

28 May 2021

Independent Communications Authority of South Africa

Attention: The Chairperson

Per email: MarketInquiry2018@icasa.org.za**DRAFT MOBILE BROADBAND SERVICES REGULATIONS, 2021**

1. ISPA refers to the Draft Mobile Broadband Services Regulations, 2021 published as General Notice 272 in Government Gazette No. 44337 of 26 March 2021 (“**the Draft Regulations**”) and to the Authority’s invitation to comment thereon.
2. ISPA concurs in general with the conclusions set out in the Findings Document on the Mobile Broadband Services Inquiry (“**the MBSI Findings Document**”) published contemporaneously with the Draft Regulations.
3. In particular, ISPA welcomes and supports:
 - 3.1. The commitment made by the Authority – as a first response to remedy ineffective competition in the market for access to high site infrastructure – to commence with the process of defining “essential facilities”. It cannot be overstated how the notion of “essential facilities” as contemplated in the ECA is central to the introduction of competition: the Authority’s failure to complete the required processes since 2006 is a massive missed opportunity. ISPA looks forward to participating in this process, and notes that there is an abandoned process from 2007/2008 which could function as a starting point for this exercise.
 - 3.2. The findings made in respect of the ineffective competition in the retail market and identified upstream markets.
 - 3.3. The finding that there is an entrenched duopoly in the provision of retail mobile broadband services and many of the upstream markets identified. Further, the specific identification of the anti-competitive effects of the vertically integrated nature of Vodacom and MTN such as to justify a finding of SMP in the markets under consideration.
 - 3.4. The findings relating to the market for wholesale APN resellers, particularly identification of the anti-competitive effect of retail rates being set lower than wholesale rates.

- 3.5. The removal of the upstream market relating to access to radio frequency spectrum and the characterisation of access to spectrum as a wholesale input into other markets rather than a market in and of itself.
4. ISPA notes that the Authority does not state with any certainty whether it will undertake a review of the Electronic Communications Facilities Leasing Regulations 2010. ISPA reasserts its position – shared with Vodacom and others – that these Regulations urgently require review as they are not serving their purpose.
 - 4.1. The concerns ISPA raised in its previous submission are not limited to high site infrastructure but electronic communications facilities in general. As noted by Vodacom, there are repeated difficulties in exercising facilities leasing rights in the deployment of fibre optic electronic communications networks. These concerns are not addressed by obligations imposed on successful bidders in the future high-demand spectrum auction.
 - 4.2. The vast majority of agreements which fall within the definition of a lease of electronic communications facilities as contemplated in the ECA are simply not submitted to ICASA. Telkom's Gyro subsidiary, for example, refuses to entertain arguments that leases it enters into for access to masts and other high-site infrastructure amount to leases of electronic communications facilities.
 - 4.3. These Regulations came into force 11 years ago: this alone is enough to justify their review.
5. ISPA supports in general the approach taken in the Draft Regulations: that the Authority should initially impose reporting obligations as being less intrusive and determine whether any further pro-competitive remedies are required based on its analysis of reports submitted. This approach is also aligned with the current capacity of the Authority and ISPA understands that the Competition Commission would also have access to these reports alternatively the analysis undertaken by the Authority.
6. Notwithstanding this general support, ISPA disagrees that accounting separation is not an appropriate remedy, particularly taking into account the emphasis in the MBSI Findings Document on the anti-competitive effects arising from the vertically integrated nature of Vodacom and MTN.
 - 6.1. There is nothing new about imposing such obligations: the Regulations on Chart of Accounts and Cost Allocations Manual promulgated by the Authority pursuant to section 46(1) of the Telecommunications Act effected accounting separation. A template exists for both the Authority and the operators which does not suggest that this process will be overly complex or costly.
 - 6.2. The complexity, cost and time taken – concerns raised by Vodacom and MTN - are in any event relative concerns which must be weighed up against the utility and impact of imposing cost

accounting. ISPA submits – drawing directly on its own experiences with Telkom prior to the establishment of Openserve - that accounting separation goes to the very heart of the competitive issues identified in the Findings Document.

- 6.3. The reporting requirements set out in the Draft Regulations in any event amount to a “lite” form of accounting separation.
7. ISPA extends its appreciation to the Authority for its consideration of these comments, and trusts that these will be of assistance to the Authority in finalising the Draft Regulations.
8. Should the Authority hold oral hearings or workshops, ISPA hereby gives notice of its intention to participate.

Regards,

ISPA Regulatory Advisors