



Government Gazette Staatskoerant

REPUBLIC OF SOUTH AFRICA
REPUBLIEK VAN SUID AFRIKA

Vol. 669

26

March
Maart

2021

No. 44337

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ISSN 1682-5845



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GOVERNMENT NOTICES • GOEWERMENTSKENNISGEWINGS

INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA

NO. 272

26 March 2021



**“DRAFT MOBILE BROADBAND SERVICES REGULATIONS”
PURSUANT TO SECTION 67(4) OF THE ELECTRONIC COMMUNICATIONS
ACT NO. 36 OF 2005**

I, Dr. K Modimoeng, Chairperson of the Independent Communications Authority of South Africa hereby publish the draft Regulations set out in the Schedule in terms of section 4 read with section 67(4) of the Electronic Communications Act No. 36 of 2005.

Interested persons are hereby invited to submit written representations with regard to the proposed regulations. Written representations must be submitted to the Authority within thirty (30) working days from the date of the publication of this notice by post or hand delivery at the Authority's offices or via email MarketInquiry2018@icasa.org.za.

Dr. K Modimoeng
Acting Chairperson

SCHEDULE

1. Definitions

In these Regulations, unless the context indicates otherwise, a word or expression to which a meaning has been assigned in the Act or the ICASA Act, 2000 (Act No. 13 of 2000), as amended, has the meaning so assigned, and the following words and expressions shall have the meaning set out below:

"the Act" means the Electronic Communications Act, 2005 (Act No. 36 of 2005);

"Authority" means the Independent Communications Authority of South Africa;

"ECNS" means an electronic communications network service as defined in the Act;

"ECS" means an electronic communications service as defined in the Act;

"ICASA Act" means the Independent Communications Authority of South Africa Act, 2000 (Act No. 13 of 2000);

"MTN" means the Mobile Telephone Networks (Pty) Ltd registration Number 1993/001411/07;

"SMP" means significant market power as defined in section 67(5) of the Act

"Vodacom" means Vodacom (Pty) Ltd registration number 1993/003367/07.

2. PURPOSE OF REGULATIONS

The purpose of these regulations is to:

- (a) define relevant wholesale and retail markets or market segments for mobile broadband services;
- (b) determine whether there is effective competition in those relevant markets and market segments;

- (c) determine which, if any, licensees have significant market power in those markets and market segments where there is ineffective competition;
- (d) impose appropriate pro-competitive licence conditions on those licensees having significant market power to remedy the market failure;
- (e) set out a schedule in terms of which the Authority will undertake periodic review of the markets and market segments, taking into account subsection (9) and the determination in respect of the effectiveness of competition and application of pro-competitive measures in those markets; and
- (f) provide for monitoring and investigation of anti-competitive behaviour in the relevant market and market segments.

3. MARKET DEFINITION

The relevant wholesale and retail markets or market segments for mobile services are defined as follows:

- (a) Retail market: mobile retail services provided in regional geographic areas (provincial, split by urban and rural).
- (b) Upstream market 1: wholesale site infrastructure access in local and metropolitan municipalities.
- (c) Upstream market 2: wholesale national roaming services for coverage purposes.
- (d) Upstream market 3a: wholesale national mobile virtual network operator (MVNO); and
- (e) Upstream market 3b: wholesale access point name (APN) services (including resellers).

4. METHODOLOGY

In determining the effectiveness of competition in the markets defined in regulation 3 above, the Authority has applied the following methodology:

- (a) the identification of relevant markets and their definition according to the principles of the Hypothetical Monopolist Test, taking into account

the non-transitory (structural, legal, or regulatory) entry barriers to the relevant markets and the dynamic character and functioning of the relevant markets;

- (b) the assessment of licensees' market shares in the relevant markets; and
- (c) the assessment on a forward-looking basis of the level of competition and market power in the relevant markets.

5. EFFECTIVENESS OF COMPETITION

Pursuant to regulation 4 of these Regulations, the Authority has determined that competition in the Retail market, Upstream market 1, Upstream market 2, and Upstream market 3b, as defined in regulation 3, are ineffectively competitive.

6. SIGNIFICANT MARKET POWER DETERMINATION

MTN and Vodacom are dominant in the following markets:

- (a) Retail market: MTN and Vodacom have significant market power, in terms of the market share threshold, in markets for retail mobile services in between 2 and 7 regions defined by the Authority. MTN and Vodacom also have SMP as a result of vertical relationships that could harm competition.
- (b) Upstream market 1: MTN and Vodacom are dominant, in terms of the market share threshold, in the market for site infrastructure access in 8 and 39 local municipalities, respectively. MTN and Vodacom also have SMP as a result of vertical relationships that could harm competition.
- (c) Upstream market 2: MTN and Vodacom are dominant in the market for wholesale national roaming since there are only two operators that provide this service for coverage purposes in South Africa. MTN and Vodacom also have SMP as a result of vertical relationships that could harm competition.

