

Submission by the South African Communications Forum ("SACF") to the Independent Communications Authority of South Africa ("ICASA") on the Draft Mobile Broadband Services Regulations

28 May 2021

1. The South African Communications Forum ("SACF") is an industry association that enjoys the most diverse membership in the ICT sector. Our membership allows us to advance views that are balanced and seeks to promote a sector that is inclusive, competitive, able to sustain growth and attract investment.
2. The SACF welcomes the publication of the Draft Mobile Broadband Services Regulations to ascertain effective competition within wholesale and retail markets and markets segments for mobile broadband services. In this document we provide our response to the Draft Regulations, with a focus on the determination of Significant Market Power (SMP) provided therein. We bring to the attention of the Authority irregularities inherent in the methodology applied in determining that competition in the relevant markets and market segments is ineffectively competitive. We provide our rationale on how the implications of an inadequate methodology may result in an uncompetitive telecommunications environment, and advance proposals on how this may be remedied.
3. The proposals advanced in this document are divided into broad themes that are referenced in the Draft Regulations in order to provide balanced views that will enable both the Authority and the licensees to ascertain that effective competition prevails within the markets and market segments.
4. The SACF would like to participate in any future processes in relation to the Draft Regulations including public hearings and workshops.

Introduction

5. In the main, this submission addresses the Authority's findings that competition is ineffective in four of the five markets pursuant to section 3 of the Draft Regulations.
6. In addressing the competition matters the submission looks into the methodology of significant market power determination, the application of this methodology in competition matters and the arrival of the determination.

7. This leads the submission to a detailed analysis of the market definitions (geographic and product) offered in the Regulations, and the SACF's position on these definitions and their applications.
8. The Submission further address the provisions in the remedies, as provided for in the Pro-Competitive Terms and Conditions; as well as the subsequent penalties related to this.

Context –

9. The SACF notes that the purpose of the draft regulations is primarily to define the wholesale and retail markets for mobile broadband services. Secondary to this is the determination of effective competition in those relevant markets and market segments.
10. To this end, the Authority further then determines whether there is significant market power in any of the markets and if this leads to ineffective competition.
11. The Draft Regulations thus find that MTN and Vodacom have significant market power and are dominant in the following markets:
 - a. Retail Markets: MTN and Vodacom are dominant in this market
 - b. Upstream Market 1: MTN 8 Municipalities and Vodacom 39 Municipalities
 - c. Upstream Market 2: MTN and Vodacom are dominant in this market
12. The SACF finds the Draft Regulations are scant on the methodology employed and the subsequent implementation of the said methodology applied by the Authority in defining the market and in determining significant market power therein.
13. The Draft Regulations propose Pro-Competitive Terms and Conditions that are applicable to the wholesale markets. The Regulations acknowledge that the retail and wholesale markets are vertically integrated and as such measures in the wholesale market will most likely address the findings of the retail market.
14. The SACF thus makes a submission based on the above context of the gazetted Draft Regulations.

Significant Market Power Determination

15. Market definition plays an important role in ex ante competition regulation and is an imperative step in determining anti-competitive behaviour. The Authority does not clearly set out the methodology used to determine SMP.

16. As such the SACF has offered alternatives and supplementary approaches that it believes shall assist the Authority in the an empirical and objective determination of SMP that will serve the purpose of the Regulations.

Hypothetical Monopolist Testing

17. The Small but Significant and Non-transitory Increase in Price (SSNIP) test typically forms the basis of Hypothetical Monopolist Testing, which the Authority has used in the methodology. Our understanding is that the SSNIP test defines the relevant market by determining whether a given increase in product prices would be profitable for a monopolist in the candidate market.
18. What is often debated in the application of the SSNIP test is whether the test should be performed with an increase in one price, some prices or all prices in the candidate market. Populist views argue that this should depend on the characteristics of the market; if there are asymmetries between products, increasing only one price might be the best way to identify competitive constraints.
19. With this understanding, we find the application of the Hypothetical Monopolist methodology to the segmentation of Retail market in terms of regional geographic areas inapt. We elaborate on this further in the section below.

Product vs Geographic Market Definition

20. Considering that the I-ECNS license allows for national service provision, we understand that all the licensees considered in the Draft Regulations do provide national coverage to customers. As such, none of the licensees are precluded from price adjustments in a specific geographic market at any point in time.
21. Geographic Market Definition is firmly rooted in economic analysis, and should tie in with the use of Hypothetical Monopolist Test that the Authority adapted, in order to render the most accurate market segmentation. In reference to our understanding of the use of the SSNIP test and Hypothetical Monopolist test as stated above, we strongly believe the composition of the South African geographic market is inaccurately defined in the Draft Regulations.
22. The findings document includes micro sites in the Product Market, yet the Draft Regulations removes it without reason as to why. In our view this distorts the infrastructure access level market. The soundness of the product market definition depends on being evidence based, which is not apparent in this case. The exclusion of micro sites based on their role in 5G hinders the Draft Regulations from being forward-looking.

