INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA

NOTICE 485 OF 2017

Independent Communications Authority of South Africa
Pinmill Farm, 164 Katherine Street, Sandton
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NOTICE OF INTENTION TO CONDUCT AN INQUIRY IN TERMS OF SECTION 4B OF THE INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA ACT OF 2000 TO IDENTIFY PRIORITY MARKETS IN THE ELECTRONIC COMMUNICATIONS SECTOR

1. LEGAL BASIS FOR THE INQUIRY

1.1 The Independent Communications Authority of South Africa ("the Authority") is the sector regulator for the electronic communications sector (amongst others). The Electronic Communications Act 36 of 2005 ("the ECA") provides that the Authority has certain powers to deal with competition matters in the sectors that it regulates.

1.2 In particular, section 67(4) of the ECA provides that the Authority "*must, following an inquiry, prescribe regulations defining the relevant markets and market segments and impose appropriate and sufficient pro-competitive licence conditions on licensees where there is ineffective competition, and if any licensee has significant market power in such markets or market segments. The relevant regulations must, among other things-*

(a) define 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;

(d) impose appropriate pro-competitive licence conditions on those licensees having significant market power to remedy the market failure;

(e) set out a schedule in terms of which the Authority will undertake periodic review of the markets and market segments, taking into account [section 67(9)] and the determination in respect of the effectiveness of competition and application of pro-competitive measures in those markets; and

(f) provide for monitoring and investigation of anti-competitive behaviour in the relevant market and market segments."

1.3 Section 4B(1) of the Independent Communications Authority of South Africa Act 13 of 2000 ("ICASA Act") in turn provides that: "The Authority may conduct an inquiry into any matter with regard to:

(a) the achievement of the objects made in terms of [the ICASA Act] or the underlying statutes;

(b) regulations and guidelines made in terms of [the ICASA Act] or the underlying statutes;

(c) compliance by applicable persons with [the ICASA Act]and the underlying statutes;

(d) compliance with the terms and conditions of any licence by the holder of such licence issued pursuant to the underlying statutes; and

(e) the exercise and performance of its powers, functions and duties in terms of this Act or the underlying statutes."

1.4 In order to exercise its powers in terms of section 67(4) of the ECA to conduct market reviews and make regulations imposing pro-competitive conditions on licensees which have significant market power in those markets or market segments where there is ineffective competition, and thus a market failure, the Authority

considers that it is appropriate to undertake a process to identify broad markets and market segments in the electronic communications sector and to assess which of those markets or market segments are susceptible to *ex ante* regulation.

1.5 Of those markets or market segments which are considered to be susceptible to *ex ante* regulation, the Authority will make a determination as to which or those markets or market segments are considered to be priority markets in relation to which the Authority plans to initiate market reviews in terms of section 67(4) of the ECA in due course. The identification of priority markets in this manner is envisaged in the Guideline for Conducting Market Reviews which was published by the Authority in March 2010.

1.6 In conducting this inquiry, the Authority is exercising its power in terms of section 4B(1)(e) of the ICASA to conduct an inquiry with regard to the exercise of its powers, functions and duties in terms of section 67(4) of the ECA. The findings made by the Authority at the conclusion of the inquiry will inform the exercise in due course of the Authority's powers in terms of section 67(4) of the ECA when the Authority conducts market reviews in relation to specific identified priority markets.

2. PURPOSE OF THE INQUIRY

2.1 The purpose of this inquiry is:

2.1.1 to identify relevant wholesale and retail markets or market segments in the electronic communications sector that are generally prone to *ex ante* regulation; and

2.1.2 to determine from these markets and market segments those that the Authority intends to prioritise for market reviews and potential regulation in terms of section 67(4) of the ECA following the conclusion of this inquiry.

2.2 This inquiry is not in and of itself a market review as described in section 67(4) of the ECA. It is an inquiry aimed at identifying priority markets and market segments that the Authority intends to focus on, in order to provide certainty to stakeholders in relation to the markets that the Authority intends to analyse through the market review process.

2.3 As discussed below, the electronic communications sector is dynamic and the markets and market segments identified in this inquiry may change by the time a market review for a particular priority market is initiated.

2.4 The fact that markets and market segments have been identified as priority markets does not mean that regulation of those markets through the imposition of pro-competitive conditions on relevant licensees is automatically warranted. An assessment of whether regulation is warranted will be made when the Authority conducts analysis of specific priority markets during the market review process.

3. THE INQUIRY PROCESS

3.1 As indicated in Section 1, the Authority is conducting this inquiry in terms of section 4B(1)(e) of the ICASA Act. The process contemplated in section 4B(2) of the ICASA Act is that the Authority will give notice of its intention to conduct an inquiry, indicating the purpose of the inquiry and inviting interested persons to submit written representations on or before the date specified in the notice, which may not be less than 45 days from the date on which the notice was published.

