GOVERNMENT GAZETTE

OF THE

REPUBLIC OF NAMIBIA

N$9.60 WINDHOEK - 20 October 2020 No. 7368

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GENERAL NOTICE

General Notice

COMMUNICATIONS REGULATORY AUTHORITY OF NAMIBIA

No. 441 2020

NOTICE OF INTENTION TO MAKE A DETERMINATION OF DOMINANT POSITION IN THE TELECOMMUNICATIONS SECTOR

The Communications Regulatory Authority of Namibia in terms of Section 78 of the Communications Act, 2009 (Act No. 8 of 2009) and regulation 4 of the Regulations Regarding Rule-Making Procedures published as General Notice No. 334 of 17 December 2010 (hereafter "the Regulations Regarding Rule-Making Procedures") publishes this notice of intention to make a Determination of Dominant Position in the Telecommunications Sector, which contains the following:

a) A draft of the proposed Market Study on Determination of Dominant Position in the Telecommunications Sector as set out in the Schedule.

Members of the public are further invited to make written submissions to the Authority no later than 30 days from the date of publication of this Notice, in the manner set out below for making written submissions.

Reply comments to written submissions may be submitted to the Authority:

(a) no later than 15 days after the time for the making of written submissions has lapsed; or

(b) if the opportunity for the submission of reply comments is published in a subsequent Gazette, after the lapse of 14 days from the date of such publication.

All written submissions must -

(a) contain the name and contact details of the person making the written submissions and the name and contact details of the person or entity on whose behalf the written submissions are made, if different; and

(b) be clear and concise.

(c) be sent or delivered -

- (i) by hand to the head office of CRAN, Communications House, 56 Robert Mugabe Avenue, Windhoek;
- (ii) by post to CRAN, Private Bag 13309, Windhoek, Namibia;
- (iii) by electronic mail to CRAN email address: legal@cran.na;
- (iv) by facsimile to CRAN facsimile number: +264 61 222790; and
- (v) by facsimile-to-email to number: 0886550852.

The "Notice of Intention to Make Regulations" is available at the head offices of the Authority during business hours and copies may be made on payment of a fee determined by the Authority, and on the Authority's website where copies may be downloaded free of charge.

H. M. GAOMAB II
CHAIRPERSON
BOARD OF DIRECTORS
COMMUNICATIONS REGULATORY AUTHORITY OF NAMIBIA

SCHEDULE

1. Introduction

Market definitions and declarations of dominance are a legal requirement. Section 78 (1) of the Communications Act No. 8 of 2009 (the Act) mandates CRAN to undertake a market study to determine if there are dominant operators in the telecommunications market.

CRAN's approach to the market studies of 2012 and 2016 has been one of minimal intervention. To determine dominance in the market, it is necessary to define relevant markets. The adopted approach of 2012 aimed at minimising the burden on licensees while allowing CRAN to implement the objectives of the Act. Only two markets were defined at the time, telecommunication services and broadcasting services. Dominance was only declared for the telecommunications service market and MTC, Leo and Telecom Namibia were declared dominant.[1] The 2016 market study defined four priority markets.[2]

