



Suggested Amendments to the South African Electronic Communications Act: Competition Matters

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The Electronic Communications Act (EC Act), which came into force in 2006, replaced disparate telecommunications and broadcasting legislation. One of its aims was to pave the way to a converged and competitive industry. In the few years since the EC Act came into force it has become apparent that it does not allow for the effective regulation of the industry by the Independent Communications Authority of South Africa (Icasa). This is especially true in respect of competition matters, where Icasa has failed to produce regulations and therefore cannot implement the competition matter provisions.

This is the third in a series of articles suggesting amendments to the EC Act. In this article, we discuss amendments to the provisions of chapter 10 the EC Act relating to competition matters.

COMPETITION MATTERS IN THE EC ACT

The EC Act attempts to deal with competition matters setting out provisions regarding ex post and ex ante regulation.

Ex Post Regulation

Section 67(1) of the EC Act provides that Icasa may direct a licensee (or exempt service provider) to cease or refrain from engaging in an anti-competitive act, if such person has engaged in an act or intends to engage in any act that is likely to substantially prevent or lessen competition by, among other things, (a) giving an undue preference to, or (b) causing undue discrimination against.

Icasa is required, in terms of sections 67(2) and (3), to prescribe regulations setting out what constitutes an anticompetitive act and procedures for complaints, monitoring and investigation.

Although Icasa may investigate matters on its own accord, it is likely that most matters in respect of section 67(1) will result from complaints. However, Icasa has failed to promulgate the regulations required with the result that the provisions of section 67(1) cannot be implemented.

Defining Markets, Significant Market Power and Ineffective Competition

Section 67(4) provides that Icasa must prescribe regulations defining relevant markets and market segments where there is ineffective competition, and must determine which service providers have significant market power in those markets and market segments, after which it may impose pro-competitive licence conditions on licensees.

Section 67(5) provides how Icasa will determine significant market power. A licensee has significant market power in the relevant market or market segment where Icasa finds that the particular individual licensee or class licensee:

- Is dominant;
- Has control of essential facilities; or
- Has a vertical relationship that it determines could harm competition in the market or market segments applicable to the particular category of licence.

'Dominant' is defined with reference to section 7 of the Competition Act. Section 7 of the Competition Act indicates that a firm is dominant if it:

- Has at least 45% of that market;
- Has between 35 and 45 percent of that market, unless it can show that it does not have market power; or
- Has less than 35% of that market, but has market power.

'Market power' (as opposed to significant market power) is defined with reference to the Competition Act as:

“the power of a firm to control prices, or to exclude competition or to behave to an appreciable extent independently of its competitors, customers or suppliers.”

'Essential facility' is defined in the EC Act as:

“an electronic communications facility or combination of electronic communications or other facilities that is exclusively or predominantly provided by a single or limited number of licensees and cannot feasibly (whether economically, environmentally or technically) be substituted or duplicated in order to provide a service in terms of this Act.”

'Vertical relationship' is defined in the Competition Act as "the relationship between a firm and its suppliers, its customers, or both."

With respect to defining markets and market segments, section 67(6) of the EC Act provides that Icasa must consider the non-transitory (structural, legal, or regulatory) entry barriers to the applicable markets or market segments and the dynamic character and functioning of the subject markets or market segments.

When determining the effectiveness of competition in the relevant market or market segment, Icasa must take the following factors, among others, into account:

- An assessment of relative market share of the various licensees in the defined markets or market segments; and
- A forward looking assessment of the market power of each of the market participants over a reasonable period in terms of, amongst others:
 - actual and potential existence of competitors;
 - the level, trends of concentration, and history of collusion, in the market;
 - the overall size of each of the market participants;
 - control of essential facilities;
 - technological advantages or superiority of a given market participant;
 - the degree of countervailing power in the market;
 - easy or privileged access to capital markets and financial resources;
 - the dynamic characteristics of the market, including growth, innovation, and products and services diversification;
 - economies of scale and scope;
 - the nature and extent of vertical integration; and
 - the ease of entry into the market, including market and regulatory barriers to entry.

Icasa has, despite initiating several proceedings, not made any of the determinations required by chapter 10.