The Remedies

23. Remedies imposed following a finding of significant market power ought to address the problem identified in this case it would be an ineffectively competitive market. In addition to this we recognize the Authority's need for regular data to enable it to monitor and evaluate the effectiveness of the remedies implemented.
24. However, while the Authority requires regular data it is important to collect the data in a manner that is useful and to support the required analysis, recognizing the remedies will not be amended on an ongoing basis. Therefore, it is important to review the impact of the remedies on the market being addressed.
25. Hence, the current formulation of the reporting requirements seems unnecessarily administratively burdensome and difficult for the Authority to process as received.
26. As a result we are of the view that it may be more useful for licensees to submit these reports on a six monthly basis with the information aggregated on a quarterly basis which may be useful to enable the Authority to process this information and publish its findings.

Comments on the Draft Regulations

Significant Market Power Determination

27. The Draft Regulations have cited the definition of SMP as defined in section 67(5) of the Electronic Communications Act (ECA) No. 36 of 2005 as:

“(5) A licensee has significant market power with regard to the relevant market or market segment where the Authority finds that the particular individual license or class licensee –

(a) is dominant;

(b) has control of essential facilities; or

(c) has a vertical relationship that the Authority determines could harm competition in the market or market segments applicable to the particular category of licence.”¹

28. In the absence of a study to determine dominance, the basis for the determination is unclear and should be outlined in the interests of transparency and fairness, the SACF is of the view that the methodology must be publicly

¹ https://www.gov.za/sites/default/files/gcis_document/201409/a36-050.pdf

available to enable all interested stakeholders to interrogate the methodology and application of the methodology.

29. The lack of clarity on how SMP was determined makes it difficult to support the determination of SMP -access to the methodology is as critical to the conclusions.
30. MTN and Vodacom are competitors with national presence and operate independently of each other therefore it is unclear why ICASA has combined the market share of the two to determine dominance.
31. The combination of market share for the two larger Operators will invariably result in dominance because of their market shares even though they operate independently and are competitors. We have not found other jurisdictions where the determination of SMP has been reached by combining the market share of competing operators; the rationale of this is unclear.
32. Pursuant to Paragraph 81 Table 1 in the regulations, ICASA attempts to expose the “incumbent dominance”, however, fails to do so by not taking the following into consideration:
 - a. In combining the incumbent's market share, ICASA ignores the longstanding competition between the two operators. This competition has benefitted the sector and end users in the form of the national network infrastructure and has, and continues to spur on innovation in providing competitive quality national coverage.
 - b. The Draft Regulations fail to acknowledge that MTN and Vodacom are individual licensees and competitors who compete on a national basis.
 - c. The SACF welcomes the separation of market share in paragraph 94 Table 2 as this highlights the true reflection of the market. The SACF is of the view that it may benefit the industry if this separation be accompanied by the relevant share figures, as it was set out in Table 1.
 - d. The Draft Regulations do not include an assessment of Dominance in four regions in 2019. The rationale for this change is not set out, we do not understand this change; we are of the view that this omission could potentially be an indication of a shift in the market. Therefore we are of the view that it should be included.

33. The SACF is concerned that this may lead to the imposition of inappropriate remedies where there may not be a need to impose remedies.
34. The SACF urges ICASA to reconsider the two-year period used for such an assessment. It is our understanding that for an analysis to be sound, the minimum timeframe that can be used should be three periods (years in this instance) as is international best practice. We are of the view that the shortened review period is less likely to reflect the true dynamism of the market.
35. While we appreciate the complexities inherent to the South African telecommunications market which differ to some degree to those in the European region, we believe that the Authority might find valuable counsel if it were to consult such international organizations to learn from the international experience. Moreover, this will ascertain that the Authority adheres to international standards in carrying out their regulatory mandate.
36. We propose that ICASA may consider following European precedent in the revision of Guidelines on Significant Market Power. The revision of Guidelines by the European Commission promotes, *inter alia*, the consideration of past market data, existing market conditions as well as expected or foreseeable market developments over the course of the next review period in the absence of regulation based on SMP. This is known as a Modified Greenfield Approach.²
37. The Modified Greenfield Approach is a prospective analysis that considers market developments over the course of the next review period to ascertain whether tacit collusion is the likely market outcome in the absence of currently applicable SMP-based regulation.³ The European Commission has found that depending on the case being analysed, some of the barriers to entry such as existence of sunk costs, control of infrastructure not easily duplicated and technological advantages or superiority might be reduced to the benefit of new entrants.⁴

Hypothetical Monopolists Test

38. Simply put the Hypothetical Monopolist Test or SSNIP test defines the relevant market by determining whether a given increase in product prices would be profitable for a monopolist in the candidate market.

