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GENERAL NOTICE

NOTICE 3165 OF 2003

FINDINGS AND CONCLUSIONS IN TERMS OF SECTION 27(8) (a) OF THE TELECOMMUNICATIONS ACT (NO. 103 OF 1996) ON THE SECTION 27 ENQUIRY ON THE GUIDELINES FOR TRIAL AND LAUNCH OF NEW SERVICES

1. Background

1.1 On 15 May 2003, the Independent Communications Authority of South Africa (ICASA) published a discussion document in Notice number 1513 of 2003 in Government Gazette number 24884, inviting representations from interested parties on the guidelines for trial and launch of new services. The enquiry was to assist the Authority with the development of a methodology for satisfying itself that trials conducted by telecommunications licensees do not grant unfair competitive advantage.

1.2 The Authority received seven (7) written representations on 19 June 2003.

1.3 The ICASA Council appointed a special committee in terms of section 17 of the ICASA Act 13 of 2000 to conduct public hearings which were held on 29 August 2003. Six (6) respondents requested the opportunity to make oral representations. Oral representations were made by Telkom SA Ltd (Telkom); Mobile Telephone Networks (MTN); Vodacom (Pty) Ltd; Cell C (Pty) Ltd; Internet Service Providers Association (ISPA) and Transtel/Eskom/Nexus (SNO minority shareholders).

2. Findings

In terms of the provisions of section 27(8) (a) of the Telecommunications Act No 103 of 1996 ("the Act") and in light of the above-mentioned the Authority has made the following findings:

2.1 General

2.1.1 The Authority recognises that it is important that innovation is rewarded because considerable benefits to both customers and suppliers flow from the introduction of new and enhanced services. Therefore, the Authority believes that it is extremely important that no action should stifle innovation or delay getting new technologies launched into the market as this would negate competitive advantage.

2.1.2 However, the Authority recognises that there is a potential for anticompetitive conduct when trialing new services or products. For example, a form of anti-competitive behaviour may be where a trial is used as a guise for undue discrimination or preferential treatment to a customer or as a method of locking-in customers. The Authority is especially concerned with instances where two licence categories are bundled into one trial with the exclusion of other competitors.

2.1.3 ICASA has powers under the Act, specifically under section 53(1) to direct a licensee to cease or refrain from taking any action which has or is likely to have the effect of giving undue preference to or causing undue discrimination against any person or category of persons. In addition, telecommunication operator licenses expressly provide that no undue preference or no undue discrimination may be shown or exercised in the provision of any service. The test in these instances is whether an advantage may give undue preference or will unduly discriminate against someone thereby contravening section 53 (1) of the Act.

2.1.4 The current provisions in the Act and the licence conditions which address pricing, fair competition and discrimination also apply to a product an operator is offering on a trial. In addition, the Competition Act No. 89 of 1998 specifically chapter 2 addresses anti-competitive behaviour during trials and launches of new products and services. Therefore, the Authority believes there is no need for additional regulation.

2.1.5 However, no rules presently exists dealing specifically with the trial and launch of new services and products. Therefore, the Authority in this document has set out some general guidelines which it believes will promote fair trading principles during trials and launch of new services and products. The premise will be on operators to act in accordance with these guidelines.

2.2 What Constitutes a Trial?

2.2.1 A test becomes a trial once testing of a product or service extends to company external users or consumer participants. As long as the tests are conducted "internally" i.e. with company employees there is no or little possibility of influencing the market, signing-up trial participants as customers or any other anticompetitive behaviour. ICASA will not concern itself with any testing or even company internal trialing wherein the trialing operator is compliant with the Act and/or its current licence conditions.

2.2.2 In addition, a test becomes a trial as soon as the process includes soliciting and evaluation of market data (i.e. technical and commercial market research) in addition to pure functional technical testing. ICASA will not concern itself with any testing that does not include aspects of market research unless it is contrary to the Act and/or the operator's current licence conditions.

2.3 Criteria for Justifying the Introduction of a Trial

2.3.1 The Authority has found that the appropriate criteria to justify the legitimate introduction of a trial are both technical feasibility and commercial prospect.

2.3.2 *Technical feasibility*, involves the testing of a product with a limited group in order to identify and resolve technical problems related to the introduction of the technology itself, or of the associated revised processes and support systems, before a service is made widely available.

2.3.3 The *commercial prospect* for conducting a trial refers to the evaluation of commercial prospects of a service, and may be undertaken alongside the technical evaluation in the same trial. In the case where the commercial prospects of a new service are evaluated separately from technical viability, the purpose of the commercial trial is to enable the commercial risks inherent in a full national launch to be reduced even where the new service is considered to be technically feasible. In such cases the trial must be conducted in a fair, transparent and pro-competitive manner that encourages innovation.

2.4 Duration of Trial

2.4.1 ICASA recognizes that there is a danger of a trial becoming anticompetitive if it lasts too long and has found that trials should not result in customers, receiving a privileged service. The Authority therefore found that a trial should not normally last longer than 6 (six) months for an adequate evaluation to be made. In the event that a trial lasts longer than 6 (six) months, the licensee should be able to substantiate that no undue discrimination or preference would arise from the extended period.

