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GENERAL NOTICE

NOTICE 332 OF 2008



INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA

REGULATIONS PURSUANT TO SECTION 67(4)(f) 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) 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 *Gazette*.

PARIS MASHILE
CHAIRPERSON

Regulations detailing the processes for monitoring and investigating anti-competitive behaviour in a relevant market or market segment pursuant to section 67(4)(f) of the Electronic Communications Act No. 36 of 2005.

1. Introduction

1.1 Section 67(4) of the Electronic Communications Act No. 36 of 2005 ("the Act") mandates the Authority to prescribe regulations defining the relevant markets and market segments, as applicable, that pro-competitive conditions may be imposed upon licensees having significant market power where the Authority determines such markets or market segments have ineffective competition

1.2 Furthermore, section 67(4)(f) of the Act mandates the Authority prescribe regulations to

"...provide for monitoring and investigation of anti-competitive behaviour in the relevant market or market segments."

1.3 The Authority views section 67(4)(f) as requiring the prescription of the administrative processes which the Authority must undertake when monitoring and investigating allegations of anti-competitive market conduct or behaviour in a relevant market or market segment.

1.4 The procedures for the monitoring of anti-competitive market conduct or behaviour are delineated from the procedures for the investigation of anti-competitive behaviour. This is premised on the basis that the function of investigation is distinct from monitoring. While the Authority is of the view that undertaking an investigation may be pursuant to a complaint, the Authority views the function of monitoring as a regulatory supervisory function pertaining to the market conduct or behaviour engaged in by licensees. The following details the administrative procedures which the Authority shall adhere to in undertaking any investigation pertaining to anti-competitive market conduct or behaviour in a relevant market or market segment.

2. The administrative processes for undertaking investigation of anti-competitive behaviour

2.1 The process for the investigation of anti-competitive behaviour shall be implemented in three phases as follows:

2.1.1 The Preliminary Phase

2.1.2 The Investigative Phase, and

2.1.3 The Recommendation and Determination Phase

3. The Preliminary Phase

3.1 The Authority shall institute a preliminary phase of investigation based on receipt of a written complaint alleging a suspected transgression by a licensee of the provisions of the Act pertaining to Chapter 10 or regulations promulgated pursuant to Chapter 10 of the Act. ("Complaints based investigation").

3.2 The Authority may also initiate an investigation of market conduct or behaviour engaged in by licensees of its own accord based upon a reasonable apprehension of a suspected transgression by a licensee of the provisions of the Act pertaining to Chapter 10 or regulations promulgated pursuant to Chapter 10 of the Act. ("Own initiative investigation").

4. Complaint based investigation by the Authority

4.1 Upon receipt of a written complaint alleging a suspected transgression of the provisions of the Act pertaining to Chapter 10 or regulations promulgated pursuant to Chapter 10 of the Act, the following procedure shall apply:

4.1.1 Within a period of seven (7) days, the Authority shall:

4.1.1.1 Notify the respondent of the complaint submitted to the Authority and the allegations therein;

- 4.1.1.2 Provide the respondent with a description of such allegations and the provisions of the Act or regulations to which the allegations pertain;
 - 4.1.1.3 Provide the respondent with a period of seven (7) days to furnish a response to the allegations.
 - 4.1.2 Within a period of seven (7) days, the respondent must:
 - 4.1.2.1 Upon receiving the information detailed at regulations 4.1.1.1 to 4.1.1.3, provide the Authority with a statement to verify or rebut, in whole or in part, the factual circumstances pertaining to the written complaint.
 - 4.1.3 The Authority may direct the complainant to furnish additional relevant information which serves to verify or rebut, in whole or in part, the factual circumstances provided by the respondent.
 - 4.1.4 The Authority may request any information which would serve to assist in determining whether or not the complaint or alleged transgression of the Act, contains sufficient merit for the Authority to proceed to the investigative phase.
- 5. Own initiative investigation by the Authority**
- 5.1 The Authority may initiate an investigation of market conduct or behaviour engaged in by licensees of its own accord, where it is of the view that there exists a reasonable apprehension of a suspected transgression by a licensee of the provisions of the Act pertaining to Chapter 10 or regulations promulgated pursuant to Chapter 10 of the Act.
 - 5.2 Where the Authority intends instigating an investigation of its own accord, the following procedure shall apply:
 - 5.2.1 The Authority shall notify a licensee of the basis upon which the Authority has a reasonable apprehension that such a licensee has transgressed the provisions of the Act pertaining to Chapter 10 or regulations promulgated pursuant to the Chapter 10 of the Act.

