

27 February 2020

**Independent Communications Authority of South Africa**

Attention: Chairperson: Mobile Broadband Service Inquiry

Per email: [MarketInquiry2018@icasa.org.za](mailto:MarketInquiry2018@icasa.org.za)

**DISCUSSION DOCUMENT ON THE MARKET INQUIRY INTO MOBILE BROADBAND SERVICES IN SOUTH AFRICA**

1. ISPA refers to the discussion document on the mobile broadband services market inquiry (“**the Discussion Document**”) and to the Authority’s invitation to comment thereon.

**General Comments**

2. ISPA has long engaged with the Authority and other bodies regarding the failure of competition in the provision of mobile data services at both wholesale and retail levels in South Africa.
3. It is accordingly welcome that the Authority has confirmed this lack of competition in multiple markets and proposed pro-competitive remedies as summarised in the table below:

Market	Relevant markets	Effectiveness of competition	Licensees with SMP in one or more municipal area	Pro-competitive licence conditions
<b>Retail market for mobile services</b>	market for retail voice, SMS and mobile data services at local and metropolitan municipality level	ineffective	Vodacom, MTN	to be addressed in interventions in site access and roaming markets
<b>Spectrum</b>	national	effective	None	none
<b>Site access</b>	market for access to sites at local and metropolitan municipality level	highly ineffective	Vodacom, MTN, Telkom,	new facilities leasing obligations, prohibition on indefinite reservation of space, accounting separation

<b>Roaming</b>	market for roaming services at local and metropolitan municipality level	ineffective	Vodacom, MTN	mandatory roaming offer at municipal level, accounting separation
<b>MVNO / wholesale APN services</b>	not defined	ineffective	no finding	to be addressed in interventions in site access and roaming markets

4. ISPA also welcomes the Authority's recognition of the need to closely align the outcomes of this process with the pending high-demand spectrum assignment process and the Competition Commission's Data Services Market Inquiry outcomes. Given the respective timelines for the conclusions of these processes, it may be the case that the Authority will need to review this process against the outcome of the other two prior to finalising the design of any pro-competitive remedies to be imposed.
5. It should be obvious already that some affected parties are seeking to exploit any inconsistency between overlapping work of the Authority and the Commission, particularly when it comes to benchmarking exercises.
6. ISPA's central submissions are that:
  - 6.1. The Authority should consider pro-competitive interventions in the upstream market for MVNOs and wholesale APN services rather than seeking to address ineffective competition in these markets indirectly through interventions in the upstream markets for access to high sites and roaming.
  - 6.2. Vertical integration of the dominant mobile networks operators and data service providers remains the single fundamental obstacle to greater competition in the downstream retail market. Accounting separation as a step towards functional separation of the ECNS and ECS components of MNOs with SMP in a defined market is therefore welcome but insufficient.
  - 6.3. Any pro-competitive intervention based on a revision of the facilities leasing regime must start from the departure point that the existing regime has failed to facilitate access to electronic communications facilities and is largely ignored by licensees.

## Retail market

7. ISPA does not agree with the Authority's conclusion that the retail markets for voice, SMS and data services should all be combined for the purposes of this inquiry.
8. The focus of the inquiry is competition in markets relating to the provision of mobile data services. Incorporating voice and data markets:
  - 8.1. Serves no discernible purpose;
  - 8.2. Treats non-substitutable services involving different service providers and value chains in the same manner;
  - 8.3. Is beyond the scope of and potentially confuses the focus of this inquiry; and,
  - 8.4. Creates a risk that rulings are created in respect of a market which is not the subject of the inquiry.
9. Findings made by the Authority in respect of voice and SMS services should be used as the basis for separate market inquiries under Chapter 10 of the ECA.
10. ISPA is also concerned about the division of the retail market on a local/metropolitan municipal level. While this makes sense in the context of an upstream market for electronic communications facilities – which are fixed in nature – it is not appropriate for a retail market for a service which has mobility as its fundamental distinguishing feature and where there are no specifically regional competitors.
  - 10.1. How does this approach map onto the most populous region of the country, where a person may move between three metropolitan municipalities (Johannesburg, Tshwane, Ekurhuleni) in a morning?
  - 10.2. ISPA is wary of creating precedent which may justify price discrimination between municipal areas on the basis of different cost inputs for servicing such areas and relative population density.