2.5 Selection of Customers who participate in a Trial

2.5.1 The Authority found that the selection of the customer base will depend on the specific product in mind and the operator's needs. This is up to the operator to determine, based on objective criteria. Nonetheless, it is important that it is clearly communicated to the trial participants that it is a trial and that the product might not be launched. In the event that the product is launched it should be communicated to participants that it might be launched at different terms and conditions. Moreover, the participation of a trial must not be linked to the purchase or continued use of the trialed product or any other product or service of the operator that is conducting the trial. In addition, the operator should be able to motivate and substantiate the customer size base as the minimum size necessary to achieve the aims of the trial.

2.6 Interconnection and Interoperability of Services

2.6.1 In order for a trial to be effective, in some instances it is necessary that there is co-operation (in the form of interconnection, facilities leasing, or other forms of interoperability). Interconnection services are at the heart of a competitive market in telecommunications services and infrastructure, being crucial inputs to the operations of all licensees but particularly those who are not in a dominant position. Examples of where refusal to supply such services is likely to raise significant concerns include:

2.6.1.1 *Refusal to supply:* The operation of one telecommunication service often requires access to technical information for example, concerning interfaces about other telecommunication goods or services. Intellectual property rights (IPRs) might exist in relation to such information, and there are circumstances in which an IPR might be exercised in a manner that would constitute an abuse of a dominant position. For example, a dominant network operator might refuse to supply interface information with the objective, or effect, of

distorting competition in the supply of customer equipment designed to take advantage of the new interface. On the other hand the rights given to holders of IPRs are an important element in creating incentives to innovate, and the exercise of these rights should not be diminished without establishing precisely how dominance arises and without clear evidence of abuse. This problem is one which applies to other markets as well as telecommunications and ICASA would expect to follow the judgments of the Competition Commission and other Justice authorities closely when coming to decisions in this area.

2.6.1.2 *Refusal to supply new services:* The problem is particularly acute where a non-dominant operator is introducing, or would like to introduce, a new service. The scope for anticompetitive behaviour by dominant operators is considerable if the introduction of the service to the non-dominant operator's customers requires the co-operation of the dominant operator. But this is also an area where it is legitimate for different companies to differentiate their products in ways that are not anticompetitive. Because of the complexity of the issues involved, the Authority would approach this behaviour on a case-by-case basis.

2.6.1.3 *Refusal to supply technical information:* Where a dominant operator withholds technical information which is a necessary input into the requesting operators operations, the refusal to make that interface information available, whether or not it is protected by intellectual property rights, may be an abuse. This would be especially true where the competitors' need for such information arose from a position of dependency on the other operator (for example, where a VANS operator needs to interconnect with a dominant PSTS operator but in order to do so it requires technical information).

2.6.1.4 *Behaviour short of outright refusal*: Outright refusal to supply by a dominant operator is perhaps the clearest kind of anticompetitive behaviour relating to the supply of inputs to competitors. However, similar anticompetitive effects may be achieved by means other than outright refusal to supply, for example, unfavourable and unreasonable terms as a condition for supply and unreasonable delays in or refusal to allow testing (for example, of compatibility).

2.6.2 The general approach ICASA will adopt in looking at these issues is whether or not the relationship between the dominant operator and those seeking supply is unduly biased in favour of the dominant operator, for example, not providing connection in a timely manner. Such a bias would not of itself be evidence of an abuse of that dominance and ICASA recognises that there may be objective reasons for it. However, ICASA would expect the dominant operator to be able to justify the objective reason for any behaviour falling short of outright refusal to supply.

2.7 Fair Launch Practices

2.7.1 The Authority is aware of the possibility that certain launch practices may be regarded as anticompetitive. For example, the refusal to supply information

needed to enable an interconnected network to use the service, once it is launched. Again, there is likely to be a necessary time delay between knowing what is technically necessary to be able to use the launched service and being able to implement that technical requirement. If the information is not supplied in advance of the service the effective date at which the service can actually be used is delayed. In this case, how much notice is reasonable, and in the case of a service about to be launched, how much notice is "too short" will depend on the complexity of the service requirements and a case by case approach will again be necessary.

3. Conclusions

In light of the above-mentioned findings the Authority has reached the following conclusions.

3.1 Regulatory Framework

3.1.1 The Authority believes that it is extremely important that any form of regulatory guidance does not stifle innovation or delay getting new technologies launched into the market which would negate competitive advantage.

3.1.2 The current provisions in the Act and the licence conditions which address pricing, fair competition and discrimination also govern a product an operator is offering on a trial. In addition, competition law specifically chapter 2 addresses possible anticompetitive behaviour during trials and launches of new products and services. Therefore, the Authority believes that there is no need for additional regulation.

3.1.3 However, no rules presently exists dealing specifically with the trial and launch of new services and products. Therefore, the Authority in this document has set out some general guidelines which it believes will promote fair trading principles during trials and launch of new services and products. The premise will be on operators to act in accordance with these guidelines.

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3.5.1 The selection of the customer base will depend on the specific product in mind and the operator's needs. This is up to the operator to determine, based on objective criteria.

3.5.2 It should be clearly communicated to the trial participants that it is a trial and that the product might not be launched. In the event that the product is launched it should be communicated to participants that it might be launched with different terms and conditions.

3.5.3 The participation of a trial must not be linked to the purchase or continued use of the trialed product or any other product or service of the operator that is conducting the trial.

3.5.4 The operator should be able to motivate and substantiate the customer size base as the minimum size necessary to achieve the aims and objectives of the trial.

3.6 Fair Launch Practices

3.6.1 Certain launch practices may be regarded as anti-competitive. For example, the refusal to supply information needed to enable an interconnected network to use the service, once it is launched. The Authority would approach this type of behaviour on a case-by-case basis.

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