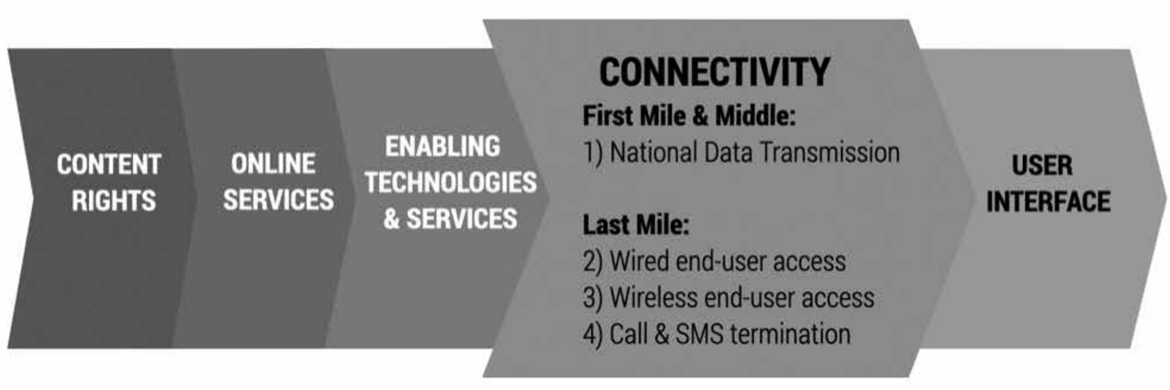
A more focused approach was considered but challenged by written submissions from licensees. CRAN had proposed to define markets more narrowly. The proposal was to define the markets for wired and wireless end-user access as copper-based and mobile end-user access. The main objection

[1] Namibian Government Gazette 2013 No. 5201 - 167.
[2] Namibian Government Gazette 28 June 2016, No. 214 No. 6054.

to this approach was that these market definitions leave out several services that may require ex-ante regulation during the period 2020 to 2022, in particular, FTTx and fixed-wireless[3].

The 2016 Market Study defined four broad markets that covered the entire connectivity segments of the Internet value chain. In 2019, with even further increased market concentration this approach is still suitable. Defining markets with more granularity would simply mean the same operators are dominant for these markets as well.

Figure 1: Identified priority markets as part of the Internet Value Chain



CRAN thus retains the market definitions from 2016.

2. National Data Transmission

The market for National Data Transmission covers all forms of prearranged connectivity within Namibia excluding the end-user access section. It covers wholesale and retail services. The markets include any form of backhauling services for mobile operators, leased lines, Metro Ethernet, microwave, national IP transit, services rendered at submarine cable landing stations and relevant facilities.

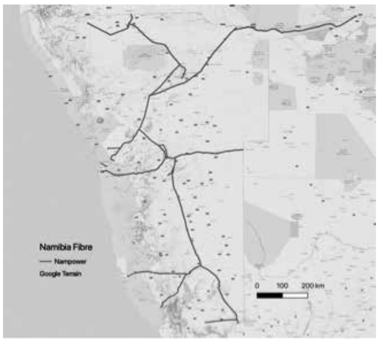
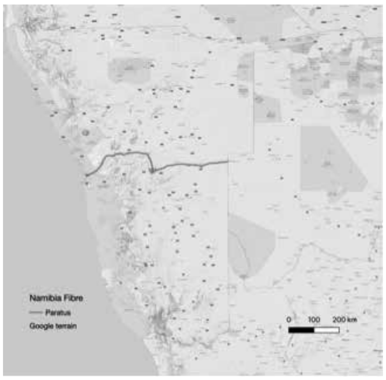
Table 2: Market concentration in terms of km fibre routes

Regions	NamPower		TN		Paratus		Combined
	km	%	km	%	km	%	km
!Karas	1,114	36%	2,013	64%			3,127
Erongo	532	26%	1,270	61%	275	13%	2,078
Hardap	266	12%	1,886	88%			2,152
Kavango East	382	54%	328	46%			710
Kavango West	133	35%	250	65%			382
Khomas	390	25%	934	59%	256	16%	1,580
Kunene	8	1%	813	99%			822
Ohangwena	38	19%	163	81%			201
Omaheke	236	17%	941	66%	248	17%	1,425
Omusati	121	35%	225	65%			345
Oshana	120	62%	74	38%			194
Oshikoto	253	50%	252	50%			505
Otjozondjupa	990	42%	1,238	53%	127	5%	2,355
Zambezi	208	42%	290	58%			498
Namibia	**4,792**	**29.3%**	**10,676**	**65.2%**	**906**	**5.53%**	**16,373**

[3] Namibian Government Gazette 27 March 2020, No.105 No. 7156.

