

13 February 2024

ICASA

Attention: Mr. Owen Mhlanga

Per email: MarketInquiry2018@icasa.org.za

Dear Owen

SUBMISSIONS: DRAFT AMENDMENT TO THE MOBILE BROADBAND SERVICES REGULATIONS, 2021

1. The Internet Service Providers' Association of South Africa (**ISPA**) has noted publication of draft amendments to the Mobile Broadband Services Regulations, 2021 ("**the Regulations**") for comment and has set out submissions raised by its members below.
2. The genesis of the Regulations was a policy direction issued by the then Minister of Communications on 4 March 2016 in the following terms:
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.
3. The Regulations came into force on 1 March 2022. MTN initiated review proceedings relating to aspects of the Regulations – including regulation 7 – during September 2022.
4. ISPA has since that time engaged with the Authority relating to the enforcement of sub-regulation 7(e) which required Vodacom and MTN to publish specified information about pricing of wholesale APN services on their websites and to submit this information to ICASA on a quarterly basis. This related particularly to the differential between wholesale and retail rates.
5. ISPA were advised that – notwithstanding the MTN litigation – the obligation set out in regulation 7(e) remained in effect and that the matter on non-compliance therewith was being taken up with Vodacom and MTN.
6. Presumably the publication of the draft amendments means that the Authority no longer holds this view, and that the Authority has conceded to the prayers relating to regulation 7 set out in MTN's founding papers.
7. In ISPA's view the proposed amendments to the Regulations are legally sound given what the Authority characterizes as its "regulatory oversight" in not making a finding of significant market power (SMP) in respect of the markets for the provision of Access Point Name ("APN") services (Upstream market 3b) and Mobile Virtual Network Operator ("MVNO") services (Upstream market 3a).

8. It follows that the Authority is procedurally barred from imposing any pro-competitive conditions as contemplated in section 67 of the ECA in respect of those markets.
9. In its reasons document the Authority expresses the view that it:
“retains the power in terms of the applicable legislation to request the operator with SMP to provide an explanation if any category of retail price is below any wholesale price in respect of services supplied by operators with SMP”
and that
“[T]he monitoring of prices shall be done by operation of the law as explained above.”
10. ISPA disagrees with this view: the Authority cannot request “the operator with SMP” to provide an explanation because it has neglected to make a finding that any operator has SMP.
11. Further the Authority is proposing to delete sub-regulation 7(g) and therefore the monitoring powers it has. If the Authority is suggesting that it will make *ad hoc* requests for information relating to margin squeeze this is itself of questionable legality and likely to be opposed (as well as being unprecedented).
12. In its “Findings Document on Mobile Broadband Services Inquiry” published on 26 March 2021, the Authority notes its inability to determine SMP in the two relevant markets (a view with which ISPA disagrees) but also highlights that these markets are characterized by ineffective competition.

223. A second area of concern raised is APN services to wholesale resellers. Various operators provide forms of wholesale services to resellers. This includes wholesale APN services to resellers such as Afrihost, Vox, RSA Web and Internet Solutions as well as various other providers. These differ in terms of business plan from those focused on businesses to those that are sold to final customers. It can be noted that there are several operators that offer this service.

224. There are also a range of effective prices paid by different customers. This depends to a large extent on the volume contracted for, and the period of the agreement. The prices per GB provided to the Authority show that there are clearly instances in which the wholesale rate is in excess of the retail rate, particularly when promotional offers are considered. Evidence provided to the Authority also suggests that these wholesale prices have not gone down over time as much as retail prices have. The wholesale prices above retail prices, together with the price trends over time strongly suggests ineffective competition in the provision of APN services.

225. Submissions from ISPA request that the Authority consider wholesale price regulation or separation as has occurred for Telkom with Openserve.

226. Similar to the MVNO market, however, the Authority believes that all operators have the capacity to provide these agreements, and in fact several operators do.

From the Authority's assessment of the market, however, there is no evidence that entities in the market have significant market power. As such regulation of APN cannot be engaged in to remedy problems in this market.

227. However, the Authority's view is that competition concerns in the retail market will likely be remedied through wholesale interventions including with respect to APN and MVNO price monitoring, set out in the draft Mobile Broadband Services Regulations. As noted, there are several changes in the market at present including obligations related to spectrum licensing and additional capacity. As such, the Authority recommends the monitoring approach to prices in the future, as set out in in the draft Mobile Broadband Services Regulations. If prices appear to be high relative to retail prices these will be referred to the Competition Commission for investigation.

(ISPA's emphasis)

13. The view expressed in para 227 as quoted that it is "likely" that competitive concerns will be addressed through price monitoring "as set out in the Mobile Broadband Services Regulations" is no longer valid (if it ever was). This is because the price monitoring provisions are now being deleted.
14. The net result is that – having identified a failure of competition – the Authority is simply going to do nothing, with nearly eight years having passed since the Ministerial policy direction was published.
15. In conclusion, the Authority's lack of progress over the past eight years to foster competition and address market failure in the wholesale APN market is deeply disappointing.
16. The consequences of this are significant, as it stifles innovation, limits market entry, limits consumer choice, and undermines the vitality of our industry. Fundamentally there is a failure to take steps to address the central concern of a persistently high cost to communicate.
17. ISPA remain committed to advocating for policies and regulations that foster fair competition and drive positive change, and we will persist in our efforts until tangible progress is achieved.

Regards

ISPA