

The #datamustfall war - Competition Commission weighs in

 By [Burton Phillips](#)

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After a public outcry, which included a social media campaign under the hashtag #datamustfall, South Africa's competition regulators, the Independent Communications Authority of South Africa (ICASA) and now the Competition Commission have announced investigations aimed at bringing the costs of data down.



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In July 2017, ICASA announced its probe into priority markets in the electronic communications sector, which it says forms part of various initiatives aimed at addressing the high costs of communication in South Africa. ICASA's investigation will start by looking into the relevant wholesale and retail markets in order to determine which of these markets or sub-markets should be prioritised for possible regulation in terms of the Electronic Communications Act, 36 of 2005 (ECA). The ECA allows ICASA to prescribe conditions to be imposed on licensees in markets where competition is ineffective and where such licensees have significant market power, in order to remedy the competitive shortcomings in a market.

Competition Commission inquiry

In August 2017, the Commission, who has concurrent jurisdiction with ICASA in respect of competition in the telecommunications market, published the terms of reference for its market inquiry into the state of competition in the data services market, which commenced on 18 September 2017. The purpose of the market inquiry is to identify the elements of the data value chain which contributes to the high costs of data and to make recommendations that would result in lower prices. The Commission will consider, amongst others elements, the strategic behaviour of large fixed and mobile incumbents, the costs and profits of fixed and mobile operators, infrastructure investments made by operators, the allocation of spectrum and the impact of the current regulatory regime. The Commission will also benchmark the costs of data services in South Africa against pricing in other countries.

Structural issues

It is well known that South Africa's data costs are amongst the highest, with prices in some instances more than 130% more expensive than its BRICS peers. In any market experiencing high prices, consumers generally point to the service providers. However, while any potentially problematic conduct on the part of service providers will be considered by the inquiry, there appears to be structural features of the South African data services market which play a significant role in the high costs of data. Some operators have publically stated their support for an inquiry and already implemented measures to promote efficiency and ultimately reduce data costs. However, one of the biggest structural challenges remains the availability of spectrum to operators. The lack of spectrum allocation means that operators have to roll out more base stations and infrastructure at a significant cost, which ultimately consumers have to pay for. ICASA has recognised that spectrum allocation is key to bringing data costs down and improving competition in the sector. According to statements made by ICASA, adequate spectrum in other African countries has resulted in significantly lower data costs compared to South Africa.

There appears to be considerable debate between government and ICASA on how best to deal with the spectrum issue. The Department of Telecommunications and Postal Services has called for an open access network approach which would result in all spectrum being pooled and assigned to an open access network. This contrasts with ICASA's proposal for auctioning spectrum to operators. Whatever the outcome, it is clear that the spectrum issue must be resolved if there is to be any victory in the war against high data costs.

Other factors

Apart from the spectrum issue which is likely to receive a lot of attention during the inquiries by ICASA and the Commission, the inquiries will hopefully reveal the extent to which other factors such as the practices and strategies of operators, input costs, margins, the structure of the market and barriers to entry affect the costs of data.

The Commission will call on all firms directly or indirectly involved in the data services value chain as well as consumers and consumer groups to provide information and participate in the process. On conclusion of the Commission's inquiry, which is due to be finalised in August 2018, it will make recommendations to government on how to improve competition in the market and make South Africa a low-data-costs economy.

End game

These recommendations may relate to new or amended policy, legislation or regulations. It will also make recommendations to ICASA on the impact of the regulatory framework and any amendments required, which may include recommendations around spectrum allocation and other structural impediments. The Commission also has the power to initiate complaints on the basis of information obtained during the inquiry which may result in firms having to defend its practices before the Tribunal or face administrative penalties.

Data will be even more important in future as consumer and business demand increases. Therefore, the costs of #datamustfall in order to stimulate growth in the economy and to allow for wider broadband penetration throughout the country, particularly in rural areas. The success of the inquiry will require all stakeholders to get involved by making

submissions, sharing insights, market research and best practices, attending public hearings and extensively engaging in the process in order for the Commission to make robust and practical recommendations which will ultimately bring costs down while allowing operators to remain efficient and profitable. It would appear less of a war, but more of a peaceful settlement is required for data to fall.

ABOUT BURTON PHILLIPS

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