NamPower and Telecom Namibia, both 100% state-owned, control more than 94% of Namibia's Fibre routes. NamPower has 30% and TN 65% of fibre routes. Paratus only operates 5.5% of Namibia's fibre routes and this only in four regions: Erongo, Khomas, Otjozondjupa and Omaheke. Geographic markets would not make sense at the moment given that Paratus only has between 5-17% of market share in fibre routes in the four regions it operates in. Table 3 displays the fibre map for Namibia based on submissions from Telecom Namibia, NamPower and Paratus.[4]

Table 3: Fibre routes in Namibia (Source: CRAN)

Telecom Namibia	NamPower	Paratus
		
10,676 km	4792 km	906 km
65.2%	29.3%	5.5%

Market power for the National Data Transmission market rests on fibre route ownership. Resellers buy bandwidth from fibre route owners and their end-user prices are downward limited by what they have to pay the fibre route owners. Resellers thus have limited market power.

Table 4: Market share of national data connectivity market in terms of revenues

	Africa Online	Bidvest	Misty Bay	MTN	Paratus	SALT	Telecom Namibia
Jan-Mar 2018	1.7%	0.6%	0.3%	17.7%	25.7%	0.1%	53.9%
Apr-Jun 2018	1.0%	0.6%	0.4%	16.1%	27.7%	0.0%	54.2%
Jul-Sep 2018	1.2%	0.7%	0.4%	16.6%	28.6%	0.1%	52.6%
Oct-Dec 2018	1.2%	0.7%	0.4%	20.7%	29.3%	0.0%	47.7%
2018	**1.3%**	**0.6%**	**0.4%**	**17.8%**	**27.8%**	0.1%	**52.1%**
Source	CRAN Portal, except Telecom Namibia which submitted figures as part of the market study information request						

In 2018, Telecom Namibia held a 52% market share for national data connectivity revenue. This is an estimate since the revenues are based on submissions to the CRAN Portal for ethernet and leased line revenues, except for Telecom Namibia which stated a higher figure for national data connectivity in its submission for the market study. The revenue figure in its submission is still well

[4] CRAN received fibre files from Paratus for Walvis Bay, Swakopmund and Windhoek but not for the Trans-Kalahari Fibre route. The length of the route was estimated following the road from Swakopmund (B2) to Windhoek and Windhoek to .Buitepos (B6) using Google Earth.

below what is captured under data revenues in Telecom Namibia's audited financial statements. However, given that market power mainly relies on infrastructure ownership it is not necessary to obtain more precise revenue data.

CRAN finds:

(a) Telecom Namibia has more than 50% share of the revenues 65% of the national fibre network and is thus dominant.

(b) NamPower was only licensed in 2018 and will be providing services to all licensees going forward. Given its extensive fibre national fibre network, it is also a dominant operator.

(c) Paratus is not dominant despite its newly built fibre routes. Firstly, Paratus only operates in four regions and its fibre routes constitute less than 5.5% of total fibre routes. Secondly, Telecom Namibia and NamPower have routes alongside Paratus' fibre route (Table 3). The other licensees that provide national data transmission services are only resellers and have thus little market power.

Table 5: SMP in the market for National Data Transmission

		Telecom Namibia	NamPower	Paratus
1	At least 35% market share?	Yes	No	No
2	Less than 35% market share but controls some infrastructure that is necessary for the provision of the services in question?	Yes	Yes	Yes
3	Less than 35% market share but has dominance in a related market and therefore is able to exercise power in the market for the telecommunications services in question	Yes	No	No
4	Less than 35% market share but 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?	No	No	No
Do the 4 criteria give the licensee the ability to exercise market power (Section 78(5))?		**Yes**	**Yes**	**No**
Declared Dominant		**Yes**	**Yes**	**No**

3. Wireless End-User Access

The market for wireless end-user access includes mobile and fixed-wireless services. This market includes call and SMS origination as well as Internet access provided via mobile phone, dongle, wireless modem, wireless router or VSAT terminal.

