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Time to focus! Comments called for on the Electronic Communications Amendment Bill

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The Electronic Communications Amendment Bill, 2022 (the Bill), has been published for comment and aims to introduce an array of significant amendments to the Electronic Communications Act 36 of 2005 (ECA). It is advisable for businesses to be alive to the potential impact these amendments could have and what implications they may pose for the industry as a whole. Interested parties have until Sunday, 23 July 2023 to make submissions.

In essence, the Bill aims to –

1. provide for a new license category for electronic communications facilities services;
2. enable the Minister to make a national standard by-law for a uniform wayleave process;
3. enable spectrum sharing;
4. regulate Mobile Virtual Network Operator Services (MVNOS), terms and conditions, including a maximum wholesale pricing;
5. regulate international roaming arrangements;
6. address spectrum sharing;
7. improve the facilities leasing framework and its pricing principles; and
8. provide for competition regulation.

Some of the above aims could arguably be welcomed by industry participants but others require scrutiny. Of interest is also the aim of the Bill to grant the Independent Communications Authority of South Africa (ICASA) concurrent jurisdiction with the Competition Commission (the Commission) to enforce one another's decisions.

New license category

The object of these new license categories is to bring electronic communications service providers, such as tower companies, within the licensing framework of the Act. These facilities will subsequently have wholesale regulations and licensing conditions imposed against them.

The standard by-law

This amendment proposes a uniform wayleave process where the instalment of electronic communications networks and facilities by telecoms providers for a tenant via an agreement with the landlord will be enabled by the rapid deployment across municipalities.

Spectrum sharing

This amendment essentially allows ICASA to share the spectrum of licensees who have failed to use their spectrum for a period of two years with licensees in under-serviced areas. ICASA will be mandated to prioritise the assignment of unused spectrum to community networks. ICASA will have to approve any sharing of high demand spectrum due to the importance of mobile competition but may also need to be notified of spectrum that is not in high demand. The Bill prescribes that when ICASA is determining the potential competition impact, they may consult the Commission.

MVNO services

An electronic communications network service licensee with access to International Mobile Telecommunications radio frequency spectrum, with network coverage of 90% of the population will have to provide roaming and MVNOS.

This amendment aims to address what is perceived to be roaming arrangements are not competitively priced and that contribute to raising rivals' costs. Furthermore, it is the view that MVNOS are not well developed in South Africa due to lack of incentives by larger networks to provide access. The aim of the Bill is to remove barriers to MVNOS operations and to introduce competitive benefits. It is expected by the authority that based on the outcome of the Bill that the number of MVNOS may increase, which will require an appropriate regulatory framework.

Roaming

There are new provisions which will be made for international roaming such as SADC roaming regulations. The Bill aims to empower ICASA to prescribe regulations which regulate the roaming agreements and pricing with international service providers.

Facilities leasing framework

In terms of the Bill, licensees will be regulated and will have to lease facilities. The amendment will replace the reasonability test for access with principles of access prescribed by ICASA. Therefore, when ICASA denies access, consideration would be in terms of reasonableness but rather the principles of access.

The principles of access will be prescribed by ICASA and once a facility is listed as essential, access will be compulsory. There is also an amendment dealing with wholesale price regulation which allows ICASA to prescribe pricing rules applicable to different types of electronic communications facilities, essential facilities, roaming and MVNOs. These pricing regulations must be fair, reasonable, non-discriminatory, cost effective and must reflect competitive commercial arrangements.

Competition Regulation

This Bill prescribes that ICASA may conduct a market enquiry if there is reason to believe that any market segment impedes or restricts competition in its area. ICASA will be able to determine actions which will remedy any adverse effects on competition.

The objective of this proposed amendment is to improve the market review process in line with the market inquiry process of the Competition Act 89 of 1998.

This provision will allow ICASA and the Commission to enforce one another's findings with the envisaged aim to promote competition. The implication of this will be that once a competition finding is made by the Commission, an inquiry will not need to be repeated by ICASA.

ICASA will also be able to perform competition assessments as part of its licensing functions and will have the power to prescribe regulations which will determine the relevant processes and procedures.

The way forward?

What is apparent from the proposed amendments is that the ECA will be impacted to a substantial degree. The Bill will be open for written submissions for a period of 30 working days from the date of publication. It is therefore paramount that businesses be mindful of the proposed amendments and are aware of the impact they may have in the future.

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