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DEPARTMENT OF ECONOMIC DEVELOPMENT

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DATA SERVICES MARKET INQUIRY

TERMS OF REFERENCE

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1. INTRODUCTION

- 1.1. The Competition Commission (“the Commission”) will conduct a market inquiry into the market(s) for data services in South Africa (“the Data Services Market Inquiry”) covering all relevant players in the value chain who contribute to or influence prices of data services in South Africa.
- 1.2. The purpose of a market inquiry is to examine whether there are features or a combination of features in data services markets which prevent, distort or restrict competition and/or to achieve the purposes of the Competition Act, No. 89 of 1998 (as amended) (“the Act”).
- 1.3. This Terms of Reference (“ToR”) is published in terms of section 43B(2) of the Act read together with section 43B(4). In terms of section 43B(2) of the Act, the Commission must publish a notice in the Government Gazette announcing the establishment of the market inquiry at least 20 business days before the inquiry commences, “*setting out the terms of reference for the market inquiry and inviting members of the public to provide information to the market inquiry*”. In terms of section 43B(4) of the Act, the ToR “*must include, at a minimum, a statement of the scope of the inquiry, and the time within which it is expected to be completed*”. In accordance with these provisions, this ToR sets out the scope of the Data Services Market Inquiry, as well as the expected timeline for the inquiry.

2. LEGAL BASIS FOR THE INQUIRY

- 2.1. This market inquiry is initiated in terms of Chapter 4A¹ of the Act and in keeping with the purpose and functions of the Commission as set out in section 2 and section 21 of the Act respectively.
- 2.2. The Commission is empowered under section 43B to initiate and conduct a market inquiry at any time, and may do so at the request of the Minister of Economic Development (“the Minister”). Section 43B(1) of the Act states that:

¹ Chapter 4A of the Act, which introduces the powers to conduct market inquiries came into effect on 01 April 2013.

“The Competition Commission, acting within its functions set out in section 21(1), and on its own initiative, or in response to a request from the Minister, may conduct a market inquiry at any time...”

- 2.3. With respect to Section 43B(1), the Data Service Market Inquiry is being conducted in response to a request from the Minister. Specifically, the Minister requested that the Commission conduct a market inquiry into the state of competition relating to the provision of data services in South Africa. The concerns of the Minister relate to high data costs in South Africa and the importance of data affordability for the South African economy and consumers. Having considered the request of the Minister, the Commission is conducting a market inquiry because it has reason to believe that there are features of the sector that prevent, distort or restrict competition within the sector, and/or to achieve the purposes of the Act.
- 2.4. Section 21 of the Act calls on the Commission to, inter alia, *“implement measures to increase market transparency”* and *“advise, and receive advice from, any regulatory authority”*. In order to fulfil these functions, and in line with the purpose of the Act, Chapter 4A of the Act enables the Commission to conduct market inquiries in respect of the *“general state of competition in a market for particular goods or services, without necessarily referring to the conduct or activities of any particular named firm”*.² A market inquiry is thus a general investigation into the state, nature and form of competition in a market, rather than a narrow investigation of specific conduct by any particular firm.
- 2.5. The purpose of the Act, as set out in Section 2 of the Act is to *“promote and maintain competition in the Republic in order –*
- (a) to promote the efficiency, adaptability and development of the economy;*
 - (b) to provide consumers with competitive prices and product choices;*
 - (c) to promote employment and advance the social and economic welfare of South Africans;*
 - (d) to expand opportunities for South African participation in world markets and recognise the role of foreign competition in the Republic;*
 - (e) to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy;*

² According to section 43B (1)(i) of the Act, the Commission may initiate a market inquiry if it has reason to believe that any feature or combination of features of a market for any goods and services prevents, distorts or restricts competition within the market.

(f) to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons.

(g) to detect and address conditions in the market for any particular goods or services, or any behaviour within such a market, that tends to prevent, restrict or distort competition in connection with the supply or acquisition of those goods or services within the Republic; and

(h) to provide for consistent application of common standards and policies affecting competition within all markets and sectors of the economy."

