



*competition***commission**
south africa

**SUBMISSION TO ICASA ON THE INFORMATION
MEMORANDUM OF 1 OCTOBER 2021 (GENERAL NOTICE
587 OF 2021, GOVERNMENT GAZETTE NO. 45255, 1
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1. INTRODUCTION

- 1.1. On 1 October 2021, the Independent Communications Authority of South Africa (“ICASA”), published a “*a notice regarding the information memorandum to advise the public on the process that it intends to follow*”¹ in respect of licencing of International Mobile Telecommunications (“IMT”) spectrum and licences for the operation of a Wireless Open Access Network (“WOAN”). The notice represents a new Information Memorandum (“IM”) following the first IM of 1 November 2019 and the setting aside of the subsequent Invitation to Apply (“ITA”)² by the High Court on 15 September 2021³.
- 1.2. The IM makes reference to the ITA, and in the process outlined by the IM, it refers to the “*Publication of the ITA as amended*”. Thus the IM appears to reference the previous ITA as a starting point for the consultations. As such in our submission below we consider both the IM as well as the ITA or at least aspects thereof.
- 1.3. With regard to the assignment of spectrum and the processes outlined in the IM, we also refer again to the findings and recommendations of the Data Services Market Inquiry (“DSMI”) regarding spectrum and the IM⁴, and previous submissions to ICASA in respect of the policy directive of 20 September 2019⁵, the IM of 1 November 2019⁶, and the discussion document for the Mobile Broadband Services Market Inquiry of 29 November 2019 (“MBSMI”)⁷.
- 1.4. The Commission has also noted the MBSMI findings document⁸ which was released by ICASA on 26 March 2021. The MBSMI find that competition is ineffective in a number of markets.

¹ Government Gazette Notice No. 45255, 1 October 2021

² Government Gazette No. 43768, 2 October 2020

³ Government Gazette Notice No. 45255, 1 October 2021, p. 3

⁴ Competition Commission, Data Services Market Inquiry Final Report, 2 December 2019, p.172-188

⁵ Competition Commission, Submission to ICASA on the assignment of spectrum in light of the policy directive issued on 26 July 2019

⁶ Competition Commission, Submission to ICASA on the licensing process for international mobile telecommunications spectrum (Notice 597 Of 2019), 31 January 2019

⁷ Competition Commission, Submission to ICASA on its discussion document for the Mobile Broadband Services Market Inquiry, 27 February 2020

⁸ Government Gazette Notice No. 4437, 26 March 2021, ICASA Findings document on mobile broadband services inquiry

2. THE OBJECTIVES OF THE IM

2.1. The Commission's submissions in respect of the IM of 2019 emphasised the importance of affordability and therefore the need to promote and prioritise the objective of competition to a greater degree, not to prioritise revenue generation and not to impose unnecessarily burdensome universal service objectives on tier 2 operators in particular.⁹ The Commission also found that aspects of the IM of 2019 would be unnecessarily burdensome or even distort competition. While the ITA listed a selection of objectives drawn from the ECA¹⁰, the Commission notes a number of welcome developments in the ITA (relative to the IM), examples of which include the following:

2.1.1. Firstly, the inclusion of an opt-in round allows Tier 2 operators to acquire spectrum best-suited to them without the larger Tier 1 operators being able to outbid them (which they will be expected to do). This could allow challenger networks to be more competitive in the market.

2.1.2. Secondly, the inclusion of explicit spectrum caps in order to prevent spectrum being concentrated in the hands of a few firms is a welcome aspect of the ITA. This includes the spectrum cap applied to the sub-1Ghz spectrum in the ITA. The importance of this spectrum means that it must not be assigned disproportionately to any one firm.

2.1.3. Thirdly, the speed and coverage requirements are more appropriate than what was contemplated in the IM. Extensive speed and coverage obligations mean greater costs and potentially negative outcomes where firms need to negotiate roaming agreements in order to achieve the obligations. In the context of policy and evidence on coverage and speeds, the obligations described in the ITA are more reasonable and appropriate than those of the IM of 2019 and support the objective of affordability. We make further submissions on these obligations below.

⁹ Competition Commission, Submission to ICASA on the licensing process for international mobile telecommunications spectrum (Notice 597 Of 2019), paragraphs 2.1 to 2.5.4

¹⁰ Notice number 697 of 2020, Government Gazette No. 43970, 4 December 2020, p.16 of Gazette notice (or p.14 of ICASA document)

