

discussion document:
market inquiry into
competition in the provision
of mobile broadband services

General

- Context for this inquiry has shifted:
 - HDS ITA
 - WOAN ITA
 - Competition Commission Data Services Market Inquiry Phase 1
 - SA Connect Phase 2
 - Focus on infrastructure development

Overview

- The Authority should consider pro-competitive interventions in the upstream market for MVNOs and wholesale APN services rather than seeking to address ineffective competition indirectly through interventions in other upstream markets.
- Vertical integration of the dominant MNOs and data service providers remains the biggest obstacle to greater competition in the downstream retail market. Accounting separation as a step towards functional separation is therefore welcome but insufficient.
- 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 definition

- Disagree with approach combining retail markets for voice, SMS and data services.
- Focus is competition in markets relating to the provision of mobile data services. Incorporating voice and data markets:
 - Serves no discernible purpose;
 - Treats non-substitutable services involving different service providers and value chains in the same manner;
 - Is beyond the scope of and potentially confuses the focus of this inquiry; and,
 - Creates a risk that rulings are created in respect of a market which is not the subject of the inquiry.
- Rather use SMS and voice finding as the basis for separate market inquiries (if warranted).
- Disagree with partitioning of retail market for mobile services at municipal level.

Upstream market for radio frequency spectrum

- Market dynamics require reassessment of position based on access to spectrum rather than assignment:
 - Wholesale offerings from Liquid
 - Vodacom / Rain and similar agreements
 - Cell C spectrum
 - Outcomes of HDS auction
 - WOAN wholesale offering
- The DD finds correlation exists between constrained supply of spectrum and inelasticity in retail data costs. Note that Vodacom has linked access to more HDS to its ability to offer competitive wholesale services to ISPs, i.e. that wholesale prices can be reduced once it has more capacity available.

Upstream market for access to high sites

- Support definition of markets at a local and metropolitan municipal level and concept of a prohibition on indefinite reservations of co-location space and similar obstructive conduct.
- Note that the Authority has conducted further investigations taking into account non-licensees and non-MNO licensees offering high site access – not clear whether this will alter findings.
- Agree that revision of facilities leasing regime and the imposition of an accounting separation obligation constitute appropriate mechanisms for addressing competitive failures found in this market. Must recognise existing framework does not work:
 - Disjunct between facilities offered by licensees vs non-licensees.
 - Avoidance of regulatory framework by characterising facilities lease as another transaction or refusing to acknowledge application of Chapter 8 and Regulations.
 - No faith in CCC to resolve complaints authoritatively or expeditiously.
 - Regulations relating to “essential facilities” never even started...
 - No pricing principles.
- Review of existing Regulations will be lengthy and contentious. Will be direct benefit to WOAN and other access seekers but impact on other markets only likely in the medium-to long-term.
- 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 within the next five years...

MVNO and APN Services Market

- Agree with market definition and that the key element of this market is access to wholesale offers allowing bulk purchase and resale of data.
- DD recognises competitive failure in this market:

“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**”.

also

“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.**”

MVNO and APN Services Market

- DD recognises benefit of intervening in this market and linkages to ineffective competition in the retail market:

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**”

but

“at present there are **indications** that they are not providing the competitive constraint that they could”

even though

“**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**”.

MVNO and APN Services Market

...but ICASA then avoids reaching any definite conclusions or taking the opportunity to offer any incentives in the market to dilute dominance in the retail market:

*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 remedied upstream.*

MVNO and APN Services Market

- Why no definite findings in respect of this market?
- Impression given is that this market was not analysed with the rigour applied to the retail market and the upstream markets for access to high sites and roaming.
- Concerns about competitive efficiency as well as the competitive benefits of intervening raised by the Authority have not, in ISPA's view, been adequately responded to.
 - Pro-competitive intervention in the wholesale access market – the ability of an ECS licensee to obtain capacity on a mobile network on a non-discriminatory basis - represents the most attainable short-term mechanism for reducing data prices and 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.
 - 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, there has not been as intense and as dynamic competition as you would’ve seen in fixed.”

- Vodacom, Competition Commission hearings Data Services Market Inquiry

MVNO and APN Services Market

- The Authority offers an 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”.
 - 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?
 - What are the time periods involved?
- Intervention in the market for site access seeks to address facilities-based competition to promote service-based competition: this may be valid but why rely only this remedy when it is feasible to intervene directly into the upstream market for MVNOs and wholesale APNs?
- 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.
- 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).
- 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....

Conclusions

- Undertake a proper analysis of the upstream markets for MVNO and wholesale APN services.
- Based on such analysis (and if warranted) the Authority should make a finding as part of this inquiry that there is ineffective / highly ineffective competition in this market.
- The Authority should then consider imposing pro-competitive conditions on licensees found to hold SMP in these markets:
 - An obligation to maintain separate accounting for MVNO and wholesale APN services;
 - An obligation to maintain structural separation for the provision of MVNO and wholesale APN services;
 - An obligation to provide access to ECNS required for retail mobile data services on a non-discriminatory basis as to quality and cost;
 - An obligation to publish a reference wholesale APN services offer specifying information which must be contained in such reference offer; and
 - Rate regulation for the provision of MVNO and wholesale APN services and matters relating to the recovery of costs.

ISPA thanks the Project Committee for its work in moving this inquiry forward under difficult circumstances.

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