Table 6: Wireless end-user access (Source: CRAN)

	2016 Dec	2017 Dec	2018 Dec
Mobile Active SIM cards	2,659,951	2,680,196	2,759,293
VSAT	354	542	960
Other wireless	14	364	268
Active SIM cards as share of total wireless end-user subscriptions	99.99%	99.97%	99.96%

Mobile end-user access is where market power is. Wireless End-user access is mostly mobile in Namibia with 99.9%. Other forms of wireless end-user access are insignificant.

Table 7: Network coverage by region based on WorldPop population mapping

Worldpop	MTC		TN		
	3G	4G	2G	3G	4G
!Karas	76%	45%	80%	51%	20%
Erongo	94%	82%	96%	52%	34%
Hardap	74%	43%	84%	49%	26%
Kavango East	81%	40%	96%	33%	35%
Kavango West	57%	0%	65%	4%	0%
Khomas	98%	92%	99%	71%	46%
Kunene	42%	5%	58%	7%	0%
Ohangwena	67%	7%	94%	7%	4%
Omaheke	56%	23%	62%	34%	1%
Omusati	68%	3%	98%	4%	2%
Oshana	88%	46%	100%	42%	28%
Oshikoto	66%	12%	92%	12%	9%
Otjozondjupa	76%	45%	81%	53%	24%
Zambezi	86%	30%	82%	31%	0%
Namibia	**78%**	**38%**	**90%**	**35%**	**20%**
Note:	MTC's 2G coverage map was not incorporated due to technical issues				

MTC and TN have extensive network coverage in all of Namibia's regions. Telecom Namibia has 2G population coverage is 90%. Both MTC and TN are national mobile broadband operators, covering all of Namibia's regions. MTC has a national 3G population coverage of 78% and 38% 4G population coverage. While MTC still dominates wireless end-user markets, Telecom Namibia managed to increase its market share to 5.2% during that year.

Table 8: Mobile revenues in 1,000s: Mobile voice, SMS, data, handsets (Source AFS)

	FY 2016	FY 2017	FY 2018
Telecom Namibia	108,254	105,480	137,987
	4.5%	4.2%	5.2%
MTC	2,323,533	2,420,896	2,498,160
	95.5%	95.8%	94.8%
Total	2,431,787	2,526,376	2,636,147

CRAN finds:

(a) MTC and Telecom Namibia operate the only national[5] mobile networks, and both are dominant.

(b) Telecom Namibia's market share for mobile voice and data is well below 35% but it does operate a national mobile network and also has market power through its national fibre network for mobile data. Telecom Namibia owns 100% of Powercom and thus owns all of Powercom's assets.

(c) Paratus' fixed-wireless revenues are insignificant when compared to MTC's and Telecom Namibia's mobile revenues.

[5] Both provide mobile end-user services in all of Namibia's regions.

Table 9: Assessment of Dominance for Mobile End-user Access market

		Telecom Namibia	MTC	Paratus
1	At least 35% market share?	No	Yes	No
2	Less than 35% market share but controls some infrastructure that is necessary for the provision of the services in question?	Yes	Yes	Yes
3	Less than 35% market share but has dominance in a related market and therefore is able to exercise power in the market for the telecommunications services in question	Yes	No	No
4	Less than 35% market share but 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?	No	No	No
Do the 4 criteria give the licensee the ability to exercise market power (Section 78(5))?		**Yes**	**Yes**	No
Declared Dominant		**Yes**	**Yes**	No

4. Wired End-User Access

The market for wired end-user access includes retail and wholesale/reseller services provided via fibre or copper lines. Services in this market include fixed call origination xDSL, FTTx, local leads or tail ends for leased lines.

