the wholesale and retail FNO ISP markets is materially increased.
14. This trend is to an extent the result of saturation of commercially viable geographic markets with fibre coverage and the need for FNOs to realise new revenue streams.
15. The proposed merger reflects and reinforces this trend.

Example: Network-to-Network Interfaces (NNIs)

16. ISPA is cognisant of shifting industry dynamics and has engaged with its own members and with FNOs to develop a set of “Fibre Network Operator and Internet Service Provider Best Practice Recommendations” with the intention of promoting open access principles and the efficient management of FNO – ISP relationships in the interests of end-users. Once completed ISPA would be happy to present this document to the Commission if there is interest.
17. This section provides an example of the impact of market constraints and vertical integration which has become clear through the development of the Recommendations. This section does not speak specifically to the conduct of the merging parties: the intention is to illustrate the kind of conditions which may be appropriate to facilitate entry and sustainability by SMME ISPs.
18. In order to provide services over a FNO network, an ISP must interconnect with the FNO. ISPs connect to FNOs either at a physical point of presence operated by the FNO or at a data centre operated by a third party.
19. This interconnection is usually referred to as a Network-to-network Interface (“NNI”) and the FNO charges the ISP an NNI fee (or NNI fees where the FNO requires the ISP to interconnect at multiple locations).

20. This is an unavoidable cost for any ISP using the network, with the possible exception of the FNO's own ISP.
21. Typically, fees charged by FNOs for NNI interconnections vary depending on the quantity of network traffic carried over that interconnection. The faster the speeds offered to the end-users connecting to the FNO, the more traffic is generated by those end-users and the more the ISP has to pay for the NNI interconnections.
22. While some FNOs appear to set their NNI fees based on the costs for providing ISPs with access to their networks, in most cases these fees are determined arbitrarily. The ability of the FNOs to set NNI fees without basing them on costs is open to significant abuse for three main reasons:
 - 22.1. An FNO's own ISP is not necessarily charged the NNI costs. This gives the FNO's ISP a significant unfair cost advantage.
 - 22.2. FNOs regularly offer "free" upgrades in speed to consumers they connect without any consultation with the ISPs who sell those services to the consumers. These "free" upgrades substantially increase traffic between the FNO and the ISP which means that the ISPs' margins on the service decrease. Effectively, FNOs are able to squeeze ISP margins under the guise of providing "free" upgrades to the customers of those ISPs.
 - 22.3. ISPA members have reported that FNOs sometimes deliberately increase NNI fees as a tactic to make it unaffordable for smaller ISPs to continue selling services on their networks. While this is purportedly because there is an administrative cost for the FNO to support each ISP using its network, the price increases are determined without reference to underlying costs.
23. Given the above concerns, ISPA believes that there are three fundamental requirements relating to NNI costs that need to be considered for any open access network:
 - 23.1. NNI fees must be cost-based. Increases in NNI fees must be a result of an increase in the underlying costs, and not arbitrarily or punitively set by the FNO.
 - 23.2. Identical NNI fees must be levied on an FNO's own ISP as are levied on third-party ISPs using the FNO's network. This prevents the FNO-owned ISP from gaining an unfair advantage.
 - 23.3. FNOs should be prohibited from offering "free" upgrades to the speed of their services to consumers unless they also offer the ISPs providing services to those consumers with free upgrades to their NNI interconnects such that the ISP can carry the additional traffic resulting from the consumer upgrades. Without this restriction, FNOs will continue to set the price to consumers while increasing the costs to ISPs.

The position of Herotel

24. ISPA seeks clarification on the exclusion of the Herotel Group from open-access obligations, as provided for in clause 5.2 of the Proposed Conditions. ISPA is obviously not privy to the arguments motivating for this exclusion.
25. ISPA understands that the Herotel Group operates under a “closed access” model and that it does so lawfully, but requests that the Commission assess whether this remains the case within the context of the implementation of the proposed merger.

Conclusion

26. The competitive environment for SMME and non-vertically integrated ISPs is becoming increasingly constrained and contentious.
27. ISPA submits that the design of conditions applicable to the proposed merger represents a valuable opportunity to promote and protect non-vertically integrated SMME ISPs in the sector.
28. In short: ISPA requests that the Commission give due consideration to including specific conditions facilitating market entry and the sustainability of SMME ISPs.

Regards

ISPA

Internet Service Providers' Association NPC Reg Nr. 2016 / 167416 / 08

Board: Sasha Booth-Beharilal (Chairperson), Cheryl Dinkelman (Deputy Chair), Prenesh Padayachee
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