



GENERAL NOTICE NO. 8/2017

PROPOSED DECISION IN TERMS OF SECTION 32 OF THE SWAZILAND COMMUNICATIONS COMMISSION ACT, 2013: MARKET DEFINITION, ANALYSIS AND DETERMINATION OF DOMINANCE.

- (1) DEFINITION OF CANDIDATE MARKETS**
- (2) FINDING OF DOMINANCE IN THE RETAIL FIXED VOICE MARKET**
- (3) FINDING OF DOMINANCE IN THE RETAIL MOBILE VOICE MARKET**

EXECUTIVE SUMMARY

The Swaziland Communications Commission is a regulatory body established in terms of the Swaziland Communications Commission (SCCOM) Act, 2013 responsible for regulating the electronic communications sector in Swaziland including; telecommunications networks and services, broadcasting services, postal services, the use and allocation of radio frequency spectrum, data protection and e-commerce.

In addition to the primary functions as set out in the SCCOM Act, the Commission is also required, in accordance with Section 23(1) of the ECA, to periodically define and carry out an analysis of relevant markets appropriate to National circumstances.

This document sets out an analysis of whether or not there is effective competition in the market for fixed access, National voice calls, and broadband ("fixed voice market") as well as mobile access, National voice calls, and SMS within Swaziland ("mobile voice market"). In particular it considers whether or not one or more operators has significant market power ("SMP"), thus dominant in the market as required in terms of section 23 of the Electronic Communications Act, 2013 ("ECA")

Theoretically, an operator or group operators with SMP have the potential to either increase price above and/or reduce output below the competitive level. They are able to behave in an anticompetitive manner in a way that can negatively impact the market

and thwart effective competition. Where operator/s enjoy SMP, it follows that consumers will benefit less compared with a market in which competition is effective. Hence, in the instance where dominance is found – the Swaziland Communications Commission (“SCCOM”) can impose remedies to prevent or curb abuse of dominance and to promote effective competition.

In fulfilling this requirement and the mandate of promoting competition within the ICT sector, in particular in the Mobile and Fixed telecommunications Markets, the Commission has undertaken an assessment in terms of Section 23(1) of the ECA. To this end, the Commission first initiated and implemented an ICT Market Study to gain an understanding of the telecommunications sector in Swaziland. The Commission conducted a data gathering exercise, through one-on-one meetings, benchmarking and desktop research. The output of the ICT Market Study findings have been used to define the specific telecommunications markets and the subsequent proposed dominance determination.

With regard to the identification of licensees with SMP, the Commission considered the factors set out in the ECA and has conducted an analysis of dominance, the control of essential facilities and vertical integration.

In terms of Section 23(1) of the ECA, and following this enquiry, the Commission must impose appropriate and sufficient pro-competitive licence conditions on licensees that have been found to possess SMP in defined market segments where there is ineffective competition. The Commission has considered remedies that have been applied in other jurisdictions.

1. BACKGROUND AND INTRODUCTION

1.1 Although at the early stages of market liberalization, the Swaziland’s ICT industry is developing rapidly in terms of investment, growth and innovation to the benefit of the entire industry and consumers. The Swazi ICT legal and regulatory framework is generally supportive of competition. The Electronic Communications Act, 2013 (“ECA”) provides a framework, similar to that found in liberalized markets, which supports competition. Section 7(v) of the Swaziland Communications Commission Act (“SCCOM Act”) provides that amongst SCCOM’s core functions is the establishment of a pricing system to protect end-users from excessive price increases and to avoid unfair price competition.

1.2 It is common knowledge that the telecommunications sector in the country has been without competition for a very long period of time and, as expected, has been characterised by monopolistic practices leading to numerous calls for the introduction of Competition in the sector. In this regard and in furtherance of the objectives of the ECA, the Commission recently issued one (1) additional

technology neutral licence to Swazi Mobile Limited for the provision of telecommunications services in the country to increase the competitiveness of the sector. This was in addition to two (2) technology neutral licences currently issued to the Swaziland Posts and Telecommunications Corporation (SPTC) and Swazi MTN Limited (MTN). The efforts by the Commission to introduce competition in the sector, will have limited success in the market if the Commission fails to apply the requisite regulatory measures to promote competition, including competition principles.

This report therefore focuses on the analysis of dominance in the mobile and fixed voice markets.