Table 10: Wired end-user access

	2016 Dec	2017 Dec	2018 Dec
Landlines	187,812	193,026	141,750
xDSL	53,381	54,524	54,014
Fibre to the home	158	252	498
MetroNet (ethernet)	57	591	496
Leased lines	9,874	7,621	6,489
Total wired- end-user access	251,282	256,014	203,247
Share of Landlines and xDSL of total wired- end-user access	**96.0%**	**96.7%**	**96.3%**

CRAN finds:

(a) Copper-based end-user access made up 96% of subscriptions in the Wired End-User Access market.

(b) While Wired End-User Access is being offered by a few licensees other than Telecom Namibia, it is mostly reselling of Telecom Namibia services. Telecom Namibia is thus the only dominant operator in this market.

5. Call & SMS Termination

The market for fixed and mobile call and SMS termination is a natural monopoly and all operators offering call and SMS termination are dominant operators.

6. Recommendations

CRAN has reverted to the technologically neutral market definitions of the 2016 market study of wired and wireless end-user markets. The wider market definitions are more suitable for a highly concentrated market in comparison to the narrower market definitions.

All licensees providing call and SMS termination are dominant. Telecom Namibia is dominant for the Wired End-User Access and the National Data Transmission markets. MTC and Telecom Namibia are dominant for the Wireless End-User Access market. NamPower is dominant for the National Data Transmission market.

Table 11: Dominance Finding

Markets		Dominant operators 2016	Dominant operators 2019
1	National Data Transmission	Telecom Namibia	Telecom Namibia, NamPower
2	Wired End-User Access	Telecom Namibia	Telecom Namibia
3	Wireless End-User Access	MTC	MTC, Telecom Namibia
4	Fixed and Mobile Call & SMS Termination	All licensees with a number range	All licensees with a number range

New licensees will be assessed for potential market power before licenses are issued by CRAN based on the framework set up in Table 24. This is a necessary pre-requisite for obtaining a license, as it is anticipated that new market entrants may derive market power from outside the ICT sector.

ANNEXURE A

CONSIDERATION OF COMMENTS ON THE DETERMINATION OF DOMINANT POSITION IN THE TELECOMMUNICATIONS SECTOR

1. Introduction

The purpose of this paper is to review the comments received from stakeholders on the Notice of Intention to make a Determination of Dominant Position in the Telecommunications Sector which was published in Government Gazette No. 7156 on 27 March 2020. Written comments were received from Telecom Namibia ("Telecom").

2. Consideration of Comments

COMMENTS BY TELECOM		
	Comment	Review & Consideration
1.	Telecom submits that on page15, it states that MTC dominates the ICT sector via investments made in infrastructure and that MTC was responsible for 85.5% of the total additional information. Telecom seeks advice on whether the Authority is considering revenue for all services in totality irrespective of whether investment of services is subject to regulation or not, or only those from licensed services. Telecom further requested the Authority to provide clarity as this would imbalance the purpose of the study and its results.	CRAN submits that this is an overview section and therefore the data presented here is not used for identification and selection of priority markets nor for determination of dominance.
2.	Telecom submits that on page 17, tables 11 & 12, it notes the Authority's response to Telecom's submission and further submits that Paratus has coverage in most towns within Namibia and for that reason they request that a breakdown of the figures from other operators such as Paratus to be reflected to understand the numbers of other operators in the same manner that MTC and Telecom are analysed. Telecom further submits that from the information available in the public media, Paratus launched its mobile service offering in 2016, effectively making them the third (3rd) mobile operator, which appears to have not received consideration in this study.	CRAN submits that Paratus provides fixed wireless services and not mobile services. The coverage considerations are with respect to the mobile market and therefore Paratus is not considered for purposes of this market.