## Upstream market for radio frequency spectrum

11. ISPA agrees with the analysis undertaken and that assignment of high-demand radio frequency spectrum is long overdue.
12. The Authority should note that this is not a static position:
  - 12.1. Market dynamics such as the agreement entered into between Vodacom and Rain and planned wholesale 5G services from Liquid Telecom – as well as questions over Cell C's future – have already shifted the balance referred to in the Discussion Document.
  - 12.2. The position in this market will also be materially changed at the conclusion of the spectrum assignment process and thereafter will materially change again when the WOAN establishes a significant operation.

13. Having established a degree of correlation between constrained supply of this spectrum and inelasticity in retail data costs, the Authority must proceed to ensure commitments to reducing these costs alongside the assignment of high-demand spectrum. The Authority has indicated in its Information Memorandum on the IMT Spectrum Assignment Process (“**the Information Memorandum**”) measures to intervene in some of the wholesale markets considered in the Discussion Document and the Competition Commission has expressed its interest in ensuring that data prices fall when the spectrum assignment process is complete.
14. The spectrum assignment process has also been linked by Vodacom to its ability to offer competitive wholesale services to ISPs, allowing them to compete with Vodacom in the retail market for mobile data. Appearing before the Commission, Vodacom noted that it acknowledges the calls by smaller providers for better wholesale prices and that it could reduce these prices if it had greater capacity on its network, i.e. access to more suitable radio frequency spectrum<sup>1</sup>.
15. For this reason, we submit that the state of competition in the upstream market for spectrum and the spectrum assignment process has direct implications for competition in the upstream market for MVNOs and wholesale APNs.

### Upstream market for access to high sites

16. ISPA concurs with the definition of markets at a local and metropolitan municipal level. This offers interesting and granular insights into the state of competition. ISPA supports the concept of a prohibition on indefinite reservations of co-location space and similar obstructive conduct.
17. ISPA is concerned, however, that:
  - 17.1. The figures compiled do not appear to take into account high site facilities not owned or operated by mobile network operators. Telkom’s Gyro division, the tower companies, wireless Internet service providers (WISPs) and municipalities all own or operate high site facilities within local or metropolitan municipalities and these offerings would need to be factored in to provide a more complete assessment of the state of the market.
  - 17.2. Given the timelines for the conclusion of this inquiry under section 67 of the ECA, we submit that the Authority should also be looking at access for high sites for 5G network deployments. Such deployments will differ from existing legacy high sites in terms of density (i.e. there will be a lot more high sites used in a small-cell 5G deployment) as well as in terms of the type of space required to house equipment (much less than for existing deployments).

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<sup>1</sup> See [We don’t have capacity to sell to ISPs](#), Vodacom says, published on TechCentral, 18 October 2018

18. ISPA concurs that revisions to the Facilities Leasing Regulations 2010 are both long overdue and that such revision and the imposition of an accounting separation obligation constitute appropriate mechanisms for addressing competitive failures found in this market.
19. It is our members' experience, however, that the existing facilities leasing regulatory regime does not work.
- 19.1. This is principally a failure of enforcement of the Facilities Leasing Regulations 2010.
- 19.2. Industry has no confidence in the ability of the Complaints and Compliance Committee or the Authority to resolve complaints "expeditiously".
- 19.3. As noted by the Commission in its Final Report<sup>2</sup>, regulations relating to "essential facilities" have never been finalised.
- 19.4. The obligation on ECNS licensees to provide access to electronic communications and the corresponding right for access seekers are accordingly hollow.
- 19.5. In practise:
- 19.5.1. Agreements which evidently fall within the definition of a lease of electronic communications facilities are characterised as something else, thereby "justifying" the avoidance of any obligation to file the agreement or otherwise act in accordance with the Facilities Leasing Regulations 2010.
- 19.5.2. Many owners and operators of high sites are not licensees. These parties control electronic communications facilities as defined in the ECA but are not subject to the provisions of Chapter 8 and the Regulations.
20. Any intervention to be achieved through a regulatory process to amend or replace the existing Regulations will be lengthy and contentious. Any benefit to be gained in levels of competition in the retail or any other market– which is by no means guaranteed – would accordingly only be felt in the medium-to long-term.
21. ISPA does not agree with the Authority's conclusion that its proposed interventions in this market will have any positive impact on levels of competition in the upstream market for MVNOs and wholesale APNs (see further below).

