
GENERAL NOTICE

NOTICE 229 OF 2014



Independent Communications Authority of South Africa

Pinmill Farm, 164 Katherine Street, Sandton
Private Bag X10002, Sandton, 2146

NOTICE OF PUBLIC INQUIRY INTO THE STATE OF COMPETITION IN THE INFORMATION AND COMMUNICATIONS TECHNOLOGY SECTOR

1. PURPOSE

The Independent Communications Authority of South Africa ("the Authority") hereby gives notice of its intention to hold a high level inquiry into the state of competition in the Information and Communications Technology (ICT) sector in terms of s4B(1)(a) of the Independent Communications Authority of South Africa Act, Act No. 13 of 2000.

2. BACKGROUND

They have been very slow to modernize local loop infrastructure, even when sharply increasing demand for digital services since 1994 warranted such investments. They have treated the monopoly of local services market as cash cows, using cash flow for dividends, share repurchases, acquisitions, and lobbying activities rather than for R&D or capital investment in new technology. They have merged with and acquired each other, reducing the total number of large local services providers from nine to four since the passage of the 1996 Telecommunications Act. They have deliberately and systematically avoided competing with each other despite making repeated public statements implying that it would be economically rational for them to do so, and in some cases despite stating that they intended to do so. And they have engaged in massive, highly coordinated political lobbying, regulatory and litigation activities intended to preserve the status quo.

(A description of the US market narrated by Economist Charles Ferguson in 2004)

Can parallels be drawn in the South African ICT market?

One of the objects of the Electronic Communications Act, No.36 of 2005 (ECA) is to promote competition within the ICT sector (object 2f). The Authority is also enjoined to promote and facilitate the convergence of telecommunications, broadcasting, information technologies and other services contemplated in the ECA (object 2a).

Electronic communications market

Since 2005 there has been considerable flux in the electronic communications network service (ECNS) and electronic communications services (ECS) markets. After the Altech court challenge, there are more than 700 ECNS/ECS licensees, of which 416 are operational.

The cost to communicate, competition and consolidation

Despite this profusion, the cost to communicate has not come down substantially and South African consumers pay considerably more than their counterparts in Africa. So there is the problem that the simple equation that increased competition automatically leads to a reduction in the cost of communication has not taken place in reality. In the mobile communication market, MTN and Vodacom control about 80% of the market and have indicated in public that they are planning to acquire other ECNS/ECS licensees. The Authority is concerned as to the implications of such unprecedented market consolidation on competition and concomitantly, on the cost to communicate, and the digital divide. Whilst those in metropolises have access to wide choice of 2G, 3G and increasingly LTE, in rural areas 2G and 2.5G remain the only choice.

Spectrum

The Authority has heard arguments in various public fora that what is holding back competitive activity in the ECNS/ECS market is lack of access to high demand spectrum and condonation of first mover advantage preventing many smaller players from gaining market entry as a result. Additional questions are surfacing as to whether the traditional gatekeepers to spectrum are actively and passively ensuring that spectrum remains a barrier to entry, and whether free-riding is being condoned de facto. The questions cannot remain unanswered and arguments cannot subsist unresolved indefinitely. The issue is what role should the assignment of high demand spectrum play in enabling competition, recognizing that the empowerment of historically disadvantaged people is also a matter of levelling the playing field. Broadcasters do not currently pay for spectrum – is this an unfair advantage in a converged environment or does it offset the cost of local content regulations?

Broadcasting market

On the broadcasting side, attempts to introduce competition in the subscription television environment are clouded by challenges faced by TopTV in attempting market entry in the subscription TV market, resulting in its entering business rescue. There is also in the commercial sound broadcasting market a series of attempts by broadcasters to develop economies of scale by acquiring minority stakes in other radio stations or requesting exemptions from the ownership and control regulations. In the free-to-air commercial television market, allegations have been made of unfair competition between subscription

TV and free-to-air TV with regard to access to adspend revenues. Concerns have also been raised by the incumbent TV broadcasters about the Authority's plans to introduce new commercial and community TV services during the digital migration process. Consumers locked in Multichoice contracts are confronted by escalating costs with no relief in sight.