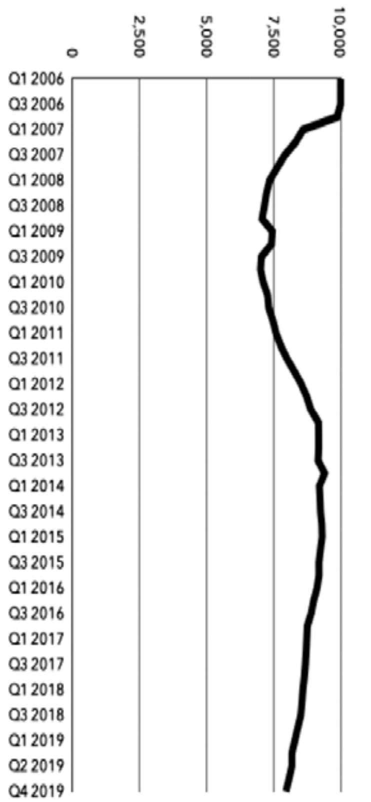
3.	3.1 Telecom submits that it notes the Authority's response on page 22, Mobile end-user access is where market power and paragraph 5 of the Authority's response dated 03 July 2020 and thus requests clarity on whether fixed wireless was included in the determination for the dominance in mobile or not? Telecom submits that this is not apparent when stating that *"if fixed wireless will be included in mobile market, dominance will not change*." The Authority should kindly qualify and substantiate why it maintains throughout its response that the inclusion or exclusion of fixed wireless mobile will not change dominance in the mobile market. 3.2 Telecom further submits that their comments on fixed wireless services should be a separate market. Telecom submits that it is not in agreement with the Authority's finding that mobile operators can easily make a mobile service fixed and that a customer can easily replace a fixed wireless service with mobile. Telecom states that this argument is valid if one considers the IMT based technologies (IMT-2000, IMT-Advanced and IMT-2020) - where compatibility of services within IMT and with fixed networks is defined as a key feature. Furthermore Telecom submits that the converse is however not rue and is not only due to an operator not having sufficient infrastructure to provide mobile service but also a function to the technology design – some fixed wireless stands like IEEE 802.16 (Fixed Broadband Wireless Access) do not support the mobility feature. The finding by the Authority is therefore not correct, and for Telecom and a conversion of fixed-wireless services to mobile is not currently happening amongst our subscribers. Telecom submits that maybe one day in the future when technology has evolved this may be possible and the market can be defined as such but for the current market it's not accurate. 3.3 Telecom also submits that while they agree that mobile services can be made fixed-wireless by turning off the handshake from one Radio Access Network (RAN) site to the next, Telecom reiterates that their recommendation that insufficient infrastructure is not the only consideration for turning mobile services into fixed-services. Telecom submits that even of an operator may have sufficient infrastructure, it reiterates that some fixed-wireless technologies like IEEE 802.16 (Fixed Broadband Wireless Access) like our WiMAX 16D do not support mobility, whether sufficient infrastructure is in place or not. Telecom submits that on this basis, the reasoning by the Authority is therefore not accurate. 3.4 Furthermore, Telecom submits that they are still not in agreement with the finding at the end of paragraph 3 of page 22 of the Government Gazette stating that, "it makes sense to define mobile rather than a wireless end-user access market", in so far as such a finding is based on those contested reasoning by the Authority, Telecom maintains that a fixed-wireless and Mobile end-user access market be defined based on their foregoing reasons as provided in this submission.	CRAN submits that: 3.1 **"**if fixed wireless will be included in mobile market, dominance will not change". This means when defining a market that combines mobile and fixed-wireless services dominance would not change. Fixed-wireless was not included in the determination of the mobile market. 3.2-4: Fixed-wireless services has not been identified as a priority market and therefore no dominance is declared for fixed-wireless.

