

Government Gazette Staatskoerant

REPUBLIC OF SOUTH AFRICA
REPUBLIEK VAN SUID-AFRIKA

Vol. 513

Pretoria, 6 March
Maart 2008

No. 30849

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GENERAL NOTICE

NOTICE 334 OF 2008



INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA

REGULATIONS PURSUANT TO SECTION 67(4)(c) 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)(c) 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: tkekana@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

Prescription of the pro-competitive terms and conditions to be imposed by the Authority where there exists ineffective competition in a relevant market pursuant to section 67(4)(c) 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 where the Authority determines such markets or market segments have ineffective competition.¹ In particular, and with regards to the imposition of pro-competitive measures, section 67(4) (c) of the Act requires the Authority to promulgate regulations which set out the pro-competitive measures which the Authority may impose in order to remedy the perceived market failure in the markets or market segments which are found to have ineffective competition, taking into account the provisions of subsection (7) of the Act.

1.2 Subsection (7) of the Act details the terms and conditions that the Authority may impose in accordance with the process envisaged by section 67 the Act. These entail the following:

- (a) *an obligation to act fairly and reasonably in the way in which the licensee responds to requests for access, provisioning of services, interconnection and facilities leasing;*
- (b) *a requirement that the obligations contained in the licence terms periods and at the times required by or under such terms and conditions, failing which a penalty may be imposed;*
- (c) *a prohibition against discriminating in relation to matters connected with access, provisioning of services, interconnection and facilities leasing;*

¹ Section 67 (4) of the Act

- (d) *an obligation requiring the licensee to publish, in such manner as the Authority may direct, all such information for the purpose of ensuring transparency in relation to —*
 - (i) *access, interconnection and facilities leasing; or*
 - (ii) *the provision of electronic communications network services, electronic communications services or any other service offered by the licensee applicable to the relevant market or market segments at issue;*
- (e) *an obligation to publish, in such manner as the Authority may direct, the terms and conditions for —*
 - (i) *access, interconnection and facilities leasing; or*
 - (ii) *the provision of electronic communications network services, electronic communications services or any other service offered by the licensee applicable to the relevant market or market segments at issue which may take the form of a reference offer;*
- (f) *an obligation to maintain a separation for accounting purposes between different matter relating to —*
 - (i) *access, interconnection and facilities leasing; or*
 - (ii) *the provision of electronic communications network services, electronic communications services or any other service offered by the licensee applicable to the relevant market or market segments at issue; and*
 - (iii) *retail and wholesale prices;*
- (g) *a requirement relating to the accounting methods to be used in maintaining the separation of accounts referred to in paragraph (f);*
- (h) *such price controls, including requirements relating to the provision of wholesale and retail prices in relation to matters connected with the provision of —*
 - (i) *access, interconnection and facilities leasing; or*

- (ii) *electronic communications network services, electronic communications services or any other service offered by the licensee applicable to the relevant market or market segments at issue;*
- (i) *matters relating to the recovery of costs and cost orientation and with regard to broadcasting services, the appropriate amount of South African programming, including —*
 - (i) *music content;*
 - (ii) *news and information programmes; and*
 - (iii) *where appropriate, programming of local or regional significance;*
- (j) *matters relating to the accounts, records and other documents to be kept and made available for inspection by the Authority.”*

1.3 In imposing the above obligations on licensees which have been designated by the Authority as possessing significant market power ("SMP") and where such a licensee possesses SMP within a relevant market or market segment which the Authority has determined to be characterised by ineffective competition, the Authority shall be guided by the principle of proportionality.

1.4 The Authority is of the view that the premise for the imposition of the above pro-competitive measures upon licensees possessing SMP and operating within a relevant market characterised by ineffective competition is to attempt to alleviate the market failure which may be observable within such relevant markets and to impose such terms and conditions on the licensees which have the effect of retarding such market failure and simulating the conditions of effective competition. Ultimately, the effect of the imposition of these pro-competitive measures is intended to alleviate the market failure, though the manner in which such market failure is alleviated must necessarily be done in a phased manner. As such, in the short-term, the imposition of the pro-competitive measures are intended to have the effect of retarding and countenancing the continuation of the adverse effects commonly associated with markets which are characterised by market failure and ineffective competition. In the medium to long-term, the imposition of the pro-competitive measures are intended

to alleviate the market failure and facilitate the introduction of effective competition in the relevant market or neighbouring, associated or related markets.

2. Considerations for the imposition of pro-competitive measures

- 2.1 Where the Authority intends imposing pro-competitive measure in accordance with section 67 of the Act, with due regard to the principle of proportionality, the Authority aims to alleviate the existence of market failure in a relevant market. With this aim as the ultimate objective for the imposition of pro-competitive measures, the Authority shall in each instance evaluate the most reasonable and proportional manner in which the alleviation of market failure on a relevant market may be attained. In this regard, the Authority shall, in exercising its discretionary powers when considering whether or not to impose pro-competitive measures, evaluate each pro-competitive measure detailed in section 67(7) of the Act, and determine whether or not the imposition of such pro-competitive measures would be reasonable and proportionate in attaining the ultimate objective of alleviating market failure in a relevant market.
- 2.2 Furthermore, the Authority shall consider whether such pro-competitive measures to be imposed amount to the most proportionate means of attaining the alleviation of market failure in a relevant market. In essence, the Authority shall consider whether the pro-competitive measures amount to the least restrictive means by which the stated objective of alleviating market failure may be attained.
- 2.3 In addition, where there exists specific obligations which have been imposed on a licensee designated as possessing SMP in a relevant market which is determined to be ineffectively competitive, or where there exists other obligations which are of general application and which may be intended to have the effect of alleviating market failure in a relevant market, the Authority shall have regard to those specific obligations and obligations of general application in its consideration of the imposition of pro-competitive measures. Where such specific obligations or obligations of general applicability serve to substantially contribute to the alleviation of market failure in a relevant market, the Authority shall consider the time series within which such obligations may be anticipated to alleviate the market failure in a relevant market, prior to determining whether or not the

imposition of any pro-competitive measures would be reasonable and proportionate.

3 Procedure for the imposition of pro-competitive measures

3.1 The imposition of pro-competitive measures in accordance with section 67(4) (c) will be preceded by:

3.1.1 A process to define the relevant market pursuant to the Regulations required in terms of section 67(4)(a) and the framework for the definition of the relevant markets, and a consideration that a licensee possesses SMP in that relevant market, and that such a relevant market within which such a licensee operates is characterised by ineffective competitive;

3.1.2 Imposition of pro-competitive measures upon a licensee shall be carried out in the following manner:

3.1.2.1 A determination with a factual finding that a licensee possesses SMP shall be directed to such a licensee;

3.1.2.2 A determination with a factual finding that the relevant market within which the licensee operates is characterised by ineffective competition shall be directed to such a licensee, and

3.1.2.3 A draft determination of the pro-competitive measures which the Authority intends imposing shall be directed to such a licensee.

3.1.3 The Authority shall publish the draft determination in the *Gazette* for a period of thirty (30) days and solicit written comments from interested parties.

3.1.3.1 Upon request, the Authority may extend the period within which the submission of written comment must reach the Authority.

- 3.1.3.2 The Authority shall within thirty (30) days of receiving written comments pursuant to regulation 3.1.3 publish the final determination in the *Gazette*.
- 3.1.3.3 The final determinations issued by the Authority are binding upon the licensees and such licensees may not have recourse to the Complaints and Compliance Committee regarding any aspect of the final determination.
- 3.1.3.4 A final determination issued by the Authority shall not preclude a licensee from instituting an action before a competent court of law.
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