### Upstream market for roaming services

22. ISPA accepts the analysis of this market as set out in the Discussion Document and supports accounting separation as a pro-competitive remedy which has the potential to provide greater transparency into the costing of inputs. A mandatory roaming reference offer is also supported.

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<sup>2</sup> Available from <http://www.compcom.co.za/wp-content/uploads/2019/12/DSMI-Non-Confidential-Report-002.pdf>

23. In ISPA's understanding, however, the impact of any intervention in this market will be limited in that it is only Telkom Mobile and Cell C that will in the short-to-medium term be in a position to take advantage of such interventions. Both these entities have, of course, already entered into national roaming agreements with Vodacom and MTN respectively.
24. ISPA is not able to discern how the proposed pro-competitive interventions in the upstream market for roaming will have any positive impact on levels of competition in the upstream market for MVNOs and wholesale APNs.

### MVNO and APN Services Market

*Question 9: Do you agree with the Authority's preliminary view on MVNO and APN services market? Please provide reasons for your response.*

25. ISPA agrees with the market definition provided and that the key element of this upstream market is access to wholesale offers allowing bulk purchase and resale of data.
26. The Authority recognises suppliers of MVNO and APN services have the "potential to play an important role in enhancing customer choice at the retail level and reducing cost"<sup>3</sup> but that "at present there are indications that they are not providing the competitive constraint that they could"<sup>4</sup>.
27. The Authority also notes "concerns that while all MNOs have the capacity to offer wholesale services that would enable stronger retail competition, there seems to be a lack of provision" and that "[S]ome wholesale APN resellers have indicated that prices charged by wholesale APN providers are high and there are no alternatives".
28. Further:

*"200. The lack of supply of MVNO services by all of the MNOs, and complaints about high wholesale APN prices relative to retail prices, suggest that this market is ineffectively competitive. This is particularly true when refusal to enter at the wholesale level protects companies from competition on the retail level. Well-priced wholesale offers would introduce greater competition and threaten market power in the retail market. As such, incentives in this market are linked to dominance in the retail market". (ISPA's emphasis)*

29. The Authority, however, then avoids reaching any definite conclusions:

*194. The Authority does not definitely conclude on relevant markets, the effectiveness of competition, significant market power or pro-competitive licence conditions in respect of wholesale MVNO and APN services. This is because the effectiveness of competition in this wholesale market is likely linked to ineffective competition upstream in site access (upstream market 2) and roaming (upstream market 3), and so any competition concerns at the level of wholesale MVNO and APN services will likely be*

<sup>3</sup> Discussion Document para 189

<sup>4</sup> Discussion Document para 193

*remedied upstream. Nonetheless, there are competition concerns in this segment of the value chain which the Authority considers in this section.*

30. ISPA is uncertain as to why the Authority has not made definite findings in respect of this market. Rather the impression given is that this market was not analysed with anything approaching the rigour that was applied to the retail market and the upstream markets for access to high sites and roaming respectively. The concerns noted by the Authority have not, in ISPA's view, been adequately considered.

31. ISPA is at a loss as to why this should be:

31.1. As we have previously raised with the Authority pro-competitive intervention in this market represents the most attainable short-term mechanism for reducing data prices in South Africa.

31.2. As shown above, it is the upstream market for spectrum and the assignment of high demand spectrum which will have a significant impact on the market for MVNO and wholesale APNs. As previously noted, ISPA accepts that some of these remedies could be imposed as obligations to be observed by successful bidders in an action for high-demand spectrum and that there may be constraints on imposing these obligations before high-demand spectrum is assigned.

31.3. Further, if the Authority does impose MVNO obligations on successful bidders as proposed in its Information Memorandum, it will have to establish a regulatory framework governing the relationship between the host network and the MVNO if such obligations are going to have any chance of succeeding. This must be done whether as part of this inquiry or part of the spectrum assignment process.

