COMMENTS ON THE ELECTRONIC COMMUNICATIONS AMENDMENT BILL, 2017

PRESENTATION TO THE DEPARTMENT OF TELECOMMUNICATIONS AND POSTAL SERVICES

TWEEFONTEIN, PRETORIA

06 MARCH 2018

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Introduction

- Hekima Advisory is a regulatory economics and competition policy advisory firm, with a special focus on regulated sectors such as telecommunications, broadcasting, energy and transport
- We are grateful for the opportunity to present our comments on the Draft EC Amendment Bill
- We have limited our comments to competition issues in the Bill

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General comments

- Role of the Minister
  - There is a conflation of policy making and regulatory roles. The Minister is given roles and responsibilities that go beyond policy making and executive administration to play a regulatory function.
    - Examples: Definition of high demand spectrum and section 31E, High demand spectrum
    - Subsection (b) of the definition seems to suggest that it is the Minister who must determine whether radio frequency spectrum is fully assigned, hence qualify as high demand spectrum. This contradicts the architecture of the Bill which places the responsibility for spectrum assignment on the Authority and that of spectrum allocation on the Minister. In any event this is a regulatory operational matter within the jurisdiction of the Regulator and it is not clear why the Minister should be burdened with pure regulatory determinations. Part (a) of the definition suffices and caters for instances of part (b)

General comments

- Use of policy directions
  - The National Integrated ICT Policy White Paper provides the policy framework, from which flows the proposed legislation and consequently the regulations
  - The use of Policy Directions should be limited – in the past policy directions have unintentionally encroached onto the regulatory space
- Use of the term 'cost based pricing' without defining it. Cost based pricing is not similar to setting prices that are equal to the cost of production
- Capacity challenges of the Authority v defects in the legislation
  - This should not wait for the establishment of a new regulator, which may take years

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Section 67

- The requirement imposed on the Authority in the proposed section 67(3A) to define all relevant markets and market segments relevant to the broadcasting and electronic communications sectors, within a period of 12 months is untenable. It is not clear to what end this obligation is being imposed.
- Identifying priority markets and the process of market definition are distinct
- This appears to stem from an observation in section 9.1.1.1 entitled 'Challenges' in the White Paper that " The EC Act is overly prescriptive in the manner in which market reviews must be conducted and what information needs to be assessed. It takes what are considered 'guidelines' in other jurisdictions, including the European Union, and prescribes them in law. Thus even when market power is obvious (for example where a monopoly commanding 100% market share, a duopoly commanding 90% of market share, or six players diving up all high demand spectrum between themselves in market of 400 other licensees) the regulator has been prevented from exercising regulatory interventions without conducting cumbersome, lengthy competition enquiries."

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Section 67 cont…

- There can be no short-circuiting of proper regulation. What section 67 prescribes is standard practice in competition analysis. To the extent that the proposal is for the identification of priority markets as is done in the EU, that is an administrative decision that doesn't require legislating for. However if the idea is to perform market definitions that are separate from the entire competition analysis i.e. assessing the effectiveness of competition, identifying players with significant market power and imposing remedies, this would be amiss
- For a sector specific regulator like ICASA, market definition is a first step in the process of diagnosing competition defects in the sector. The competition authorities and other jurisdictions follow a similar process

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Concurrent jurisdiction

- 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 sector. This is the essence *of ex ante* v *ex post* regulation
- According to the new section 67 (13) the Authority must perform the market definition and market review proceedings after consultation with the Competition Commission
  - The Authority's decisions should not be subjected to another regulator
  - This can be dealt with in terms of the MOA

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Concurrent jurisdiction

- 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, including 2008 amendments of the Competition Act
  - Imposes an obligation to amend the existing MOA within 3 months. Department cannot impose legislative timelines on an entity not falling under its portfolio
- The current MOA is in force and has been utilised by both parties – what does this amendment seek to achieve

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Section 42 A

- 42 A(1)
  - (c) prices for roaming services must not be less than underlying costs – it is not clear which costs are referred to here and what the intention is. If it is to prevent predatory pricing then prices should not be less than marginal or average variable costs
  - (d) Prices for roaming services should be cost based and not be too excessive in comparison with prices charged for the same services at national level. The concept of excessive pricing is elusive. We propose deletion of any reference to excessiveness.

Definitions

- Definitions form an important element of drafting a workable legislation. We propose the following amendments to definitions:
  - General open access principles
    - The open access model being proposed in the Bill 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 and impose other unfair access terms. It is not clear why the principles of fairness has been left out and we propose its incorporation into the definition of open access principles
    - Effectiveness as a principle of open access is rather vague and may be difficult to apply. One can only measure effectiveness after the fact, not at the point of granting access. Thus measuring effectiveness may be difficult to achieve in the context of open access and we propose its deletion
  - High demand spectrum

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THANK YOU

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