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GENERAL NOTICE

NOTICE 331 OF 2008



INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA

REGULATIONS PURSUANT TO SECTION 67(4)(e) OF THE ELECTRONIC COMMUNICATIONS ACT NO. 36 OF 2005 (THE ACT)

1. The Independent Communications Authority of South Africa ("the Authority") hereby gives notice in terms of section 4(4) of the Electronic Communications Act No. 36 of 2005 ("the Act") of its intention to prescribe regulations in terms of section 67(4)(e) of the Act and section 4(3)(j) of the Independent Communications Authority of South Africa Act No. 13 of 2000 as amended ("The ICASA Act").
2. Interested persons are invited to submit written representations on these draft Regulations by no later than **16h00 on 5 May 2008**, by post, hand delivery, facsimile transmission, or electronic transfer (in Microsoft Word or PDF) for the attention of:

Thamsanqa TM Kekana

ICASA

164 Katherine Street

Pinmill Farm: Block B

Sandton

or

Private Bag X10002

Sandton

2146

Fax: (011) 321-8233

Telephone: (011) 321-8542

E-mail: ttkekana@icasa.org.za; cc mnkopane@icasa.org.za

3. Persons making written representations are requested to indicate if they wish to make oral submissions in the event that the Authority decides to conduct oral hearings in terms of section 4(6) of the Act, the duration thereof not to exceed one hour.
4. All written representations submitted to the Authority pursuant to this notice will be made available for inspection by interested persons at the Authority's library and copies of such representations may be obtained on payment of the prescribed fee.
5. At the request of any person who submits written representations pursuant to this notice, the Authority will determine whether such representations or any portion thereof is confidential in terms of section 4D of the ICASA Act. If the request for confidentiality is refused, the person making the request will be allowed to withdraw such representations or portion thereof.
6. With respect to written representations or portions thereof determined to be confidential in terms of paragraph 5 above, ICASA may direct that the public or any member or category thereof, shall not be present while any oral submissions relating to such representations or portions thereof are being made; provided that interested parties must have been notified of this intention and allowed to object thereto. The Authority will consider the objections and notify all interested parties of its decision.
7. The final regulations will be published in the Government Gazette.

PARIS MASHILE
CHAIRPERSON

Regulations detailing the schedule within which the Authority will undertake periodic review of relevant markets or market segments pursuant to section 67(4)(e) of the Electronic Communications Act No. 36 of 2005

1. Introduction

- 1.1 The Independent Communications Authority of South Africa ("the Authority") is required to promulgate regulations defining the relevant markets and market segments, as applicable, that pro-competitive measures may be imposed upon licensees having significant market power ("SMP") where the Authority determines such markets or market segments have ineffective competition.¹ In particular, and with regards to undertaking periodic reviews of the relevant markets or market segments which have been determined by the Authority as being ineffectively competitive and the review of the pro-competitive measures which have been imposed by the Authority on a licensee in possession of SMP, the Act requires the Authority to promulgate regulations which set out the manner in which the Authority shall undertake such periodic reviews, taking into account the provisions of section 67(8) of the Act.

2. Procedures for undertaking the review of pro-competitive conditions pursuant to section 67(8) (a) of the Act

- 2.1 The process for undertaking the review of pro-competitive measures imposed on licensees designated to possess SMP shall be undertaken by the Authority at intervals of eighteen (18) months, such eighteen (18) months being calculated from the effective date of the imposition of the pro-competitive measures upon licensees.
- 2.2 The Authority is of the view that a period of eighteen (18) months provides an adequate time period within which the Authority may assess the development of the relevant market with regards to the following:
- 2.2.1 The existence of new market entrants,
- 2.2.2 The growth of the relevant market, and
- 2.2.3 The degree of innovation in the relevant market.
- 2.3 The above non-exhaustive list of factors may serve to assist the Authority in discerning the development of the relevant market.

