

16 April 2012

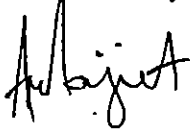
Mr Lazarus Jacobs
Chairperson
Communications Regulatory Authority of Namibia
Communication House
56 Robert Mugabe Avenue
Windhoek

Dear Sir

**RE: NOTICE IN TERMS OF S78 OF THE COMMUNICATIONS ACT
(TELECOMMUNICATIONS MARKET STUDY AND DOMINANCE)**

- 1 We refer to the Authority's notice in terms of s78 of the Communications Act, 2009 ("the Act"), regarding the hearing that the Authority intends to hold to determine dominance in the telecommunications and broadcasting markets, gazetted by the Authority on 20 March 2012.
- 2 MultiChoice Namibia (Pty) Ltd is grateful for the opportunity to submit written submission regarding the Discussion Document setting out some of the issues which the Authority will consider during a hearing in terms of s78 of the Act.
- 3 However, by virtue of the provisions of the Act, we respectfully submit that proceeding in terms of s78 may not apply to broadcasting service licensees. Our detailed submissions are attached hereto, in this regard.
- 4 We also request an opportunity to make oral submissions at the forthcoming hearing to be held by the Authority.

Yours sincerely



Ali Majiet

Acting General Manager

Communications Regulatory
Authority of Namibia (CRAN)

ACKNOWLEDGEMENT

OF RECEIPT

BY: Sharita

DATE: 17.04.12

TIME: 09:55

SIGNATURE: J. Waggie

SUBMISSIONS BY MULTICHOICE NAMIBIA ON THE NOTICE IN TERMS OF s78 OF THE COMMUNICATIONS ACT, 2009

Introduction

- 1 MultiChoice Namibia (Pty) Ltd ("MultiChoice Namibia") has a commercial broadcasting service licence issued to it by the Authority on 18 November 2011.
- 2 MultiChoice Namibia welcomes the opportunity to submit written submissions regarding the Discussion Document setting out some of the issues which the Communications Regulatory Authority of Namibia ("the Authority") will consider during a hearing in terms of s78 of the Communications Act, 2009 ("the Act"). The Document was gazetted on 20 March 2012 ("the Discussion Document")¹.
- 3 MultiChoice Namibia requests an opportunity to make oral submissions at the forthcoming hearing to be held by the Authority.

Communications Act: Prospective regulation to ensure the development of competitive telecommunications market

- 4 Almost every provision in the Act which refers to "a licensee who is dominant"/"a dominant licensee"/"when a licensee has a dominant position" is a provision which applies only to a licensee which provides a "telecommunications service". The Authority's own analysis of all these statutory provisions (see Table 1 at pages 4 to 6 of the Notice) supports this point. The only exception is s33 of the Act, which section we will deal with later in these submissions.
- 5 "Telecommunications services" are defined in s1 of the Act to mean "services whose provision consists wholly or partly in the transmission or routing of information on telecommunications networks by means of telecommunications processes but does not include broadcast services". (our emphasis)

¹ Government Gazette No. 4905, Notice No. 62, 20 March 2012

- 6 s2 of the Act confirms that one of its objects is "to ensure fair competition and consumer protection in the telecommunications sector" (s2(k)). (our emphasis)
- 7 The intention of the Namibian legislature was clearly to provide for a regulatory framework for telecommunications services which would permit the Authority –
- 7.1 to conduct hearings (usually every three years) to determine which telecommunications services are dominant in a market (this is to be done in terms of s78 of the Act); and having done so
- 7.2 to impose, either through licence obligations and duties or through regulations, on those telecommunications service licensees which have been found to be dominant carriage requirements (s48 of the Act), interconnection requirements (s49 of the Act), sharing of infrastructure requirements (s50 of the Act) or requirements concerning cost accounting procedures (s54 of the Act).
- 8 This approach is usually referred to as "*ex ante* regulation" – i.e. the regulation in advance of specific competition law concerns. Most of these relate to access to telecommunications infrastructure.
- 9 The Authority itself points out that the Act "makes provision for heightened regulation on telecommunications licensees that hold a dominant position in the market" (see page 2 of the notice). (our emphasis)
- 10 Elsewhere the Authority states:
- "The main aim of these provisions in the Act is to promote competition by leveraging Namibia's infrastructure given Namibia's small population, limited resources and small market size. The intent is to let existing networks be used by competitors to avoid duplication while achieving the highest level of competition."² (our emphasis)

² The paragraph immediately preceding Table 1 on page 4 of the Notice

11 The prospective regulation of these specific concerns within the telecommunications sector requires the determination by the Authority of which telecommunications service licensees are dominant. The means whereby the authority is to make these determinations is set out in s78 of the Act, which provides:

- "(1) Subject to subsection (2) the Authority must hold a hearing within one year from the date of commencement of this Act and thereafter every three years in order to determine which licensees hold a dominant position in the market.

- (2) A licensee may request the Authority to conduct such a hearing earlier than required by subsection (1) and the Authority must hold such hearing, if the licensee requesting such a hearing presents sufficient information to the Authority to convince it that there is a prima facie case that a different licensee has become a dominant provider of telecommunications services.

- (3) The Authority may also conclude that a licensee is dominant in respect of a specific class of telecommunications services when it is considering a matter where the question of dominance is relevant: Provided that it gives all parties affected by that finding an opportunity to be heard on that matter.