- 5.2.2 The licensee must within seven (7) days of receiving a notification from the Authority pursuant to regulation 5.2.1, furnish the Authority with the relevant information which serves to verify or rebut, in whole or in part, the factual circumstances provided by the Authority pursuant to regulation 5.2.1.
- 5.3 The Authority may request any information which would serve to assist it in determining whether or not the Authority ought to proceed to the investigative phase.
- 5.4 Where the Authority is of the view that there exists insufficient circumstantial evidence to warrant further investigation, the Authority shall:
- 5.4.1 In a complaints based process, notify the complainant and the respondent in writing of its determination not to proceed to the investigative phase, and provide reasons to the complainant and the respondent for the determination.
- 5.4.2 In an own initiative process, notify a licensee in writing of its determination not to proceed to the investigative phase, and provide reasons to the complainant and the respondent for the determination.
- 5.5 A complainant in receipt of a determination from the Authority that there exists insufficient evidence to warrant further investigation by the Authority may refer a complaint to the Complaints and Compliance Committee ("CCC").

6. The Investigative Phase

- 6.1 Where the Authority is of the view that there exists sufficient evidence that there is a reasonable likelihood that the market conduct or behaviour engaged in by a licensee may result in the substantial prevention or lessening of competition in a relevant market or market segment, the Authority shall notify a licensee of its intention to proceed to the investigative phase.
- 6.2 The Authority may elect to conduct an investigation pursuant to section 4B of the Independent Communications Authority of South Africa Act No. 12

of 2000, as amended ("the ICASA Act"). In this regard, the Authority must, pursuant to section 4B(2) of the ICASA Act, give notice in the *Gazette* of its intention to conduct an inquiry regarding the investigation of anti-competitive market conduct or behaviour in a relevant market or market segment.

- 6.3 The procedures detailed in section 4C of the ICASA Act shall apply when the Authority elects to conduct inquiries pursuant to section 4B of the ICASA Act regarding anti-competitive market conduct or behaviour in a relevant market or market segment.

7. The Recommendation and Determination Phase

- 7.1 At the conclusion of an inquiry conducted in terms of section 4C of the ICASA Act, and in accordance with section 4C(6) of the ICASA Act, the Authority must make determinations which amount to the substantive findings regarding the alleged anti-competitive market conduct or behaviour engaged in by a licensee. The Authority shall publish these substantive findings in a *Gazette*.
- 7.2 The recommendations and determinations made by the Authority shall be binding on the licensee(s) to which such recommendations and determinations are directed.
- 7.3 A penalty may be imposed by the Authority where a licensee fails to adhere to the recommendations and determinations directed to it.
- 7.4 The penalty imposed shall not exceed ten (10) percent of the licensee's annual revenues of the preceding financial year.
- 7.5 A final determination issued by the Authority shall not preclude a licensee from appealing to the CCC or instituting an action before a competent court of law.

8. The Administrative Process for the monitoring of anti-competitive behaviour

- 8.1 For monitoring purposes, the Authority shall from time to time request licensees to prepare and disclose certain information regarding their licensed operations.
- 8.2 The Authority may direct a licensee to submit certain information within fourteen (14) days upon receiving a written request from the Authority. Such information may be inclusive of the following, but not limited to:
- 8.2.1 Any contracts,
 - 8.2.2 Wholesale and retail prices;
 - 8.2.3 Terms and conditions of supply of wholesale and retail services;
 - 8.2.4 Performance measures and statistics regarding times, technical performance and quality of services data;
 - 8.2.5 Plans and forecasts, and
 - 8.2.6 Network capacity information.
- 8.3 A penalty may be imposed by the Authority where a licensee fails to adhere to a direction for the submission of information pursuant to regulation 8.2.
- 8.4 The penalty shall not exceed ten (10) percent of the licensee's annual revenues of the preceding financial year.
- 8.5 Where the Authority is of the view that the information received pursuant to regulation 8.2 above amounts to sufficient evidence to warrant the Authority instigating an own initiative investigation, regulations 5 – 7 shall apply.
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