¹ Section 67 (4) of the Act

- 2.4 Not less than thirty (30) days prior to the anniversary of the initial eighteen (18) months of the imposition of pro-competitive measures, the Authority shall publish a notice in the *Gazette* detailing its intention to undertake a review of the pro-competitive measures imposed on licensees with SMP.
- 2.5 Where the Authority has modified the pro-competitive measures in accordance with section 67(8)(c) of the Act, such modified pro-competitive measures shall be effective for a period of eighteen (18) months, at the expiration of which the Authority shall undertake another review in accordance with section 67(8)(c) of the Act. The procedures for undertaking this subsequent review shall be consistent to those detailed at regulation 6.
- 3. Principles for the revocation of pro-competitive measures imposed on licensees with SMP pursuant to section 67 (8) (b) of the Act**
- 3.1 When undertaking a review of the pro-competitive conditions imposed on licensees with SMP, the Authority is of the view that it is necessary that the relevant market or market segments within which licensees in possession of SMP be defined in accordance with the Regulations promulgated pursuant to section 67(4)(a) of the Act. Only after having conducted the analysis required by the Regulations promulgated pursuant to sections 67(4) (a), the Authority is of the view that an analysis of whether or not a licensee possesses SMP in a relevant market or market segment must be undertaken in accordance with the Regulations promulgated pursuant to section 67(4)(d), having regard to the provisions of section 67(5) of the Act.
- 3.2 The purpose of undertaking the sequential steps detailed at regulation 3.1 is to provide the Authority with the necessary context to discern whether a licensee continues to be in possession of SMP in a relevant market or market segment. In this regard, the appropriate interpretation of section 67(8)(a)(i) of the Act entails undertaking the review of pro-competitive measures imposed by the Authority on the basis and upon the analytical criteria which the pro-competitive measures were initially imposed by the Authority.
- 3.3 When undertaking a review of the pro-competitive measures, the Act mandates the Authority to have regard to the earlier analysis conducted by the Authority in arriving at the initial determination of defining the relevant market or market segments, the designation of SMP and the determination that a relevant market is characterised by ineffective competition. While the Authority is enjoined by the Act to consider the initial analysis undertaken by the Authority, nonetheless the Authority is of the view that the review of pro-competitive measures must necessarily entail undertaking another analysis.

- 3.4 This is so since the evolution of the relevant markets or market segments may be such that the contours within which competitive constraints exist have either expanded or contracted. That is to say, within a given time series, the Authority anticipates that several factors may serve to significantly influence whether or not the relevant market may be broader or narrower than initially defined by the Authority.
- 3.5 Such factors may amount to, but not limited to the following:
- 3.5.1 The degree of innovation in the relevant market,
 - 3.5.2 The alleviation or significant reduction of legal and regulatory barriers to entry in the relevant market,
 - 3.5.3 The existence of new market entrants who are capable of providing effective competitive constraints on the market participants in the relevant market, and
 - 3.5.4 The augmentation of the degree of countervailing power in the relevant market.
- 3.6 Therefore, the Authority is of the view that undertaking another analysis would enable the Authority to accurately discern whether certain developments in the relevant markets have served to significantly alter the structural disposition of the market so as to result in a change to the SMP determination of a licensee.
- 3.7 Where such market developments have served to significantly alter the structural disposition of the relevant market for there not to be in existence a licensee who possesses SMP, the Authority must revoke the pro-competitive measures which were initially imposed where the Authority determined that such a licensee possessed SMP. The Authority is of the view that the purpose of section 67(8)(b) is to ensure that where pro-competitive measures had been imposed on the basis that such pro-competitive measures were intended to attain the alleviation of market distortions or perceived market failure, where these no longer exists, it would be disproportionate to continue to subject licensees to remedies which have served their objectives.
- 3.8 Consequently, where the Authority has defined the relevant markets or market segments and determined that there exists no licensee which is in possession of SMP, the Authority shall direct a determination to the licensee initially determined to be in possession of SMP of the effective date upon which the pro-competitive measures initially imposed shall

cease to be effective. Furthermore, the Authority shall cause such a determination to be published in a *Gazette*.