- 2.6. Although the ToR delimits the scope of the market inquiry as currently envisaged, additional and related matters not identified herein may arise during the conduct of the inquiry. If the Commission believes that the ToR should be amended in any way, either through the addition of new matters or exclusion of matters currently identified herein, the ToR may be amended in terms of section 43B(5) of the Act.

3. SCOPE AND PURPOSE OF THE INQUIRY

- 3.1. In essence, the purpose of the inquiry is to understand what factors or features of the market(s) and value chain may cause or lead to high prices for data services, and to make recommendations that would result in lower prices for data services.
- 3.2. This inquiry will cover all market participants involved at any point in the value chain for any form of data services that are provided to customers such as government, businesses and end-consumers in South Africa.
- 3.3. The main objectives of the market inquiry are to:
- 3.3.1. Obtain a clear understanding of the data services value chain, including the interaction and commercial relationships between different levels of the value chain, and the relationship with other parts of the ICT sector and the broader economy.
 - 3.3.2. Assess the state of competition in the market at every stage of the value chain for provision of data services in order to identify areas of market power where customers or consumers may be exploited or excluded by firms and to identify any other structural, behavioural or regulatory factors that may influence competition or pricing. The assessment would include but not be limited to:
 - 3.3.2.1. Market structure;

- 3.3.2.2. The general adequacy and impact of the current regulatory regime;
 - 3.3.2.3. Strategic behaviour by large fixed and mobile incumbents;
 - 3.3.2.4. Costs faced and profits earned by fixed and mobile network operators;
 - 3.3.2.5. Current arrangements for sharing of network infrastructure;
 - 3.3.2.6. Investment in infrastructure by operators and access to, and allocation of, spectrum as they relate to data services price and competition concerns; and
 - 3.3.2.7. The adequacy of regulation to promote new South African entrants (particularly historically disadvantaged individuals), including but not limited to matters such as dynamic spectrum access and local loop unbundling.
- 3.3.3. Benchmark South African data services pricing against those of other countries.
 - 3.3.4. Establish whether data supply quality and coverage is adequate by international standards and the country's developmental needs.
- 3.4. The outcome of the market inquiry will be to make recommendations on any matter covered in this ToR, including the following:
 - 3.4.1. Recommendations to government as to how the market could be made more competitive and inclusive and how data prices can be brought down in order to secure South Africa's position as a low-data-cost economy.
 - 3.4.2. Recommendations to the sector regulator on the competitive impact of the regulatory framework, and any need for amendments thereto.

4. MARKET INQUIRY TIMELINES AND PROCESS

- 4.1. The inquiry will be carried out primarily by a team of the Commission as well as subject matter experts as required by the Commission.
- 4.2. Section 43B(3) of the Act empowers the Commission to conduct a market inquiry in "*any manner*", subject to the application of specific provisions of the Act, which regulate the Commission's powers. For instance, section 43B(3)(c) affirms the power to issue summonses in terms of section 49A of the Act, which includes the power to direct a person appearing before it to produce documentation in their possession that may be relevant to the market inquiry. Section 43B(3)(d) makes

section 54(b), 54(e) and 54(f) applicable to market inquiries, which empower the Commission to accept submissions from any participant in the market inquiry and question any person under oath or affirmation.

- 4.3. The participants in the market inquiry process will include firms directly or indirectly involved in the data services value chain, as well as those that have an impact on competition in the sector. The inquiry will also include participation by business and trade associations, government departments, public entities, regulatory authorities, consumers and consumer groups, and any other stakeholder that may be able to provide information relevant to the market inquiry. Members of the public are encouraged to participate fully in the inquiry process.
- 4.4. The Commission will publish a report at the conclusion of the market inquiry.
- 4.5. The Commission is committed to the principles of fairness, transparency and integrity and will conduct the inquiry in accordance with these principles. The Commission will allow stakeholders fair and reasonable opportunity to provide input into the inquiry process and its outcomes. For this reason, the Commission may release interim reports throughout the market inquiry for public consideration and comment at its discretion.
- 4.6. The inquiry is expected to commence on 18 September 2017, and is likely to be completed by 31 August 2018.