

Overview: Electronic Communications Amendment Bill 2023

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Introduction

The Competition Commission’s [Data Services Market Inquiry report](#), published on 2 December 2019, made recommendations to the Department of Communications and Digital Technologies (**DCDT**) on the amendment of the Electronic Communications Act, 2005 (“**the ECA**”). The Electronic Communications Amendment Bill 2023 (**ECAB 2023**) addresses a number of the recommendations made.

Licensing scheme for electronic communications facilities service providers

The Bill proposes to bring pure electronic communications facilities service providers such as tower companies within the ECA licensing framework as individual or class electronic communications facilities service (ECFS) licensees. According to the DCDT this will allow for the wholesale regulation of such facilities and the imposition of licensing conditions.

The key definition is:

***electronic communication facility service** means a service whereby a person makes available an electronic communications facility, whether by sale, lease or otherwise for use in electronic communications networks*

An individual ECFS licence will be available on application in the prescribed manner and required where facilities are operated for commercial purposes on a provincial or national scope or as prescribed by ICASA.

A class ECFS licence will be available through a registration process and required where facilities are operated for commercial purposes on a district or local municipal scope or as prescribed by ICASA.

Standard by-laws

Recognition is given to the role of the Minister responsible for local government in creating a standard by-law under the Municipal Systems Act that facilitates rapid deployment of digital infrastructure by providing for:

- a uniform wayleave process for electronic communications networks and facilities;
- cost-based wayleave application fees;
- a framework for sharing of appropriate municipal property and infrastructure with and between ECNS licensees upon request;
- municipalities to take the deployment of digital infrastructure into consideration when developing Integrated Development Plans (IDPs); and
- other measures to promote rapid deployment of digital infrastructure and uniformity of wayleave processes and tariffs.

Note that [this standard by-law was gazetted by the COGTA Minister on 23 February 2023](#).

Facilities leasing

Extensive changes are proposed to Chapter 8 of the ECA, which regulates the leasing of electronic communications facilities with the intention of promoting competition. The new licensing category – electronic communication facilities services (ECFS) – is brought within the ambit of the facilities leasing framework and ECFS licensees will be subject to the obligation to lease facilities upon request.

The Bill proposes to remove the current reasonability test and replace it with principles of access to be prescribed by ICASA: the question will no longer be whether the facilities lease is reasonable, but whether the lease is aligned with the principles of access. Facilities leasing agreements will also need to be based on these principles.

Facilities leasing pricing principles

ICASA is given 18 months to prescribe wholesale pricing rules or standards applicable to different types of electronic communications facilities including essential facilities, roaming and mobile virtual network operator services. This is an existing provision but “may” has been changed to “must”, so the regulator no longer has a discretion. These rules/standards must be:

- fair and reasonable;
- non-discriminatory, unless there are pro-competitive or efficiency justifications that exist and it does not prevent or distort competition;
- reflect the benefits of sharing costs amongst users sharing the facilities;
- cost-oriented; and
- at levels reflective of competitive commercial arrangements for other facilities and services.

Providers of essential facilities must retain separate accounts for the electronic communications facilities.

Essential facilities

The concept of essential facilities has been part of the ECA since 2006, but none of the provisions have been translated into regulation. The Bill proposes a refresh with a simpler definition and process.

“essential facility means an electronic communications facility that cannot practically be substituted or duplicated and without access to which competitors cannot efficiently provide goods and services to their customers such as to exercise a competitive constraint on the essential facility owner;”

ICASA is given 12 months in which to prescribe a list of essential facilities, which is to be reviewed every three years. Importantly it will no longer be necessary for ICASA to hold a lengthy market inquiry before prescribing this list. An ECNS or ECFS licensee is obliged to lease prescribed essential facilities upon request and to agree on non-discriminatory terms and conditions of a facilities leasing agreement within 20 days of receiving the request (failing which ICASA may impose terms).

Competition matters

The process for ICASA to make pro-competitive assessments of and interventions in markets making up licensed activities has been substantially simplified, while the scope for co-operation between ICASA and the Competition Commission has been broadened and strengthened.

Competition Assessments

ICASA is to have discretion to undertake competition assessments: an assessment of the general state of competition in a market or submarket, or the impact that one or more transactions may have on competition, as part of exercising its licensing functions.

Market inquiries

Under the Bill it will be much easier for ICASA to undertake a market inquiry: the threshold is simply whether ICASA has reason to believe that any feature or combination of features of any market or market segment impedes, distorts or restricts competition. The proposed process is far closer to that followed by the Competition Commission. When doing an inquiry or assessment, ICASA may consider findings by the Competition Commission, other relevant regulators and the Courts.

Relationship with the Competition Commission

ICASA and the Competition Commission may enforce each other's findings, in order to promote and enhance competition. Once a finding is made by the Commission, ICASA need not conduct an inquiry before it implements pro-competitive remedies which it is better placed to oversee.

Spectrum

New provisions are proposed to promote efficient use of spectrum.

Use it or share it

ICASA is to be empowered to:

- amend a spectrum licence where the holder fails to use the assigned spectrum adequately for a period of two years in any under-serviced area; and
- allow spectrum sharing of such spectrum in the relevant under-serviced area until such time and on such conditions as may be determined by the Authority.

Community networks

Under the Bill ICASA is required to prioritise the assignment of unused spectrum to community networks. A new definition of "community network" is proposed, emphasising provision of ECNS and ECS in an under-serviced area by non-profit entities.

Spectrum sharing

A framework for sharing high-demand spectrum (requiring ICASA's prior approval) and non-high demand spectrum (requiring prior notification to ICASA) is proposed, with ICASA given 12 months to develop a regulatory framework.

ICASA will only be able to refuse an application where sharing of high-demand spectrum is likely to:

- have a negative impact on competition that is not offset by efficiencies or public interest benefits (in consultation with the Competition Commission if required);
- amount to spectrum trading; or
- compromise emergency services and other services that meet public interest goals.

The regulatory framework must include the criteria and conditions for spectrum sharing; and processes and procedures applicable to the 'use it or share it' principle.

Spectrum trading

A new definition for spectrum trading is proposed:

'radio frequency spectrum trading' means the transfer, by a licensee, of ownership or control of the rights, in full or in part, held under a radio frequency spectrum licence by way of a sale, lease or sub-letting to a third party, and "spectrum trading" has a similar meaning;".

Roaming and MVNOs

A new chapter 7A creates a framework for regulation of roaming and mobile virtual network operator (MVNO) services, including an obligation on ECNS licensees that have 90% or more national coverage using IMT spectrum to provide national roaming and MVNO services upon request. Time periods are provided for the conclusion of agreements and resolution of disputes and affected ECNS licensees must retain separate accounts for its radio access network, core network and retail operations.

ICASA has 18 months to develop a regulatory framework which covers:

- the requirement for a reference offer containing model terms and conditions;
- the minimum quality, performance and level of service to be provided;
- the mobile technology generations to which access is mandated;
- maximum average wholesale rates, as contemplated in section 47;
- contractual dispute-resolution procedures;
- the framework for determining the feasibility of providing national roaming and MVNO services access and principles of access; and
- the parties subject to this obligation.

International roaming

ICASA is required to prescribe international roaming regulations, including SADC roaming regulations. The intention is to enable a framework for reciprocal roaming, where service providers in participating countries are required to provide services on reciprocal terms and conditions, including tariffs. ICASA is given powers to promote reciprocal roaming arrangements.