3.2 Given the purpose of the inquiry, it is necessary to conduct the inquiry in a series of phases, as detailed below. The Authority intends to consult stakeholders at various stages of the inquiry as indicated

below. At each stage of the inquiry, stakeholders will have at least 45 working days to submit their responses or comments, as the case may be. The time periods for submission of responses or comments may be extended if the Authority considers it to be necessary and appropriate to do so.

3.3 As the inquiry unfolds, the Authority may introduce additional steps where necessary to keep stakeholders apprised of the progress of the inquiry and the Authority's thinking on the matters being assessed.

3.4 The Authority may conduct public briefing sessions in relation to matters of process.

3.5 Phase 1 - Market study

3.5.1 The purpose of the Market Study is to obtain information and opinions from market participants and stakeholders. The information and opinions obtained will be taken into account in (1) the identification of broad markets and market segments in the electronic communications sector that are generally prone to *ex ante* regulation; and (2) those that the Authority may prioritise for market reviews in the future, as discussed in Section 2 above.

3.5.2 The Market Study will be undertaken through a series of questions to market participants aimed at identifying broad market markets and market segments.

3.5.3 Stakeholders are invited to submit their written responses to the questions in the Market Study within forty-five (45) working days from the date of the publication of this notice.

3.5.4 Stakeholders have ten (10) working days, from the date of the publication of this notice, to review the questions in the Market Study and to send any clarification questions on the Market Study

for the attention of the Chairperson: Priority Markets Committee at prioritymarkets2017@icasa.org.za.

3.5.5 The Authority will respond to all clarification questions by publishing a Briefing Note on the Authority's website (www.icasa.org.za) within fifteen (15) working days of the final date for submission of clarification questions.

3.5.6 Should a stakeholder be of the view that any information submitted in response to the market study is confidential, the stakeholder must request confidentiality as envisaged in section 4D of the ICASA Act with regard to such information. A confidential and non-confidential version of the response must be submitted with the request for confidentiality.

3.5.7 In the event that the Authority does not grant a request for confidentiality on a submission, such information may be withdrawn from submission.

3.5.8 Non-confidential responses will be made available on the Authority's website and in the Authority's library as contemplated in section 4B(3) of the ICASA Act.

3.5.9 The Authority may request one-on-one meetings in relation to information submitted by a stakeholder in response to the Market Study where necessary to clarify any information that is submitted. The Authority will inform stakeholders in advance of the information to be clarified and will give adequate notice to stakeholders of proposed meetings.

3.6 Phase 2 - Publication of Discussion Document

3.6.1 The Authority will publish a Discussion Document, in the *Government Gazette*, which will be informed by the information submitted by stakeholders in the context of the Market Study and

any other research or benchmarking exercises that may have been conducted.

3.6.2 The Discussion Document will be published for public comment for a period of 45 working days.

3.6.3 The Discussion Document will include, *inter alia*, a proposed list of markets that following Phase 1 are regarded as being prone to *ex ante* regulation and a list of markets that are then proposed to be identified as priority markets. The Authority will set out its rationale for the identified markets and proposed priority markets. Stakeholders will be invited to comment on the Authority's assessment of the identified markets and the proposed priority markets.

3.6.4 Stakeholders may then submit written representations on the Discussion Document and must indicate whether they require an opportunity to make oral representations at any public hearings as contemplated by section 4B(2)(b) of the ICASA Act.

3.7 Phase 3 - Public hearings

3.7.1 The Authority may hold public hearings on issues raised in the context of the inquiry if deemed necessary.

3.7.2 The Authority will, if it deems it necessary to hold public hearings, notify stakeholders of the date, time and the venue of the hearings.

3.8 Phase 4 - Publication of Findings Document

3.8.1 The Authority will publish a Findings Document in the Government Gazette within 90 days from the date of conclusion of the inquiry as prescribed in section 4C(6) of the ICASA Act. The Findings Document will list the markets that have been identified by the

Authority as being generally prone to ex ante regulation and a list of the markets that have been identified as priority markets in respect of which the Authority intends to conduct specific market reviews.

3.8.2 The Findings Document will be the final output of the inquiry.

4. TIMELINES

4.1 The Authority aims to finalise this inquiry on or before 31 March 2018.

4.2 The Authority may amend this date after notifying stakeholders.

All communications relating to this inquiry must be directed to the Chairperson: Priority Markets Committee by email at prioritymarkets2017@icasa.org.za.



Rubben Mohlaloga
Acting Chairperson
Date: 23 June 2017