Convergence and the Internet

In the arena of convergence, there has been little debate within the ICT sector about the impact of convergence on the way the ICT market as a whole is functioning and restructuring. South Africa's per capita Internet penetration should be much higher and this raises questions as to what the multifaceted problems obstructing Internet growth are. For example, while South Africa's broadband capacity and speed increases over the coming years are also a source of concern, what role will Over-the-Top services play with respect to competition in the sector? The focus on voice services and termination rates are a distraction since these are supposed to be approaching zero, especially considering the transition to IP. Should the actual focus not be data pricing, considering the need for a sustainable information society?

Innovation, net neutrality and disruptive technologies

Innovative technologies introduced through dynamic spectrum management are finding ways of accessing artificial restrictions of spectrum. Is it time to introduce them into the market in the short term? How will issues of net neutrality come into play? What are the implications of the current anxieties in the traditional telecom market regarding becoming 'dumb pipes', simple purveyors of bandwidth? Multiple closed transactions between mobile companies and content developers are taking place outside any regulatory framework, yet broadcasters continue to be subject to strict rules. What role will new disruptive technologies such as TV White Spaces play in making our ICT sector more competitive? How can more effective competition be introduced in the subscription television broadcasting environment? The mobile sector has effectively moved to an IP platform. What are the immediate implications for the ICT market?

Competition and the inquiry

While it may appear that many of these issues are policy matters, and that they could be addressed in the ICT Policy Green Paper consultation process, the Authority in its mandate of safe-guarding public interest is compelled to guard against market failure, and wishes to establish what corrective measures can be put in place to ensure a competitive market which delivers goods more efficiently to end-users over the short to medium term. The option to follow an inquiry is further necessitated by prevalent information asymmetries, appeals for regulatory certainty and significant technological changes. As the Authority is a pro-competitive regulator in terms of the ECA, the conduct of the inquiry will not affect pro-competitive activities in the Authority's strategic plan. It is sometimes said that one can't see

the wood from the trees. The inquiry aims precisely to take a look at the wood and report on the view. Respondents to the public consultation process are therefore requested to think “outside the box” and view the inquiry as an exploration of these issues and how they may affect the regulation of competition in the ICT sector as a whole.

3. THE SCOPE OF THE INQUIRY

The inquiry will seek to address the following issues:

- 3.1 The current state of competition in the ICT sector as a whole;
- 3.2 Challenges to creating a level playing field across platforms;
- 3.3 The impact of convergence, net neutrality and disruptive technologies on the competitive landscape;
- 3.4 The role of fixed (fibre) and wireless (high demand spectrum) in enabling competition;
- 3.5 The tension between consolidation and plurality in the ICT sector.

The inquiry will go through a number of iterative stages. Initially responses to the issues will be solicited through written submissions and oral representations at a public hearing. Key areas requiring further research and engagement with stakeholders will be identified. This will lead to a draft position paper on competition in the ICT sector, which will be subject to a further public comment process. Once the public consultation process is complete, the Authority will issue the findings of the inquiry as a final position paper. The Authority expects that the inquiry will take six to eight months to complete.

4. INVITATION FOR WRITTEN REPRESENTATIONS

In terms of section 4B of the Independent Communications Authority of South Africa Act, Act 13 of 2000, interested persons are hereby invited to submit their written representations on the matters outlined in this Notice. Interested parties are invited to lodge written representations in relation to the inquiry within sixty (60) working days of the date of publication of this notice. Interested parties must indicate in their written representations if they would like to be afforded an opportunity to make an oral representations. The submissions and any representations received pursuant thereto will be made available and be open for inspection by interested parties in the Authority’s library during the Authority’s normal office hours.

All written representations, responses and other correspondence in respect of this Notice must be submitted to the Authority by post, hand delivery or electronically (in Microsoft Word) and marked specifically **Attention: Ms Thandi Nkosi. Delivery address: Block B, Pinmill Farm, 164 Katherine Street, Sandton.** Further enquiries in that regard may be directed to her via e-mail at: CNkosi@icasa.org.za or by facsimile: **011 566-3038** or by telephone: **011 566-3037**; between 10h00 and 16h00, Monday to Friday only.