Pro-competitive Licence Conditions, Including Pricing

Section 67(7) of the EC Act provides that pro-competitive licence terms and conditions to be imposed by Icasa may include but are not limited to terms and conditions relating to:

- Interconnection and facilities leasing (subsections (a), (c))
- Penalties for failure to abide by terms and conditions (subsection (b))
- Obligations to publish information (subsections (d) and (e))
- Obligations requiring separate accounting and accounting methods (subsections (f), (g), and (i))

- Pricing (subsection (h))
- South African broadcasting content (subsection (i))

Section 67(8) deals with the review of pro-competitive conditions, inter alia. It provides that, where Icasa undertakes a review of the pro-competitive terms and conditions, it must also review the market determinations and decide whether to modify the pro-competitive conditions set by reference to a market determination. If Icasa determines that a licensee to whom any pro-competitive condition applies is no longer a licensee possessing significant market power in that market or market segment, Icasa must revoke the applicable pro-competitive conditions. If Icasa determines that the licensee to whom pro-competitive conditions apply continues to possess significant market power in that market or market segment, but due to changes in the competitive nature of such market or market segment, the pro-competitive conditions are no longer proportional, Icasa must modify the applicable pro-competitive conditions applied to that licensee to ensure proportionality.

SUGGESTED AMENDMENTS TO THE EC ACT

The provisions of chapter 10 require determinations to be made by Icasa in respect of defining and identifying markets, whether there is effective competition in those markets, determining whether any person has significant market power in those markets, and setting pro-competitive licence conditions on those determined to have SMP in markets where there is ineffective competition. As written, the provisions are not clear and this has resulted in, at best, delayed regulatory action by Icasa. For example, subsection (6) arguably requires intractable circular analyses. In addition, there is no manifest requirement for licensees to provide ICASA necessary information for ICASA to make the determinations required. It seems that Icasa is simply not able to implement the provisions as written.

The suggested amendments set out below should assist Icasa in implementing the competition matters regulatory regime set out in chapter 10.

It is not recommended that subsections 67(1-3) are amended, however, Icasa is encouraged to promulgate the required regulations so that section 67(1) can be implemented.

It is suggested that subsections 67(4-7) be significantly re-written, as follows.

“(4) The Authority must prescribe regulations determining relevant markets or market segments where there is ineffective competition, and whether any licensee has significant market power in such markets or market segments,

and if so, imposing appropriate and sufficient pro-competitive licence conditions on such licensees. The regulations must, amongst other things -

- (a) determine relevant wholesale and retail markets or market segments;
- (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; and
- (d) impose appropriate pro-competitive licence conditions on those licensees having significant market power to sufficiently remedy the market failure.

(5) When determining whether there is effective competition in markets and market segments, the Authority must consider, among other things, the non-transitory (structural, legal, and regulatory) entry barriers to the applicable markets or market segments and the dynamic character and functioning of the markets or market segments, including an assessment of relative market share of the various licensees or providers of exempt services, in the markets or market segments, and a forward looking assessment of the relative market power of the licensees in the markets or market segments.

6) Licensees must provide to the Authority any information specified by the Authority in order that the Authority may carry out its duties in terms of this section.

(7) A licensee has significant market power in a market or market segment if that licensee -

- (a) is dominant;
- (b) has control of an essential facility; or
- (c) has a vertical relationship that the Authority determines could harm competition.

(8) Pro-competitive licence conditions may include, but are not limited to -

- (a) obligations in respect of interconnection and facilities leasing in addition to those imposed by chapters 7 and 8 and any regulations made in terms thereof;
- (b) penalties for failure to abide by the pro-competitive licence conditions;
- (c) obligations to publish any information specified by the Authority;
- (d) obligations to maintain separate accounting for any services specified by the Authority;
- (e) obligations to maintain structural separation for the provision of any services specified by the Authority;

(f) price regulation as determined by the Authority, in addition to that imposed by chapters 7 and 8 and any regulations made in terms thereof, including matters relating to the recovery of costs; and

(g) obligations relating to accounts, records and other documents to be kept, provided to the Authority, and published.

CONCLUSION

In his budget vote address on 23 June 2009, the Minister of Communications General (ret) Sipiwe Nyanda, stated:

“... [t]he country needs to constantly review its policy and regulatory environment, to assess whether it appropriately supports the future growth of the sector. I believe that the time has come to outline the country’s long term vision for the sector, to direct future interventions by all spheres of government and relevant role players, and to provide policy certainty for the industry and investors.”

In order to achieve these goals, the industry, which previously was dominated by monopolists and duopolists, must be competitive. Chapter 10 of the EC Act was intended to give Icasa the tools to ensure a competitive regulatory framework. But as written, the provisions cannot be implemented.

The amendments suggested herein do not require policy changes; they will result in the more effective and efficient regulation of competition matters by Icasa. The result surely will be a more competitive industry but not as an end to itself, but as a means to help South Africans reach the goals of universal service - affordable access to all.

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