- 2.1.4. Fourthly, the conditions for enforced spectrum sharing where spectrum is not used as contemplated in paragraphs 12.6.1 to 12.6.2.3 is a welcome addition to the ITA which accords well with the recommendations of the DSMI around allowing the utilisation of otherwise-unused spectrum in rural and underserved areas.
- 2.2. However, notwithstanding the above, the IM of 1 October 2021 does not provide any further clarity on the objectives of ICASA in assigning spectrum and the process to be followed, beyond what was stated in the ITA. While it makes specific reference to the reasons document for the ITA (which contained a response to our previous submissions on the issue of the objectives of the spectrum assignment process), and the competition assessment within the reasons document specifically¹¹, no reference is made to the MBSMI of ICASA which was finalised *after* the ITA and thus should influence the approach of the IM in 2021 and the resulting spectrum assignment process.
- 2.3. Both the MBSMI and the DSMI find there are significant competition concerns in the market. And, as ICASA starts this process again, the Commission submits again that the objective of enhancing competition to promote affordability must be a central objective. Without first addressing issues of affordability, ICASA may achieve universal access, but not *universally affordable* access. The Commission notes further that, in addition to affordability, competition is also key to furthering innovation in the sector.
- 2.4. Spectrum is an important asset in the hands of the State that can be used to address competition concerns. As per our submission with respect to the discussion document for the MBSMI¹², given the positions of Vodacom and MTN, and the robustness of their market positions, robust regulatory interventions are needed, and the spectrum assignment process is one clear opportunity to do so.
- 2.5. Furthermore, we also note the substantial reserve values for spectrum lots detailed in the ITA, which amount to over R8bn. The Commission's finding in the DSMI and its submissions to ICASA in respect of the Policy Directive both emphasise that revenue generation should not be an objective of the spectrum assignment process. It is unclear how these reserve prices will satisfy the selected objectives listed in the ITA. The high

¹¹ Notice number 697 of 2020, Government Gazette No. 43970, 4 December 2020.

¹² Competition Commission, Submission to ICASA on its discussion document for the Mobile Broadband Services Market Inquiry, 27 February 2020

reserve prices may be overly restrictive which may be a reason why only the existing six current holders of spectrum applied to bid for spectrum in the last ITA (Vodacom, MTN, Telkom, Cell C, Liquid, and Rain). Lower reserve prices may reduce the costs of potential entrants or tier 2 operators, especially given the spectrum caps.

3. SPECTRUM CAPS

- 3.1. The primary concern with the assignment of spectrum is that the Tier 1 players who already hold strong positions in the market also end up holding the most spectrum and therefore further entrenching their positions of market power. Spectrum caps are a useful tool to avoid such outcomes. In this case, the imposition of a cap on *total* spectrum holdings will likely result in the Tier 1 players having the maximum amount of spectrum after the auction (equal to the cap). However, if other players are unable to attain the same level of spectrum due to, for instance, additional bidders or affordability reasons, this may potentially result in Tier 1 suppliers having more spectrum than other players after the auction. This would have negative consequences for competition.
- 3.2. In this regard, ICASA may consider applying a cap on total spectrum that applies only to Tier 1 players. This could be imposed alongside another cap that would apply only to the as-yet-unassigned spectrum that is to be assigned through the auction. This would allow a degree of flexibility for other players, while protecting against spectrum being concentrated in the hands of the Tier 1 players. As the DSMI showed, spectrum constraints cannot explain the high pricing of the Tier 1 suppliers given the high levels of profitability for these players (amongst other factors). Therefore, this would likely lead to more positive outcomes for competition and affordability.
- 3.3. The IM also refers to whether the “*spectrum assigned for the broadband fixed wireless access*”¹³ would be included in the calculation of spectrum caps. To a large extent these spectrum bands are used to provide last mile connectivity or possibly as an alternative to fibre and may require specific devices, and are thus “*not allocated to Mobile Service on a primary basis*”¹⁴. Thus, it may not be appropriate to include such spectrum in the contemplated caps, especially if this prevents operators holding these

¹³ Government Gazette Notice No. 45255, 1 October 2021, para. 1.3.3

¹⁴ Government Gazette Notice No. 45255, 1 October 2021, para. 1.3.2

spectrum bands from attaining a sufficient and appropriate spread of IMT spectrum holdings.

4. COVERAGE OBLIGATIONS

- 4.1. The Commission submitted previously that speed and coverage obligations on smaller operators have the potential to negatively impact competition and affordability¹⁵, and as noted above, the ITA reflects a more appropriate approach compared to the IM of 2019.
- 4.2. In terms of the ITA itself, it is not clear whether paragraph 12.2.2.1 refers only to Tier 1 players or to any winner of these lots. The content of paragraph 12.2.3 which refers to Tier 2 players would appear to contradict paragraph 12.2.2.1 unless it referred only to Tier 1 players. The Commission submits that given the market position of the Tier 1 suppliers and the extensive coverage already achieved by the Tier 1 suppliers, extensive coverage requirements such as those of paragraph 12.2.2.1 should only apply to Tier 1 operators.

5. CONCLUSION

- 5.1. The Commission welcomes the opportunity for engagement on the IM and process to be followed in assigning spectrum, and makes the above submissions in this regard. The Commission emphasises again its previous submissions to ICASA referred to above, and avails itself for any further engagements with ICASA as needed.

¹⁵ Competition Commission, Submission to ICASA on the licensing process for international mobile telecommunications spectrum (Notice 597 Of 2019), 31 January 2019, p. 13-16