

**Representations by M-Net and
Orbicom on ICASA's Discussion
Paper on the Regulatory Framework
for Broadcasting Transmission
Services**

13 September 2011

INTRODUCTION

- 1 On 15 June 2011 ICASA gazetted its Discussion Paper on the Regulatory Framework for Broadcasting Transmission Services ("the Discussion Paper"), and invited comments by interested parties. M-Net and Orbicom wish to thank the Authority for this opportunity to comment on the Discussion Paper.
- 2 Given the focus of ICASA on the managed transmission services ("MTS") for terrestrial television and radio transmission services in South Africa, and the position of M-Net and Orbicom in those markets, we do not intend to comment on specific issues or questions posed in the Discussion Paper.
- 3 Instead, we wish to raise two overarching concerns about this process, namely –
 - 3.1 the legal basis for this process; and
 - 3.2 the economic analyses of ICASA in its Discussion Paper.

LEGAL BASIS FOR THIS PROCESS

- 4 There is uncertainty about which provisions of the Electronic Communications Act, 2005 ("the EC Act") and/or of the ICASA Act, 2000 the Authority is relying on in conducting this process. This uncertainty flows from the following:
 - 4.1 Prior to gazetting the Discussion Paper, on 30 September 2010 ICASA gave notice of its intention to embark on a "section 4B inquiry process on wholesale transmission services in terms of the ... ICASA Act".
 - 4.2 Thereafter, on 6 October 2010, it published on its website and sent to licensees a questionnaire. At the same time it gazetted a notice of the release of the questionnaire, which it claimed was "pursuant to

section 4(3)(g)" of the ICASA Act and the Standard Terms and Conditions for Individual/Class Licences Regulations.¹

4.3 However, throughout the Discussion Paper the language used by ICASA is the language to be found in s67 of the EC Act.

5 This uncertainty is unfortunate, since the participants in the process need to know the legal context within which this process is taking place.

6 Furthermore, if ICASA is going to exercise or to seek to exercise powers equivalent to those set out in s67 of the EC Act, then it would need to do so in terms of that section.

ECONOMIC ANALYSES OF ICASA

7 Even if ICASA were acting in terms of s67 of the EC Act (which is not clear), we would have concerns about ICASA's economic analyses, and particularly with the following three issues, namely -

7.1 ICASA's understanding of the basis upon which it may justify regulatory intervention in a market;

7.2 the pro-competitive remedies proposed by ICASA; and

7.3 inadequate evidence to support a number of the propositions made by ICASA.

Concerns about ICASA's understanding of the basis on which it may justify regulatory intervention in a market

8 From an economics perspective, regulatory intervention in a market is normally reserved for situations where a real competition problem is identified, or the risks of such a competition problem, in the context of facilitating new entry, are sufficiently high that *ex ante* regulation is justified in order to attract entry in the first place.

¹ At that point, these Regulations had not come into operation

9 The structure and wording of s67 of the EC Act reflect that at least market failure and ineffective competition must first be found for the imposition of pro-competitive remedies.

9.1 s67(4), which provides the overarching mandate to ICASA, states that "...pro-competitive conditions may be imposed upon licensees having significant market power where the Authority determines such markets or market segments have ineffective competition". This indicates that a finding of ineffective competition is the basis for a potential pro-competitive remedy.

9.2 s67(4)(c) is more specific in stating that the regulations must "set out the pro-competitive measures the Authority may impose in order to remedy the perceived market failure in the markets or market segments found to have ineffective competition..." This goes further and contemplates the finding of an existing market failure in addition to ineffective competition in order to justify the pro-competitive remedy.

9.3 Finally, in contemplating on what basis a review may alter the pro-competitive conditions, s67(8)(c) states that "Where, on the basis of such review, the Authority 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 in accordance with subsection (7), the Authority must modify the applicable pro-competitive conditions applied to that licensee to ensure proportionality." This suggests that the subtle nature of actual competition in the market informs proportionality and the pro-competitive remedy selected, and not just the existence of SMP. (our emphasis)

10 It is of concern that ICASA's approach in this Discussion Paper diverges from the economic rationale for pro-competitive remedies and its mandate in the EC Act. It appears that ICASA has taken the view that pro-competitive remedies are justified by a finding of significant market power ("SMP") (or dominance) alone, and ignores the fact that market failure and ineffective competition should be the basis for proceeding to pro-competitive remedies.

10.1 Probably the best demonstration of this is in the executive summary (repeated in section 6.3) where it is stated "There are a range of pro-competitive remedies available to address the potential impact of SMP in a market."² Similarly, in section 6.2 of the Paper it is stated that "In the absence of regulation, licensees found to have SMP can potentially adversely impact the market through exploiting their market power", and section 6.4 states that "Regulatory action is warranted when SMP is found in a properly defined market".

