COMMENTS ON THE ELECTRONIC COMMUNICATIONS AMENDMENT BILL

Submitted to the Department of Telecommunications and Postal Services
31 January 2018

Contact person

Fungai Sibanda

e-mail: fksibanda@hekima.co.za

Postal: Hekima Advisory (Pty) Ltd
P.O. Box 102811
Moreleta Plaza
0167

Office: Building 12, Mezzanine Floor
Oxford Office Park
3 Bauhinia Street
Highveld Techno Park
Centurion
0169

E-mail: info@hekima.co.za

Website: www.hekima.co.za

Tel: 012 754 1424

1 Introduction

Hekima Advisory is a regulatory and competition policy advisory firm. We specialise in regulatory economics with a special focus on telecommunications, broadcasting, energy and transport sectors, in addition to general competition policy expertise. We appreciate the opportunity to comment on the draft Electronic Communications Amendment Bill (the Bill) and are willing to further engage the Department of Telecommunications and Postal Services (the DTPS) on any aspect of our comments, should the need arise. Due to time constraints, our comments focus mainly on the competition related provisions of the draft Bill.

2 General comments

The DTPS has published the Bill for public comment following an extensive policy review process that culminated in the publication of the National Integrated ICT Policy White Paper (White Paper) on 3 October 2017. The White Paper replaced the 1996 White Paper on Telecommunications Policy, which had been in place for more than 20 years. Good practice suggests the review of national policy after a period of at least 5 years. In the absence of a policy review, especially in the fast changing world of ICTs, policy and legislation often play catch-up instead of setting the scene for the future development of the sector. Thus the White Paper and the Bill come at an opportune time when there have been a lot of lessons learnt from the practical implementation of and experience with the current legislation. However, in an attempt to correct past shortcomings, there is a temptation to over-reach, resulting in the proverbial 'killing a fly with a sledge hammer' phenomenon.

This is apparent in the amendment of section 67 of the Electronic Communications Act No 36 of 2005 (the ECA). It is imperative that in attempting to enhance the effectiveness of the Independent Communications Authority of South Africa (the Authority), lessons learnt from past experience should guide this process. The Authority has undertaken market reviews in the past. Whilst there may have been challenges experienced, it would be unfortunate if a new process is introduced which is different from what the Authority has tried to learn and

perfect over the years, with respect to market reviews. The Bill conflates market definition and market review processes as if there are separate. Failure to get the process correct will have far reaching implications for the sector and will keep the Authority in unending legal challenges by market players and other interested parties.

3 Specific comments

Definitions

1. **Amendment of section 1 of Act 36 of 2005**

The definition of **"general open access principles"** rests on the two pillars of transparency and non-discrimination. However, the third element of fairness is also critical from a pricing perspective. The open access model gives monopoly status to a wholesale infrastructure provider. In the absence of competition such a service provider has the incentive to charge high access prices. It is imperative therefore that open access be premised on fairness in addition to transparency and non-discrimination. We also propose deletion of the principle of effectiveness as it may be difficult to measure in the context of open access.

The body of the bill refers to open access principles, whereas the definitions section defines the term 'general open access principles'. We therefore propose a deletion of the term 'general' and refer simply to 'open access principles'.

Thus we propose the following amendment:

"**open access principles**" means providing wholesale open access to electronic communications networks on terms that are fair, transparent and non-discriminatory

Substitution of section 20 of Act 36 of 2005

Standard practice in defining ministers is to refer to the underlying portfolio instead of using the title of the minister, which is subject to change. Thus the following definition is proposed –

"Minister" means the minister responsible for telecommunication services

2. Amendment of section 67 of Act 36 of 2005

Clause 35 seeks to insert a new section 3A which obliges the Authority to define all relevant markets and market segments relevant to the broadcasting and electronic communications sectors, within a period of 12 months.

The art of defining relevant markets is not an end in itself nor is it undertaken for its own sake. Rather market definition is undertaken for purposes of either merger evaluation, in order to determine market overlap or for purposes of an investigation into alleged anticompetitive conduct in order to determine market dominance. In both instances the end is about assessing the impact of particular conduct or transaction on competition and formulating appropriate remedies to cure the effects.

For a sector specific regulator like ICASA, market definition is a first step in the process of diagnosing competition defects in the sector. In order to undertake such a process there must be reasonable suspicion that competition is being compromised. Thus in order to properly dissect what may be stifling competition a definition of the relevant market is undertaken. Thereafter an assessment of the effectiveness of competition is done, followed by the identification of market players with significant market power and imposing conditions to remedy the competition defects.

Thus a market review must be done on a case by case basis, based on whatever evidence, rationale or justification that exists at the time, warranting intervention by the Authority. Rather than viewing market definition as part of a market review process, the Bill separates the two processes. Market definition can never be a stand-alone process, otherwise it becomes an exercise in futility, with no objective in mind.

Clause 4(e) enjoins the Authority to monitor and investigate anticompetitive behaviour in the market or market segment. Whilst monitoring is part and parcel of the Authority's functions, the Competition Commission was created for purposes of investigating anti-competitive conduct in all sectors of the economy, including the electronic communications and broadcasting sectors.

According to clause 4C, the Authority must complete a market review within a period of 12 months. It is not advisable to prescribe a period of time with no option of an extension. In

terms of the Competition Act, the Competition Commission has a period of 12months within which to complete an investigation. However, should an investigation not be completed within that period, the Commission can, with the permission of the complainant extend the period. Over its 20 year history and with all the experience, expertise and capacity it has garnered the Commission still has a lot of investigations that last more than 12 months. In addition to investigations, the Commission also undertakes market enquiries, the majority of which take more than a 12 months to complete. The current market enquiry on private healthcare was initiated in January 2014. It will therefore be impractical to tie up the Authority to a 12 month period with no flexibility. There are other administrative means of dealing with delays and non-performance, than prescribing a stringent timeframe in legislation.

According to the new section 67 (13) the Authority must perform the market definition and market review proceedings after consultation with the Competition Commission. This requirement is not necessary as the relationship between the Authority and the Commission is governed by a memorandum of agreement, which provides for cooperation, exchange of information and participation in each other's proceedings. Subjecting the Authority to such a requirement adds red tape into the process and can hamstring the Authority's work.

3. Concurrent jurisdiction agreement between the Authority and the Competition Commission

The new clause 67A seeks to govern the relationship between the Authority and the Commission. Section 67 (9)-(12) of the current Act deals with such a relationship. In addition, section 4 (3A) of the ICASA Act and sections 3 (1A), 21 (h)-(j), 82 (1)-(3) of the Competition Act all deal with the relationship between the Authority and the Commission. The detail contained in the proposed section 67 (A) belongs in a memorandum of agreement.