1.2.1 Mobile Voice Market: Until recently, retail mobile voice services have been provided in Swaziland solely by Swazi MTN (“MTN”) a licensed mobile network operator. In August 2017, Swazi Mobile launched its services after having been licenced in February 2017. For the purposes of this analysis the presence of Swazi Mobile in the market is predicted and its potential performance is forecasted, but its current market share and conduct are not analysed. The broader voice market includes fixed voice calling services, which are provided by SPTC, the sole player in the fixed voice market, which for purposes of this report is considered a separate relevant market.

1.2.2 Fixed Voice Market: SPTC holds one hundred (100%) of the fixed voice market. The fixed market is relatively small in the context of the total voice market. Ten percent (10%) of the total population subscribes to fixed services. The total voice market is approximately 1,011,874 customers. Ninety-five percent (95%) of the total voice market, i.e. 967 262 customers, are mobile voice customers. However, fixed voice services have not been found to be substitutable with mobile voice services in Swaziland.

This report therefore focuses on the analysis of dominance in the fixed voice market. It is common cause that, given the market structure, which is a monopoly, SPTC is dominant both based on market share (100%) and market power. This report objectively assesses market power in the fixed voice market in line with global best practice and in compliance with the requirements of the ECA.

1.2.3 Overview of Swaziland's ICT environment

Item	Relevant statistics
Total number of fixed lines	44 612 (2016)
Fixed operators (market share)	SPTC: 100%
Total number of mobile subscribers	967 262 (December 2016)
Mobile operators (market share)	MTN Swaziland: 100.0%
Mobile penetration	Population: 74% Household: No data
Source: SPTC (2016); MTN (2016); TeleGeography (2016)	

1.3 In carrying out this exercise (markets definition, analysis and dominance determination), the Commission considered the provisions of the ECA, the Swaziland Communications Commission Act, No.10 of 2013 (SCCOM ACT) as well as approaches used in other jurisdictions. Having performed a comprehensive assessment on the information available, the Commission's view is that there is ineffective competition in the markets that have been defined so far.

1.4 The approach followed by SCCOM draws on best practice from the European Union, South Africa, Nigeria and Uganda, amongst others and adapts this to recognise the specificity and uniqueness of the Swaziland market. SCCOM is of the opinion that competition in the telecommunications markets has many advantages, but so does the continuing investment, which is needed to ensure that the country's telecommunications infrastructure and services meet the needs of Swaziland's businesses, consumers and fosters economic growth.

1.5 The Commission has conducted research which has identified retail telecommunications markets and their corresponding wholesale markets ("candidate markets") as set out in Section 2.2.3 of this decision. The markets identified address access to fixed and mobile networks, and to services provided over fixed and mobile networks.

1.6 SCCOM has assessed two markets – retail mobile voice and retail fixed voice – and found dominance and therefore potential competition problems in both markets. The Commission therefore proposes regulatory remedies appropriate to each market to invigorate fair competition.

2. PROCESS ADOPTED

2.1 Consultation and Data Collection

2.1.1 SCCOM is committed to participatory and evidence based regulation. In November 2016 SCCOM commenced the process of gathering market baseline information (Baseline ICT Sector Study), on the three key markets that it regulates; telecommunications, broadcasting and postal sectors. The objective of the study was to provide SCCOM with an overview of the current status of telecommunications, postal services and broadcasting to identify market constraint factors which may be impeding sector growth and development; to make evidence-based regulatory decisions; and to have a basis against which to measure progress and development in the Swazi ICT sector. The analysis is based on data obtained through primary and secondary research. Primary research consisted of interviews undertaken with the relevant stakeholders and data made available by providers of ICT services in Swaziland. Secondary research drew on data available in the public domain (including operator reports) and data available in SCCOM's service providers' repositories.

2.1.2 The Baseline ICT Sector Report was finalized and presented to the industry on the 7th June 2017 at Mountain Inn resort, Mbabane, Swaziland. The baseline report is furthermore a key input to the market studies that have ensued which seek to determine the level of competition in the industry.

2.2 Markets Definition

2.2.1 The ECA provides that where the Commission determines that a relevant market is not effectively competitive, the Commission shall identify and designate licensees with a dominant position in that market and shall impose upon those licensees the appropriate regulatory obligations provided for in Sections 24 to 28.

2.2.2 The assessment of each market is essentially a consideration of the susceptibility of each to competition issues that are best addressed with *ex-ante* regulation. *Ex ante* regulation is regulation designed to prevent the occurrence of any anti-competitive behaviour in that market.