- (4) Subject to subsection (5), the Authority must find a licensee to be dominant if it is of the opinion that –
 - (a) the licensee in question has such a share of the market in the class of telecommunications services in question, that it is able to act independent of its competitors;

 - (b) the licensee controls some infrastructure that is necessary for the provision of the services in question;

- (c) the licensee in question is dominant as provided in paragraph (a) or (b) in respect of a class of related services (which need not be telecommunications services) and the licensee can use that dominance to exercise power in the market for the telecommunications services in question; or
 - (d) the licensee in question has a position in a market in another country or a relationship with providers in another country that can be used to exercise market power in respect of the relevant class of telecommunications services in Namibia.
- (5) The Authority must consider the market power that may be exercised by a competitor of the licensee concerned in order to determine whether any of the matters referred to in subsection (4) will give the licensee concerned market power as contemplated in subsection (4)."(our emphasis)

12 The purpose of s78 is clear: it is to determine which telecommunications service licensees hold a dominant position in the market.

Retrospective regulation of anti-competitive practices

- 13 The only section of the Act which seeks to regulate competition issues and which is not specific to the telecommunications sector is s33. This section provides for the retrospective regulation of anti-competitive practices in the market for telecommunications or broadcasting services. In other words, what is contemplated is the investigation by the Authority from time to time of allegations or concerns that the practice or activity of a telecommunications service or of a broadcasting service has the object or effect of preventing, restricting or distorting competition in a market, alternatively an investigation of an allegation or concern that a telecommunications or broadcasting service has abused its dominant position.
- 14 This approach is usually referred to as "ex post" regulation – i.e. the retrospective regulation of anti-competitive practices.

Approach in Communications Act accords with international best practice

- 15 The distinction in the Communications Act between allowing for the possible *ex ante* regulation of competition concerns in the telecommunications market, on the one hand, and the *ex post* regulation from time to time of anti-competitive practices in the telecommunications or broadcasting sectors, on the other hand, accords with international best practice.
- 16 The overall approach of the European Commission is that generally *ex post/retrospective* regulation ought to apply. It is only in exceptional circumstances that *prospective/ex ante* regulation ought to be permitted so as to ensure the development of competition within a particular market.
- 17 However, the European Union has developed a specific framework for the regulation of electronic communications networks, services and associated facilities, which framework consists of a number of Directives. Those Directives only apply to telecommunications services and networks (referred to in those Directives as "electronic communications services" and "electronic communications networks"). It is important to note that those Directives do not apply to broadcasting services.
- 18 In 2003 the European Commission, acting in terms of this framework, adopted a Recommendation, the purpose of which was to identify those markets within the telecommunications sector in which *ex ante* regulations might be justified. Of the 18 markets identified, 17 related to the telecommunications services. The 18th market related to broadcasting signal distribution – but note that this involves the transmission of this broadcast signal over a network. So the concern was limited to the infrastructure or network required for broadcasting signal distribution. The Authority itself refers to those 18 markets (page 16 of the Notice).

Communications Act does not empower prospective competition regulation of broadcasting market

- 19 The Authority is a creature of statute established in terms of s4 of the Act. Its powers, functions and duties are determined by this Act. It has no jurisdiction other than that conferred on it by this Act.
- 20 As we have demonstrated, and as confirmed by the Authority itself, the Act permits the prospective regulation of dominant telecommunications service licensees, and the means whereby dominant telecommunications service licensees are to be determined is set out in s78 of the Act. Having determined those telecommunications service licensees, the Authority is then empowered to address very specific concerns related to those licensees, namely concerns about carriage, interconnection, the sharing of infrastructure and cost accounting.
- 21 In contrast, there are no provisions in the Act which would permit the prospective regulation of competition concerns in relation to broadcasting service licensees. It is precisely for this reason that s78 only refers to telecommunications services.
- 22 The purpose of s33 of the Act is very different. As already indicated, it contemplates the retrospective/*ex post* regulation of allegations or concerns about anti-competitive practices in the telecommunications or the broadcasting market which may arise from time to time. Those allegations or concerns will be dealt with on a case by case basis, taking into account all the relevant facts at the point in time when the allegation is made or the concern arises. It is only at that point in time, and in the context of the particular allegation or concern, that the Authority would need to identify the relevant market(s) and, if the allegation or concern is in terms of s33(2), to assess whether the licensee in question is dominant within that market.
- 23 The Authority is therefore not permitted by the Act to conduct proceedings in terms of s78 of the Act in relation to broadcasting service licensees.

24 More specifically, the approach adopted by the Authority in the paragraph at the top of page 3 of the Notice is impermissible. In that paragraph, the Authority states:

"Although section 78 does not specifically refer to broadcasting licenses, section 33(2) of the Act provides that 'any abuse of individual or collective dominant position by one or more persons in a market for the supply of telecommunications or broadcasting services or any product used in connection with these services is prohibited'. Therefore, this proceeding will apply in principle to both telecommunications and broadcasting licensees."

By virtue of the provisions of the Act, this proceeding in terms of s78 may not apply to broadcasting service licensees.

Concluding remarks

25 MultiChoice Namibia would like to thank the Authority once again for the opportunity to make these submissions, and trusts that these submissions will contribute to the proper conduct of these proceedings.