

1 November 2017

The Competition Commission

Per email: datainquiry@compcom.co.za

ISPA SUBMISSION ON THE INQUIRY INTO THE DATA SERVICES MARKET

1. ISPA refers to the Call for Submissions: Data Services Market Inquiry, 20 September 2017, and related documents and sets out its submissions below.
2. ISPA welcomes the involvement of the Commission in this issue and confirms its availability to assist in whatever manner it can to the execution of the Inquiry.

Focus of the Inquiry

3. ISPA has previously engaged with the Commission on issues relating to competition in the wholesale and retail markets for fixed and mobile data services. ISPA is aware that the Commission has insight into the structure of these markets and experience in addressing anti-competitive conduct by a vertically-integrated incumbent provider in the fixed markets.
4. ISPA's members – and the ISP community in general – have shown over the past decade the impact of competition in reducing the cost to communicate to consumers. Where ISPs have been allowed to compete to a degree in the reselling of Telkom's ADSL network through the IPC product, the effect has been to revolutionise pricing, service and innovation:
 - 4.1. Consumers have seen per GB pricing falling from R70 to current pricing which is as low as R2.50 per GB.
 - 4.2. At the same time competition from aggressive ISPs has seen the explosion of uncapped broadband product, with an uncapped 1 Mbps account now costing as little as R199 per month excluding line rental costs charged by Telkom.
 - 4.3. More recently, the growth in local fibre deployments on an open access basis has also created competition in the provision of broadband services over these networks.
5. The result of efficient competition at the services level has been to lower the cost to communicate while creating significant value for consumers and facilitating productivity in the SMME and corporate markets which typically use fixed data services as their primary broadband connection.
6. ISPA has long argued that the benefits of competition in the fixed broadband market are markedly absent from the mobile broadband market and that this is due to failures in the wholesale market for mobile broadband services.

7. Promoting competition in the mobile data services markets should be the primary focus of the Inquiry.
 - 7.1. **This is regulating for maximum effect:** most broadband connections are already mobile and more than 90% of the population has access to a broadband service offered over a mobile network. There is an “affordability gap” rather than an “access gap”: addressing the cost to communicate with specific reference to those who access the Internet exclusively through mobile data services represents the biggest bang for buck available¹.
 - 7.2. **This is regulating for the future:** for IP networks and the removal of legacy distinctions through the convergence of data and voice.
 - 7.3. **There is precedent for the effectiveness of competition at the services level:** developments in the fixed market provide a ready example of the beneficial effects of competition in downstream markets on the cost to communicate achieved through the introduction of a wholesale model and basic separation of wholesale and retail services. The Competition authorities have already achieved much of the hard work required for effective ex post regulation of this split through their work with Telkom.
8. ISPA acknowledges that there are factors and practices in the fixed broadband market which contribute to the cost to communicate, but the Commission is aware of the mostly-healthy competitive dynamics in the downstream market for fixed data services whether provided over copper or fibre. Access to retail fixed data services is, however, limited: there is far greater utility in prioritising the investigation of mobile data services which are available to almost all South Africans.
9. ISPA submits that the Terms of Reference of the Inquiry are too broad. While ISPA appreciates the need to acquire a complete understanding of the issues underpinning affordability of communications, there is also a danger that an overly-broad inquiry achieves nothing.
10. ISPA’s view is that South Africans already know where the problem is.

The current regulatory and policy regime

11. **The simple fact is that there has not been a single direct intervention into competition in the data services market** by ICASA since the commencement of the Electronic Communications Act 26 of 2005 in July 2006.
12. ICASA has extensive powers under Chapter 10 of the ECA in respect of ex ante competition regulation. Outside of the Call Termination Regulations 2010 and the Call Termination Regulations 2014, it has not exercised these powers.

¹ The Commission is referred to StatsSA’s General Household Survey for the period January to December 2016 and the statistics presented regarding how South Africans access the Internet.

http://www.statssa.gov.za/?page_id=1854&PPN=P0318&SCH=6819

13. This is notwithstanding the fact that ICASA itself had extensive input into the amendments to Chapter 10 of the ECA introduced by the Electronic Communications Amendment Act 1 of 2014, which were intended to simplify the application of the relevant provisions and thereby facilitate their use.
14. ISPA acknowledges that ICASA has recently launched an investigation into the markets which it should prioritise for investigation under Chapter 10, but, with respect, does not expect this process to be constructive in the next five years. ISPA's view on this process takes into account:
 - 14.1. The number of failed attempts ICASA has previously made to engage with Chapter 10 or to make inquiries into matters relating to competition.
 - 14.2. The fact that ICASA is undertaking an exercise into which markets it should prioritise when the Minister of Telecommunications and Postal Services had – more than a year previously – issued an explicit policy direction to ICASA to prioritise competition in broadband markets.
 - 14.3. The fact that – through the implementation of the ICT Policy White Paper – ICASA is to be replaced by a sector regulator over the course of the next three years.
 - 14.4. The timelines involved: a Chapter 10 investigation will take between 2-3 years and is likely to be followed by litigation if the outcomes are not acceptable to incumbent operators
15. The very fact that the Commission is undertaking this Inquiry suggests to ISPA that there has been a failure to implement the current legislative and regulatory framework.

Access spectrum for mobile data services

16. ISPA notes that the mobile network operators are increasingly connecting their inability to reduce data rates to the continued failure of ICASA and Government to assign high-demand access spectrum.
17. Currently, the unit cost of mobile data decreases exponentially as volumes increase. This clearly drives behaviour that is in stark contrast to the spectrum scarcity argument.
18. It is also the case that spectrum scarcity – where it exists – is limited to certain parts of metropolitan areas in certain frequency bands only.
19. There is no doubt that this spectrum needs to be assigned as quickly as possible: this process is provided for in the National ICT Policy White Paper and outcomes will be determined through such process.

Conclusion

20. ISPA looks forward to further engagement with the Commission in this regard.

Regards

Dominic Cull

ISPA Regulatory Advisor