² <https://digital-strategy.ec.europa.eu/en/news/revision-guidelines-significant-market-power-commission-publishes-drafts-revised-guidelines-and>

³ https://www.wik.org/fileadmin/Konferenzbeitraege/2018/SMP_guidelines_workshop/Keynote_Whelan.pdf

⁴ https://berec.europa.eu/doc/publications/erg_08_21_erg_rep_3crit_test_final_080604.pdf

39. Below we provide our understanding of the application of a Hypothetical Monopolist test:

- Hypothesis: Could a Hypothetical Monopolist between Operator X and Y, raise prices by 5% or more in the next twelve (12) months and remain profitable
- If upon market research it is conclusive that Operator X and Y will remain profitable upon imposing a 5% price increase, then the conclusion is that the two operators do have SMP, and the market is defined.
- If upon market research it is conclusive that operator X and Y will not remain profitable upon imposing a 5% price increase in the next twelve months, then the conclusion is that the two operators do not have SMP and the Hypothetical Monopolist Test should be expanded.
- The expansion should include a variety of substitute products and the hypothesis should be ran again, following the same considerations. This should be done until the hypothetical market is such that imposing 5% price increase will not render the operators profitable albeit including all product substitutes available in the market.

40. The Draft Regulations do not set out this process clearly which deprives the industry of an understanding of the implementation of the methodology and its accompanying calculations that may have been adopted.

41. Notwithstanding its popularity within the economics and regulation of competition, the Hypothetical Monopolists Test is characterised by a number of shortcomings. One of those, is that the test focuses solely on Price and ignores all other elements of the Marketing Mix i.e. People, Product, Place and Promotion.⁵ This is a limited approach as it is widely known that all businesses extend far beyond price to be sustainable. Subsequently, one of the identified consequence of the Hypothetical Monopolist Test is that it results in markets that intuitively seem to be too narrow⁶.

42. The SSNIP test is based on assumptions, and similar to all economics and statistical theories, those assumptions need to be explicitly stated for the sake of the analysis integrity. As such, the SACF is of the view that the Authority should have provided the assumptions under which the SSNIP test was adopted.

43. The accurate application of the SSNIP Test would have revealed that a single operator can enter the province from adjacent areas and undercut the

⁵ <https://corporatefinanceinstitute.com/resources/knowledge/other/5-ps-marketing/>

⁶ <https://www.youtube.com/watch?v=5VE6FaCILaU>

hypothetical monopolist. This entry would render the monopolist's price increase unprofitable. A SSNIP test would have shown that a given province can only be a separate market if a hypothetical monopolist can profitably raise prices within the one province.

44. However, this is unlikely as some operators have appreciably 100% national coverage across the country through their own network rollouts, or through a combination of their network rollouts combined with roaming arrangements to supplement their networks or roaming in its entirety. This means each operator has the ability to respond to a price change by any other operator in any of the nine provinces.

Product Market Definition

45. Section 7.1.1.5 includes micro sites in the list of site categories a licensee must provide to the Authority on a quarterly basis for the purpose of monitoring retail and wholesale prices. Moreover, Section 9 stipulates the penalties a licensee shall be subjected to should the licensee be in contravention of the regulation stipulated in section 7, including the one mentioned herein. This suggests that micro sites are of notable value to the analysis of their relevant product market competition.
46. The regulations ought to adopt a forward looking approach and as such should be looking at access to sites holistically acknowledging that trend of the last while has for operators to divest of their towers resulting in third party entities owning the towers. As we enter a 5G environment, licensees will increasingly have less control over access to sites particularly micro-sites which will have increasingly prominence as 5G.
47. To reiterate our position, we do appreciate that the evolution of 5G is not as apparent in South Africa and this is the market segment on which micro solutions, lampposts and billboards play an important role. However, this uncertainty speaks more to the steepness of the growth trajectory of 5G uptake and accessibility, than its feasibility from the supply-side. The SACF believes that the inclusion of this micro sites in the relevant product market in fact talks to the use of Modified Greenfield Approach as suggested above as it will account for the 5G market development in the next coming years.
48. In a recent GSMA trade association survey, the findings reported were that the increase in 5G activity expected in sub-Saharan Africa will be led by South Africa. However, GSMA reports that, the mass deployment will be delayed by the high cost of 5G infrastructure⁷. The report cites that the networks have to be