2.2.3 The scope of the market definition exercise in the telecommunications sector includes fixed and mobile retail services as well as upstream wholesale services and infrastructure. The table below summarises the initial markets that SCCOM has identified and considered susceptible to *ex ante* regulation. As SCCOM does further research on each of these markets, it may find that the markets are sufficiently competitive and therefore take no further action in this regard.

Table 5 List of Candidate Markets

#	Product	Type	Geography	Customers
1	Mobile Access, call termination, National Voice Calls and SMS	Retail	National	Consumer and business customers
2	Fixed access, call termination, National Voice Calls	Retail	National	Consumer and business customers
3	Broadband Internet Access from a fixed location	Wholesale	National	Licensed ECNS
4	Broadband Internet Access from a Mobile Terminal	Retail	National	Consumer and business customers
5	Broadband Internet Access from a Fixed Location	Retail	National	Consumer and business customers
6	National Leased Lines	Retail	National	Business customers
7	International Leased Lines	Retail	National	Business customers
8	Passive Infrastructure	Wholesale	National	Licensed ECNS
9	National Roaming	Wholesale	National	Licensed ECNS providing mobile services

2.2.4 This decision deals with the first two markets, i.e. retail mobile access, call termination, national voice calls and SMS (“mobile voice market”) and retail fixed access, call termination and national voice calls (“fixed voice market”).

3. LEGAL AND REGULATORY FRAMEWORK

3.1 Section 23 of the ECA deals with market assessment and clearly sets out a process which entails market definition, analysis and the determination of dominance before *ex ante* regulation can be applied to a market with insufficient competition. In assessing the markets, the Commission follows competition law principles and processes, as follows:

- i. Define the relevant market
- ii. Conduct a market analysis

- iii. Where the Commission determines that a relevant market is not effectively competitive, identify and designate licensees with a dominant position in that market and impose upon those licensees the appropriate regulatory obligations provided for in Sections 24 to 28 of the ECA in relation to transparency, non-discrimination, regulatory-accounting and cost-based pricing and price regulation.

In addition to the obligations provided for under Part IV of the ECA, a licensee holding a dominant position on the relevant market may be subjected to specific regulatory obligations.

3.2 In general, the approach to competition assessment involves a high level analysis of the market structure, barriers to entry and expansion. In telecommunications markets, barriers to entry are often associated with large-scale investment in infrastructure over a long time, with consequent sunk costs, and could also entail an operator's need to achieve economies of scale and scope. Another barrier to entry could arise where a dominant operator is vertically-integrated; that is where the operator offers both a wholesale and a retail service. In this case, an entrant to the market may find it difficult to compete if the dominant operator's retail arm benefits from preferential treatment from its parent company, particularly if the market entrant is dependent on purchasing a wholesale input from the dominant operator. A barrier to entry could also arise because of the existence of a scarce resource, such as spectrum. The competition assessment for each of the markets has taken into account other factors which could dilute market power, such as countervailing buyer power, where a purchaser buys enough of the operator's services to be able to influence the pricing and market behaviour of the operator.

3.3 In this assessment, the following market analysis criteria was considered to determine market performance:

- i. Service penetration and growth
- ii. Vertical integration
- iii. Pricing behaviour
- iv. Structural barriers to entry

3.4 The following market analysis criteria are considered to assess market performance:

- i. Market Concentration
- ii. Scale and ability to access resources
- iii. Control of Essential Services and Facilities
- iv. Access to sales and distribution channels
- v. Market transparency
- vi. Switching costs

3.5 These criteria are similar to those used generally in market reviews and assessments globally. Regulators recognize that the depth of analysis to be carried out is related to the market share finding. In an instance where a 100% market share has been stable over time, and where it is not likely to change over the next 2-3 years, the detail of analysis of potential mitigating factors required would not be as detailed as in a situation where the market share is 50%.

4. FINDINGS FROM THE ASSESSMENT OF COMPETITION IN THE MOBILE VOICE AND FIXED VOICE MARKETS

4.1 Key findings in the mobile voice market

4.1.1 MTN's exclusivity period ended in 2008, and since then MTN has enjoyed a *de facto* monopoly in the mobile market. The Commission recently licensed Swazi Mobile, which entered the market in August 2017. Mobile subscribers in the country have grown by 4.9% since 2010, and continue to grow with the increased uptake of mobile services and affordability.

4.1.2 The mobile voice market is held solely by MTN, with a 100% market share. Projections predict a slight drop in market share with the entry of a new licensee, however MTN will still hold a majority of the market share over the next 5 years.