4. Procedures for undertaking the review of pro-competitive conditions pursuant to section 67(8)(b) of the Act

4.1 In undertaking a review of the pro-competitive measures in accordance with section 67(8)(b), the Authority shall publish a draft determination in the *Gazette* detailing the following:

4.1.1 The findings and reasons on the definition of the relevant market or market segment in accordance with the Regulations promulgated pursuant to section 67(4)(a) of the Act;

4.1.2 The findings and reasons on whether or not a licensee initially designated as possessing SMP continues to possess SMP in accordance with the Regulations promulgated pursuant to section 67(4)(d) of the Act, taking into consideration the factors detailed in section 67 (7)(5) of the Act;

4.1.3 The findings and reasons for the revocation of pro-competitive measures where the Authority has determined that a licensee initially designated to be in possession of SMP no longer possesses SMP; and

4.1.4 The effective date for the revocation of the pro-competitive measures on such a licensee.

4.2 Interested parties shall be afforded a period of at least thirty (30) days to submit written comments to the Authority on the draft determination published pursuant to regulation 4.1.

4.3 Once the Authority has considered the written comments submitted by interested parties, the Authority shall publish a notice detailing the final determination on the review for the revocation of the pro-competitive measures imposed on a licensee with SMP.

5. Principles for the modification of pro-competitive measures imposed on licensees with SMP pursuant to section 67(8)(c) of the Act

5.1 Where the Authority has determined that a licensee continues to possess SMP, however due to the changes in the competitive nature of the relevant market, the continued imposition of the initial pro-competitive conditions is no longer proportional, the Authority must modify such pro-competitive measures so as to ensure that they are proportional.

- 5.2 In undertaking such an assessment, the Authority shall have regard to all salient developments in the relevant market since the initial determination and ascertain whether or not such market developments are of the nature which would serve to mandate the Authority in the modification of the initial pro-competitive measures imposed on a licensee with SMP.
- 5.3 In modifying the initial pro-competitive measures where necessary, the Authority shall have regard to the nature of the market developments and discern whether or not these developments have had a significant effect on the degree of competition in the relevant market or market segments.
- 5.4 In discerning whether or not market developments necessitate the modification of the pro-competitive measures imposed by the Authority on a licensee with SMP, the Authority shall have regard to the extent to which these market developments serve to substantially contribute to the alleviation of market distortions or perceived market failure. Where such market developments serve to substantially contribute to the alleviation of the market distortions and perceived market failure, the Authority shall modify the pro-competitive measures accordingly.

6. Procedures for undertaking the review of pro-competitive conditions pursuant to section 67(8)(c) of the Act

- 6.1 In undertaking a review of the pro-competitive measures in accordance with section 67(8)(c), the Authority shall publish in the *Gazette*, a draft determination detailing to following:
 - 6.1.1 The findings and reasons on the definition of the relevant market or market segment in accordance with the Regulations promulgated pursuant to section 67(4)(a) of the Act,
 - 6.1.2 The findings and reasons on whether or not a licensee initially designated as possessing SMP continues to possess SMP in accordance with the Regulations promulgated pursuant to section 67(4)(d) of the Act, taking into consideration the factors detailed in section 67 (7)(5) of the Act,
 - 6.1.3 The findings and reasons on the effectiveness of competition in the relevant market or market segments in accordance with the Regulations promulgated pursuant to section 67 (4)(b) of the Act, taking into consideration the factors detailed in section 67 (6) of the Act,
 - 6.1.4 The findings and reasons on the nature of market developments which have substantially contributed to the alleviation of the market distortions and perceived market failure and which have had a

significant effect on the degree of competitiveness in the relevant market or market segment;

- 6.1.5 The findings and reasons on whether or not market developments have necessitated the modification of the pro-competitive measures initially imposed on a licensee with SMP, and
 - 6.1.6 Where in the event that the Authority has determined that a licensee continues to possess SMP in a relevant market which is characterised by ineffective competition though there exists market developments which necessitate the modification of pro-competitive measures, the draft determination detailing the modified pro-competitive measures.
- 6.2 Interested parties shall be afforded a period of at least thirty (30) days to submit written comments to the Authority on the draft determination published pursuant to regulation 6.1.
- 6.3 Once the Authority has considered the written comments submitted by interested parties, the Authority shall publish a notice detailing the final determination on the review for the modification of the pro-competitive measures imposed on a licensee with SMP and the effective date for any modified pro-competitive measures which the Authority intends imposing.
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