10.2 In addition, the very structure of the document focuses on determining if SMP by Sentech exists in each market defined, rather than first specifically considering whether there is market failure and ineffective competition. For instance, section 5 is titled "Assessment of market power and identification of licensees with SMP" and section 6 is titled "The consequences of market power and initial views on pro-competitive remedies".

10.3 Section 5 of the Discussion Paper includes an analysis of the factors incorporated under s67(6)(b) – effectiveness of competition – and the introduction to section 6 incorporates wording that notionally encompasses both the extent of SMP and effectiveness of competition³. However, conceptually and practically it seems that ICASA has looked at the factors in s67(6)(b) as a means to determine if SMP exists or not, and then focused on justifying pro-competitive

² Page 13 of the Discussion Paper

³ See section 6.1 of the Discussion Paper

remedies largely on the SMP finding alone. This is probably most evident in respect of MTS for local radio broadcasting, where ICASA has included this as a market worthy of a remedy despite the finding that 40% of local radio stations self-supply MTS. If such small stations can easily self-supply, then entry barriers are clearly low and should frustrate any attempt to degrade quality or increase price.

- 11 ICASA ought to first investigate whether there are in fact competition problems in the supply of MTS by Sentech, given that Sentech has been providing MTS for some time (a point of evidence we return to later). In other words, ICASA ought to first investigate whether there are problems with the quality of service and/or prices charged. This would provide a much stronger basis for justifying pro-competitive remedies than the mere existence of SMP and a theoretical possibility of anti-competitive conduct. This is particularly true in this case, where Sentech is a state-owned enterprise with a public mandate and may not have the incentives ascribed to a private firm.

Specific nature of the pro-competitive remedies proposed

- 12 Analytically, the weakest part of the Discussion Paper is the justification for specific negative effects of market power, and hence the remedies that are selected to address these.
- 13 In particular, there needs to be a link between the analysis conducted of the market in terms of ineffective competition and the nature/extent of remedies proposed. The ICASA approach is more akin to two separate processes whereby one first determines SMP/ineffective competition, and if found to exist then the second process simply considers the theoretical existence of SMP and nothing else. One cannot regulate based on a textbook world but rather on the actual realities of the market. ICASA appears to recognise this in theory⁴ but not in its actual behavior.

⁴ Section 6.4 of the Discussion Paper states that “In terms of section 67(4)(c), the Authority is required to set out the pro-competitive measures that it may impose in order to remedy the perceived market failure in the markets or market segments found to have ineffectual competition.”

- 13.1 First, given that Sentech has been providing MTS for a long time, the best place to start analytically in determining what the potential consequences are of its market power is evidence of actual behavior. For instance, if Sentech is not currently delaying the provision of MTS to new applicants then one should question whether they have the actual incentive to do so, and hence whether one needs a pro-competitive remedy in the first place.
- 13.2 Second, given that Sentech is not vertically integrated and that it is a state-owned enterprise with a public mandate and public funding for some of its services, some of the incentives and behavior ascribed to it appear illogical and have not been adequately analysed by ICASA. For instance, if taxpayers money is being used to finance the rollout of DTT, then is it likely that pricing will be excessive, or is it more likely that some costs will be absorbed by Sentech to keep prices down? As Sentech is not vertically integrated and hence competing with other broadcasters, what could it possibly gain by needlessly delaying the supply of MTS to a new applicant or deliberately supplying an inferior service?
- 13.3 Third, pro-competitive remedies may be proposed to facilitate entry where such entry is not possible in the current environment. However, in that context the relevant approach is first to determine if entry is desirable and/or feasible, and second to determine what the barriers to entry are that may need to be addressed. However, ICASA has not adequately investigated this. It may be in this case that there is no prospect of duplicating the high site infrastructure of Sentech for national broadcasting and that this would be socially wasteful and may even raise prices as each supplier has less business over which to spread their fixed costs (the natural monopoly argument). However, in this context there may be an argument for allowing Sentech to unbundle and charge for high sites that are then shared by broadcasters.

- 14 Furthermore, a proper consideration of remedies should first consider evidence as to their appropriateness/impact, and second the potential negative side-effects.

Inadequate evidence

- 15 ICASA issued a questionnaire, published on its website and given to licensees, on 6 October 2010, to which there were 42 responses out of a total of 262 issued. Further, it seems that meetings were held with representatives of the industry in order to gather information. However, we are concerned that there are a number of instances where there is inadequate evidence to support the propositions made by ICASA. It may be that because this Paper is considered a discussion paper with questions that this is excusable, but if no further evidence is provided then some of the propositions will be unsubstantiated.

CONCLUSION

- 16 If ICASA intends to hold public hearings in this process, M-Net and Orbicom request an opportunity to make oral representations.