4.1.3 MTN holds 100% market share, a situation that has given MTN the liberty to price liberally with little to no marginal cost floors. Network effects play a significant role on the mobile access, voice and SMS market. MTN currently offers peak and off peak rates. If off-net and on-net rates are introduced with a discounted on-net rate for consumers, given that all current consumers belong to MTN, there is a high probability that the majority of consumers will remain on the MTN network as it is connected to the largest portion of the population.

4.1.4 The market has significant fixed costs, so economies of scale offer important benefits to large operators by way of reducing their unit costs. The incumbent operator would then be able to leverage its size in both the Swazi market and internationally to take advantage of lower unit costs than a new entrant.

4.1.5 MTN is also able to reduce their unit cost through economies of scope. Offering more than one service has substantial benefits from spreading their fixed costs across multiple services. It also poses risks for unfair cross subsidisation. Furthermore, as a vertically integrated operator MTN is able to leverage its operations from other markets to self-supply upstream inputs.

- 4.1.6 By virtue of being the only operator in the market, MTN enjoys exclusive agreements with the largest independent retailers in the country. MTN's significant retail reach as well as the agreements represent significant barriers to potential operators entering the market.
- 4.1.7 Finally, MTN's access to scale and resources through its parent company, MTN Group, gives it extensive knowledge, experience, buying power, and negotiating power that would put an entrant in the market at a competitive disadvantage.

4.2 Key findings in the fixed voice market

- 4.2.1 SPTC holds 100% of the customers and market share in the fixed voice market. Fixed line subscribers have grown by 0.2% since 2010, this indicates that growth has been significantly slow and is not projected to increase in the next five years. Revenues in the fixed voice market are 100% attributable to SPTC.
- 4.2.2 The market has significant fixed costs, so economies of scale offer important benefits to large operators by way of reducing their unit costs. SPTC would then be able to leverage its size in the Swazi market to take advantage of lower unit costs than a new entrant, if one were to enter the fixed voice market.
- 4.2.3 An operator which also offers fixed broadband and fixed access also benefits from economies of scope. Offering more than one service has substantial benefits from spreading fixed costs across multiple services, giving rise to unfair cross subsidisation.
- 4.2.4 Lastly, SPTC enjoys legislatively protected influence in terms of its exclusive rights to provide national backbone services, wholesale voice and broadband services. It can therefore benefit by self-providing and, as a vertically integrated operator, can leverage its operations from other markets to self-supply upstream inputs.
- 4.2.5 SPTC prices, at both wholesale and retail level are published and it is assumed that volume discounts are catered for, thus the organisation may offer significant discounts to customers.
- 4.2.6 Finally, SPTC as the incumbent operator has SMP in the fixed market that would put a new entrant at an unfair disadvantage.

5. Dominance Findings

5.1 In light of the afore-going analysis, the Commission hereby intends to declare dominance as follows:

- i. **Swaziland Posts and Telecommunications Coporation is dominant in the fixed voice market, and**
- ii. **Swazi MTN Limited is dominant in the mobile voice market.**

5.2 Pursuant to the declaration of dominance, the relevant regulatory provisions shall be invoked, at both the wholesale or the retail level, to counteract the potential negative effects of anti-competetive behaviours that may be practiced by the dominant operator.

6. Abuse of Dominance and anti-competitive practices

6.1 A dominant operator can abuse its power by engaging in practices with the aim of eliminating or substantially lessening competition. Abuse of dominance may entail, amongst others¹:

- i. **Tying and bundling**, where an operator makes the purchase of one product or service in the relevant market conditional on the purchase of a second product or service,²
- ii. **Predatory pricing**, in terms of which an operator sets prices below cost in order to force a competitor out of the market. The OECD describes predatory pricing as “pricing so low that competitors quit rather than compete, permitting the predator to raise prices in the long run”
- iii. **Unfair cross-subsidization**, where a dominant competitor uses the profits from the sale of its dominant product / service to support (finance losses) non-dominant product / service, i.e. creating unrealistically low competitive price of such product, threatening players on the market and applying predatory pricing.
- iv. **Non-price predation**, where an operator adjusts the quality of its product offering to customers with the aim of harming its competitor. For example, an incumbent might offer an improved level of service to customers served by one new entrant.
- v. **Discrimination** - applying different conditions to equivalent transactions for different market participants (other competitors or customers) for the same services/facilities, in order to disadvantage them in competition.
- vi. **Refusal to deal**, for example a refusal to supply an essential facility to a competitor.
- vii. **Exclusive dealing arrangements**, in which a seller prevents its

