

# ICT SMME Chamber

## Response to ICASA Draft Mobile Broadband Services Regulations – No 44337

28 May 2021

## 1. ICT Chamber understanding of the Regulations

The ICT SMME Chamber understands the purpose of the published ICASA regulations as follows:

The regulations are designed to define relevant wholesale and retail markets or market segments for mobile broadband services and also to determine whether there is effective competition in these relevant markets and market segments.

Further, the Authority seek to determine which, if any, licensees have significant market power in the said markets and market segments. Through the draft regulations, the Authority seeks to impose appropriate pro-competitive licence conditions on those licensees having significant market power to remedy the market imbalance.

The Authority wishes to set out a schedule in terms of which it will undertake periodic reviews of the markets and market segments, taking into account subsection (9) and the determination in respect of the effectiveness of competition and application of pro-competitive measures in those markets. The regulations provide for monitoring and investigation of any anti-competitive behavior in the relevant market and market segments.

On the basis on this understanding the ICT SMME Chamber submits that Section 3 Market Definition needs to be relooked.

The ICT SMME Chamber proposes that the market definitions as currently proposed by ICASA be unbundled and more market definitions be made available. This will allow SMME to participate in the unbundled space as the ICT SMME Chamber understands that broadband services is the key driver for the customer's choice of broadband connection instead of the underlying technology. It is there imperative that the market definition are aligned to the services offered to the customer instead of focusing on the underlying technology.

In a speech by then Finance Minister Pravin Gordhan at the South African Chamber of Commerce and Industry (SACCI) Annual Convention Gala Dinner on 3 October 2011, he said that *"Small and medium sized firms (SMMEs) are critical for overall employment and job creation. SMMEs account for the majority of employment in the South African economy. Labour Force data shows that about 70 per cent of private employment is in firms with fewer than 50 workers. In addition, smaller firms account for a disproportionate share of gross job creation with almost 80% of all new jobs being created in firms with fewer than 50 workers."* This was said almost 11 years ago and is still relevant today despite the impact Covid-19 had on the SMMEs

The economic and social impact of this can never be underestimated. According to ITU, 2013 changing market definitions matter when it comes to establishing market power.

Further comments are summarized in the table below mapping comments against the relative clauses in the draft regulation.

Number	Title	Current Clause	ICT SMME Chamber Proposed additions / amendments to the existing clauses
1	Definitions		<p><b>Add the following definitions:</b></p> <p>“structural as referred to in the Hypothetical Monopolist Test”</p> <p>“Transformation”</p> <p>“ICT”</p> <p>“Product – This is particularity in reference to the dominant players cutting out SMME by operating in any device that have a SIM Card through the Transversal Contracts and other means for them to have Monopoly in the ICT space.”</p> <p>“SIM Card” – See paragraph above.</p> <p>“Device” – See paragraph above.</p> <p>“Localization”</p>
2	Purpose of Regulations	(d) impose appropriate pro-competitive license conditions on those licensees having significant market power to remedy the market failure:	(d) declare licensees in the relevant market or market segments, as applicable, that have significant market power, as determined in accordance with subsection (6), and impose pro-competitive conditions applicable to each such license to remedy the market failure.
3	Market Definition		
4	Methodology	(a) the identification of relevant markets and their definition according to the principle of the Hypothetical Monopolist Test, taking into account the non-transitory (structural, legal, or regulatory) entry barriers to the relevant markets and the dynamic character and functioning of the relevant markets;	Amend the clause and include access to finance as a non-transitory entry barrier, because if you do not have access to capital, there is no way you can get access to market and compete.



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5	Effectiveness of Competition		Is upstream market 3a: wholesale national mobile virtual network operator (MVNO) effectively competitive while it underpinned by the same two MNO key player?
6	Significant Market Power Determination		<b>Add the following;</b> (d) Upstream market 3b: MTN and Vodacom are dominant for the wholesale access point name (APN) services (including resellers).
7	Pro-Competitive Terms and Conditions		The measure for compliance in this clause seem to be the retail and wholesale prices which are said to be regulated somewhere. Are these the only two price variables that drive anti-competitiveness in the broadband space?  Propose Clause 1.8 <i>“Impose interconnection obligations to support new network operators, and wholesale access obligation to enable services completion where competition in the underlying network infrastructure was lacking.”</i> ITU, 2013.
8	Schedule for Review or Revision of Markets		No comments.
9	Contraventions and Penalties	A license that contravenes regulation 7 of these Regulations is subject to a fine not exceeding the greater of R5 000 000 (five million Rand) or a maximum of 10% of the license’s annual turnover for every day or part thereof during which contravention continued.	A license that contravenes regulation 7 of these Regulations is subject to a fine not exceeding the greater of R30 000 000 (five million Rand) or a maximum of 30% of the license’s annual turnover for every day or part thereof during which contravention continued.
10	Short Title and Commencement		No comment.

## 2. Conclusion

The ICT SMME Chamber supports ICASA in its effort to ensure that the dominant players in the space are regulated accordingly and believes that for meaningful transformation and participation of ICT SMME in the ICT sector these regulations should not only be written but should be enforced to ensure that the market is opened to all.