⁷ <https://www.rcrwireless.com/20200127/carriers/south-africa-still-several-years-away-from-mass-5g-adoption>

denser than previous-generation networks, which will only exacerbate the challenges faced by the South African operators of funding and building enough base stations to provide adequate coverage. The possibility of rejection of 5G service by consumers due to misinformation remains. Despite these drawbacks, the long-term prospect for 5G in South Africa is promising.

49. In April 2020 under the declared state of National Disaster due to the Covid-19 pandemic, the Authority approved the temporary allocation of high-demand spectrum frequencies to operators to meet the exponential increase in traffic on their networks, and to assist with increased demand by consumers due to the effects of the Covid-19 pandemic.
50. All these developments and founded reports allude to the fact that 5G evolution is set to yield remarkable growth opportunities for the South African telecommunications market. Therefore, the Authority ought to be proactive in preparing the regulatory landscape for this evolution. This should start with the inclusion of the current micro-sites in the relevant product market for site infrastructure.

Geographic Market Definition

51. The Authority concedes to the limitations of the Hypothetical Monopolist Test in paragraphs 64 to 67 of the Draft Regulations - asserting that municipal markets may be too narrow. However the Authority continues to group municipal markets into provinces segmented by urban and rural areas without provision of robust evidence as to why this is the prevailing method.
52. The Authority maintains in paragraph 138 that the geographic market for site infrastructure access is at least as narrow as local municipalities. The Authority's assessment ignores the fact that the incumbents both have national networks, and have rolled out sites on a national basis and that they compete nationally and regionally. The shifts in market share should support this.
53. ICASA mentions the even distribution of customers between mobile operators as one of the competition conditions it considered in the segmentation of geographical markets. However, the Authority does not provide a succinct description of what goes into this even determination and further, does not provide evidence of how these competition conditions differ from province to province. The SACF would like to know the competitive conditions that were taken into consideration.

54. Additionally, the Authority states that supply-side substitution is considered in the effectiveness of the competition stage of the assessment, instead of the market definition stage. In so doing, the Authority mitigates the risk of defining overly broad markets, which we support. However, this approach seems to ignore the risks in defining overly narrow market such as over-regulating a dynamic space. Moreover, the Authority does not properly account for supply-side substitution in its assessment of effective competition.

Effectiveness of Competition at the Retail Market level

55. Pursuant to paragraph 74 the Authority deduced that there is an apparent absence of effective competition within retail markets for mobile services, given the significant entry barriers. Furthermore, the Authority alludes to the failure to reduce market share of the incumbents, to below 90% by the new entrants in this particular market.

56. The Authority notes a persistent duopoly, in paragraph 82, and bases the findings of ineffective competition on such. This is as a result of the Authority's reliance on the market structure alone as an indicator of the effectiveness of competition which in our view is a slightly flawed approach.

57. ICASA needs to take into consideration that:

- a. Mobile data volumes have seen a substantial increase over the review period. This took place concomitantly to the drastic decrease in effective prices
- b. Operators constantly seek avenues through which they can evolve in response to competition pressure, while delivering high-value products to their subscribers.
- c. If the Authority were to thoroughly assess the network churn, it would be evident that the presence of effective competition within the retail market allows for demand substitution. Subscribers are able to, and do, switch between operators to whoever they deem the suitor to their needs.

58. We note the Authority's finding pertaining to the ineffective competition in the market for site infrastructure in municipalities. However, the Authority seems to limit the focus only on market concentration regarding its competitive assessment, which perpetuates the disregard on the competition between the incumbents.

59. This assessment appears to completely ignore the existing frameworks that support infrastructure sharing such as the ECA that obliges licensees to share

facilities and infrastructure and may only rebuff a request in specific circumstances.

60. In terms of sharing of site, the SACF struggles to see the connection between sharing and divestiture. The SACF would appreciate if the Authority shed more light as to why the Authority expects divestiture from the Operators.

61. The SACF would appeal to the Authority that any competition assessment should always involve a host of other considerations, including the characteristics of the industry in question, and the constraints imposed by the bargaining strength of a firm's customers (i.e. the extent of countervailing buyer power), as well as concentration and market share.