7. PRO-COMPETITIVE TERMS AND CONDITIONS

1. The SMP operators in markets for retail mobile services, wholesale site infrastructure access, and wholesale national roaming services identified in regulation 6 above, are obliged to keep, and provide to the Authority, and publish (subject to the confidentiality regime set out in the ICASA Act), the following accounts, records and other documents, on a quarterly basis:
 - 1.1. In relation to wholesale access to macro site infrastructure where the licensee owns the site or controls access to it:
 - 1.1.1. A list of sites approved for access within 20 business days of the initial request during the previous quarter, together with the access seeker's name, date of request, date of approval, and all charges, whether recurring or non-recurring, for access to the site;
 - 1.1.2. A list of sites not approved for access within 20 business days of the initial request during the previous quarter, together with the access seeker's name, date of request, and reason for not approving it;
 - 1.1.3. A report on the previous quarter's site access requests summarizing the information in 1.1.1. and 1.1.2. above, including a summary of time to approve the requests, a summary of reasons for not approving site access requests, and average effective charges for the sites shared;
 - 1.1.4. An updated list of all sites used by the SMP operator, and all charges for sharing any macro site infrastructure owned or controlled by the SMP operator; and
 - 1.1.5. In respect of information provided per site, the licensee must also provide the operator's identification code for the site, its longitude and latitude, and Statistics South Africa census 2011 main place code, and site category (including macro > 15m, macro <15m, rooftop, indoor, lamppost, billboard, micro, etc.).
 - 1.2. A report and supporting data on effective prices paid for wholesale roaming services by each roaming customer calculated by dividing the total roaming revenue and data roaming volumes, split by:
 - 1.2.1. Each roaming contract; and
 - 1.2.2. Any contractual price variations used (e.g. metro and non-metro).

- 1.3. A report and supporting data on wholesale national roaming data volumes used by site, together with details of that site including at least the operator's identification code for the site, longitude and latitude, and Statistics South Africa census 2011 main place code.
 - 1.4. A report and supporting data on effective retail prices paid by end user customers for data services overall, calculated by dividing total revenue for data with total volume of data used (in Gigabytes).
 - 1.5. A report and supporting data on effective retail prices paid by end user customer category calculated by dividing total revenue for data with total volume of data used (in Gigabytes) for each of the following categories:
 - 1.5.1. By prepaid, hybrid and postpaid customer segments.
 - 1.5.2. By consumer and business customer segments.
 - 1.5.3. Data used between 5am and 12 midnight and data used from 12 midnight to 5am.
 - 1.5.4. By province, and within provinces, by urban and rural, as defined by the Authority.
 - 1.5.5. Data revenue should exclude fixed-wireless data traffic, wholesale data traffic, mobile virtual network operator data traffic, and enterprise business traffic.
 - 1.6. A report and supporting data on effective wholesale prices paid by ECS and ECNS licensees for MVNO and APN (including wholesale reseller) services calculated by dividing total revenue for data with total volume of data used (GB) split using the following categories:
 - 1.6.1. By wholesale ECS and ECNS licensee customer.
 - 1.6.2. Noting that data revenue should exclude fixed wireless data traffic.
 - 1.7. Furthermore, in the event that any category of retail price is below any wholesale price the SMP operator is required to submit detailed and fully auditable evidence to the Authority, with all assumptions clearly specified, showing that this differential is cost based or temporary.
2. As such, the Authority will monitor retail prices and wholesale prices, and in particular monitor for margin squeeze, which the Competition Commission has indicated it will prosecute if wholesale rates are above effective retail rates.

8. SCHEDULE FOR REVIEW OR REVISION OF MARKETS

The Authority will review the markets for mobile services, to which these Regulations apply, as well as the effectiveness of competition and the application of pro-competitive terms and conditions in those markets when the Authority deems it necessary but not earlier than three (3) years from the date of publication of these Regulations.

9. CONTRAVENTIONS AND PENALTIES

A licensee that contravenes regulation 7 of these Regulations is subject to a fine not exceeding the greater of R5 000 000 (five million Rand) or a maximum of 10% of the licensee's annual turnover for every day or part thereof during which the contravention continued.

10. SHORT TITLE AND COMMENCEMENT

These Regulations are called the "Mobile Broadband Services Regulations, 2021" and will come into force upon publication in the Government Gazette.