¹ <http://www.ictregulationtoolkit.org/toolkit/2.2.3.2>

² <http://www.internationalcompetitionnetwork.org/uploads/2014-15/icn%20unilateral%20conduct%20workbook%20-%20chapter%206%20tying%20and%20bundling.pdf>

distributors from selling competing products or services,

6.2 The Commission will exercise vigilance in identifying the above-mentioned behavior in the market. This applies to the Commission's regulation of both the fixed voice market and mobile voice market. Part of this vigilance involves the imposition of remedies to prevent the abuse of dominance by SPTC and MTN.

7. Remedies and Obligations

7.1 Given the above, the following obligations will be imposed on the dominant operators in the mobile voice and fixed voice markets;

7.1.1 Dominant operators are expected to comply with the regulatory obligations provided for in Sections 24 to 28 of the ECA in relation to transparency, non-discrimination, regulatory accounting and cost based pricing and price regulation. These are elaborated upon in the Electronic Communications (Facilities Sharing) and (Interconnection) Regulations, 2016.

7.1.1.1 Operators shall be required amongst other obligations to:

- (a) meet reasonable requests for access to, and use of, specific network elements and associated facilities, in particular, in situations where the Commission considers that denial of access or unreasonable terms and conditions having a similar effect would hinder the emergence of a sustainable competitive market at the retail level, or would not be in the interest of the end-user;
- (b) interconnect networks or network facilities;
- (c) give third parties access to specified network elements or facilities, including unbundled access to the local loop;
- (d) negotiate in good faith with other licensees requesting access within the prescribed timelines;
- (e) not withdraw access to facilities already granted without written approval from the Commission;
- (f) provide specified services on a wholesale basis for resale by third parties;
- (g) grant open access to technical interfaces, protocols or other key technologies that are indispensable for the interoperability of services or virtual network services;
- (h) provide co-location or other forms of facility sharing, including duct, building or mast sharing;
- (i) provide specified services needed to ensure interoperability of end-to-end services to users, including facilities for intelligent network services or roaming on mobile networks;

- (j) provide access to operational support systems or similar software systems necessary to ensure fair competition in the provision of services;
 - (k) make public specified information, such as accounting information, technical specifications, network characteristics, terms and conditions for supply and use, and prices;
 - (l) publish a reference offer, which shall be sufficiently unbundled to ensure that other licensees are not required to pay for facilities which are not necessary for the services requested;
 - (m) perform accounting separation in relation to specified activities related to interconnection or access;
 - (n) make transparent the wholesale prices and the internal transfer prices to the commission by vertically integrated operators to ensure non-discrimination as laid out in Section 25 of the ECA, to prevent unfair cross-subsidy.
 - (o) perform cost recovery and price controls, including obligations for cost orientation of prices and obligations concerning cost accounting systems, for the provisions of specific types of interconnection or access, in a situation where a market analysis indicates that a lack of effective competition means that the licensee concerned might sustain prices at an excessively high level, or apply a price squeeze, to the detriment of end-users;
- 7.1.2 publish their approved tariffs, including special promotions and bundles. Published information should be easy to find and easy to understand. All tariffs including roaming, promotions and bundles must be approved by SCCOM.
- 7.1.3 publish separated accounts for their retail and wholesale activities.
- 7.1.4 not offer differentiated on-net/off-net tariffs.
- 7.1.5 not enter into exclusive agreements with independent sales-agents unless such agents are franchisees of the dominant operator.
- 7.1.6 report quarterly to SCCOM in terms of a format to be prescribed by SCCOM to enable on-going analysis of market issues and the application of relevant and timely interventions.

Following the above market analysis and declaration of dominance on Swazi MTN Limited and Swaziland Posts and Telecommunications Corporation, and as part of the public consultation process contemplated in Section 32 of the Swaziland Communications Commission Act read with the Electronic Communications Act, 2013, the Commission invites written comments from interested stakeholders and the general public on the proposed decision document. This document is also available to the public through the Commission's website www.sccom.org.sz

The deadline for submission of comments is not later than 17h00 on **1st October, 2017**. Enquiries and comments should be addressed to:

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MVILAWEMPHI DLAMINI
CHIEF EXECUTIVE

Date: 31st August 2017