Vertical Relationships

62. The Authority implies at various paragraphs of the Draft Regulations; 98, 153, 154, 155 and 192, that various issues may arise as a result of MTN and Vodacom's vertical integration – i.e. the incumbents might have an incentive to provide new entrants with inferior access to upstream services.

63. There is no provision of a robust assessment on which the Authority bases this suspicion besides theory based background. We would welcome access to the evidence that underpins ICASA's assertion that incumbents would have an incentive to provide a lower grade of service to new entrants.

64. We have noted that over the past few years licensees who may have traditionally roamed on one incumbent has switched to another which suggests that entrants and smaller licensees are able to switch. In addition, the Authority regularly conducts QOS analysis on networks which would certainly serve as a disincentive to providing a lower grade of service. However, should these claims be based on empirical evidence this should be shared.

65. In as much as there are harmful consequences from vertical integration, we find it worthwhile for the Authority to explore the advantages in order to reach a sound and conclusive assessment of the market.

Roaming Market

66. In paragraph 174 ICASA sets out its view on the roaming market defining the product market for roaming as access to coverage only. It is further explained that roaming for coverage is distinct from roaming for capacity as they are not substitutes in the Authority's view.

67. The SACF is of the view that roaming for coverage and roaming for capacity are distinct and different markets. While roaming for coverage may typically require a more ubiquitous network, licensees with smaller and even more regional networks may be able to offer roaming to other licensees including larger licensees.
68. Roaming is an efficient tool that gives licensees access to more infrastructure at a lower incremental cost and does not need the significant outlay of capital. It enables infrastructure sharing and reduces unnecessary duplication and allows licensees to share where necessary and shifts the focus to service-based competition.
69. Pursuant to paragraph 188, the Authority entertains the effectiveness of competition and barriers to entry within the roaming market. The Authority finds it not plausible for supply-side substitution to take place, where a provider of urban roaming would be able to enter rural roaming in response to a price increase. This does not consider the competition dynamics between the Operators. The SACF would request that the Authority broadened this analysis and take into consideration other infrastructure players in the roaming market.

International Benchmarking and Profitability

70. The SACF notes it that the Authority has deemed it adequate to use the benchmarking in the DSMI report and does not see the need to update this benchmarking exercise and that it is unlikely to return other outcomes. We disagree this as the DSMI report has limitations and this would have been opportune for the Authority to iron out the limitations in the DSMI report and update the international benchmarking exercise.
71. We urge the Authority to consider the following two main reasons as why we advocate for a detailed international benchmarking exercise:
 - a. While country-specific factors would not vary, such factors may still affect the evolution of costs over-time. Example: while the geography of a country is effectively constant, it still affects the cost an operator must incur to expand the geographic coverage of its mobile network and or to upgrade a given technology aspect of its operations. To the extent that South African operators chose to compete on geographic coverage while operators in other countries chose to compete on price, such an analysis would indicate unfavourable results for South Africa despite there not necessarily being a lack of competition in the market.
 - b. Country-specific factors that change over time include market inputs (such as the state of economic development, spectrum allocations, regulatory

regimes, foreign exchange and local cost of complementary factors), as well as outcomes that may serve as alternative measures of the state of competition (such as network quality, technology layers, quality of service, commercial and contractual innovations, and the full range of commercial terms other than headline data pricing.

Proposed penalties on the Remedies

72. The SACF is of the view that remedies and penalties are intended to encourage the desired behaviour incentivising and encouraging the desired outcome rather than adopting a punitive approach.
73. While, the ICASA Act sets out a framework for penalties there is nothing in the ICASA Act that precludes the Authority in our understanding from adopting an incentive based-approach instead.
74. The proposed penalties should any of the licensees contravene the Regulations are R5 000 000 or a maximum of 10% of the Licensees turnover for everyday or part thereof.
75. The SACF has long enjoyed the incentive based approach the Authority has adopted towards penalties and remedies. As such, the SACF believes that the current proposed penalties are punitive and lack remedial incentive.
76. Section 17H of the ICASA Act sets out a framework for offences and penalties, the provisions in the draft regulations on penalties do not appear to be aligned to the Act.
77. This misalignment creates regulatory uncertainty, which is undesirable.
78. Accordingly, the SACF proposes that the section on the penalties should be aligned to Section 17H of the ICASA Act. There is no need to restate the provisions of the Act, instead we believe that this provision will be adequately addressed by the following provision:

"A contravention of these regulations will trigger sanctions in accordance with 17H of the ICASA Act.'
79. We understand the fines will be imposed after due process including after an appearance before the Complaints and Compliance Committee (CCC). As a result the CCC may not implement the maximum penalty of 10% and could elect to impose a lower fine.