31.4. Imposing pro-competitive remedies on dominant licensees in this market would be by far the most effective and efficient way of reducing the cost of mobile data in South Africa as well as transforming the retail side of the industry. The ISP industry has a proven track record of price reduction and innovation to the benefit of consumers.

31.5. This was explicitly recognised by Vodacom during its presentation to the Competition Commission on 18 October 2018:

*"On the mobile side, it's slightly different picture. I think the players are a lot more fewer at wholesale, at wholesale level. There's a couple of people that who are resellers of mobile services at a retail level, but the sum total of, of the message is that we are trying to present here is that on the fixed side, there is intense competition. Essentially the barriers to entry is very low. There has been a lot of new participants that have gone into the market and I think they have really shaken up the market in a very good way. What has not happened is that in the mobile side, has there be as intense and as dynamic competition as you would've seen in mobile, fixed rather."<sup>5</sup>*

<sup>5</sup> Excerpt from transcript of hearings provided by Competition Commission for 18 October 2018, p132 line 17ff, available from <http://www.compcom.co.za/newsletter/data-inquiry-public-hearing-transcripts/>

32. The decision not to impose pro-competitive conditions on dominant operators in this market is further premised on the Authority's unsubstantiated view that the effectiveness of competition in this market is "likely linked to ineffective competition in the upstream markets for site access and roaming".

32.1. As set out in the relevant sections above, we do not believe that this is a correct view or that the Authority has substantiated it. What is the mechanism by which more equitable access to high sites will translate into addressing ineffective competition in the MVNO and wholesale APN upstream market and what would be the time periods involved?

32.2. Intervention in the market for site access seeks to address facilities-based competition to promote service-based competition, i.e. it is a long-term remedy which holds that the more network providers there are the more MVNO and wholesale APN services will be offered. This is valid but it remains illogical to rely only on this remedy when it is feasible to intervene directly into the upstream market for MVNOs and wholesale APNs.

32.3. Interventions in the roaming market are likely to serve only Telkom Mobile and, in future, the WOAN (which has a separate dispensation). Wholesale pricing for roaming incorporates a margin for the wholesale provider and this must be factored into any MVNO or wholesale APN service that the roaming operator offers.

33. The Authority explicitly recognises the harm to competition caused by the vertical integration of Vodacom and MTN:

*72. MTN and Vodacom are both vertically integrated since they operate downstream in offering retail services as well as upstream, having been assigned spectrum, operating their own high sites and offering roaming services. This degree of vertical integration is likely harmful to competition and gives rise to both operators having significant market power at the wholesale and retail levels. Evidence that the extent of vertical integration is harmful to competition is the limited sharing of infrastructure in South Africa and the very high costs of roaming (discussed below).*

33.1. It should also be stated that evidence of the harmful effects of the extent of vertical integration is also to be found in the lack of MVNO offerings and competitive wholesale APN offerings.

34. ISPA accordingly submits that:

34.1. The Authority should undertake a proper analysis of the upstream market for MVNO and wholesale APN services.

34.2. Based on such analysis (and if warranted) the Authority should make a finding as part of this inquiry that there is ineffective competition in this market.

34.3. The Authority should then consider imposing the following pro-competitive conditions on licensees found to hold SMP in line with section 67(7) of the ECA:

- 34.3.1. An obligation to maintain separate accounting for MVNO and wholesale APN services;
  - 34.3.2. An obligation to maintain structural separation for the provision of MVNO and wholesale APN services;
  - 34.3.3. An obligation to provide access to ECNS required for retail mobile data services on a non-discriminatory basis as to quality and cost.
  - 34.3.4. An obligation to publish a reference wholesale APN services offer specifying information which must be contained in such reference offer; and
  - 34.3.5. Rate regulation for the provision of MVNO and wholesale APN services and matters relating to the recovery of costs.
35. The Authority notes that it will “monitor progress in the supply of MVNO/APN services while these remedies are in force and reassess whether further intervention is needed if the upstream remedies are not effective”.
36. The timeframes involved in adopting this approach – conservatively 5 to 10 years - are such as to make any possible future intervention practically irrelevant.

## Conclusion

37. ISPA thanks the Authority for its consideration of these submissions and confirms that it wishes to participate in public hearings should they be held.

Regards

ISPA Regulatory Advisors