4.	4.1 Telecom submits that in terms of Market Definitions, they contend the reasoning in respect of the market definition for Copper-based end-user access. Telecom submits that limiting the definition to Copper-based end user access and excluding fibre and other end user access options does not reflect a forward-looking approach which is recommended by the EU 2018 market study referred to in this report and it appears to intentionally exclude some operators who are also providing fibre. Telecom considers the current definition and exclusion of fibre to be discriminatory, as it only targets Telecom and exclude all other operators on Fixed access networks, especially fibre access which is the future and which most operators are proving services including MTC and Paratus. 4.2 Further Telecom states that considering that the Authority insists on mobile dominance for Telecom, if the same measures are used in this market segment, operators like Paratus will be dominant in this market because they provide fibre. Since Paratus controls part of the infrastructure in terms of fibre access e.g. in Windhoek, we request that the Authority demonstrate a proper and forward looking and transparent evaluation of dominance in this market segment. 4.3 Telecom submits that their concern remains around the transparency and obvious prejudice in which the various markets are dealt to the detriment of some operators. If the Authority deems it necessary to exclude fibre in this category, then why does the revenue considered for IP include everything, including “fiber-based” services, while classification only include copper. 4.4 Telecom further submits that the definition is especially not forward looking especially when considered in light of the fact that operators are phasing out copper and replacing it with fibre. Telecom submits that as far as they are aware, there is currently no operator that continues to roll out copper in the market, to the contrary, everyone is busy with fibre roll out. Telecom thus submits they fail to see how the definition is forward looking as alleged by the Authority. 4.5 Telecom also submits that they reiterate that the proposed market definition is not compliant to the EU market study recommendation because according to that the EU market study, a market study should be forward-looking and take into account not only the existing market conditions, but also foreseeable market developments for the current review period. It is common cause that the mode of the end user access will (has started to) increasingly move towards fibre access and other fixed-wireless technologies hence a category of “Copper-based” only represents a narrow market definition and in contradiction to the forward-looking approach.	CRAN submits that: 4.1 Fibre based end-user access is not a priority market and no dominance has been declared for it. 4.2 Infrastructure ownership alone does not necessarily translate into market power. CRAN also has to test for 78 (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).” 4.3-5: CRAN’s definition is forward looking in that it sees the FTTx market as developing. It is treated with forbearance at this stage. Copper-based end-user access remains of regulatory concern for the next 2 years
5.	Telecom in terms of the Copper-based end-user access on page 28, requested the Authority to provide it a response on the table that was used to assess the dominance in the market for copper-based end-user access market in terms of the provided criteria in order to arrive at the findings on page 28.	CRAN submits that Telecom Namibia has a monopoly on copper-based end-user access. Other licensees may resell Telecom Namibia’s services but that does not provide them with market power.

6.	Telecom submits that on page 22, table 18, reference is made for fibre to home excluding Fibre to the Business (FTTB) and thus proposes that it should consider both Fibre to the Home (FTTH) and Fibre to the Business (FTTB).	CRAN submits the text was changed as indicated to read FTTx.
7.	Telecom submits that on page 22, the second last paragraph, that although they note the Authority's response, they however, maintain that their recommendation is that the Authority applies its mind and consider a more forward-looking approach by including both copper and fibre based access in one market.	CRAN submits that forward looking does not mean lumping old and new technologies into one market. Once the FTTx market matures it may become a priority market and dominance may be declared for it then.
8.	Telecom submits that in terms of table 18, it notes the Authority's response however Telecom requests that it be furnished with the updated table for completeness and to enable Telecom to do a proper assessment thereon.	CRAN submits that the updated market report will reflect the data's submitted. CRAN assumes that TN knows the data it submitted to CRAN. The data for other licensees has not changed.
9.	9.1 Telecom submits that Telecom seeks clarity in terms of page 25, criteria 2, on the definition of what "some infrastructure" means. Telecom seeks clarity on how much of infrastructure an operator control must before the operator meets the criteria. Telecom submits that in 2016 when the last study was conducted, Telecom controlled some infrastructure, however the Authority ruled that Telecom was not dominant in mobile because the infrastructure controlled was only a fraction of what MTC controls. Now in the 2020 study, Telecom still controls the same infrastructure, which has not grown significantly since 2016, but is declared dominant. 9.2 Telecom also submits that since 2016, Telecom's infrastructure has no really grown, only five (5) new towers were added. This is further supported by the finding on page 15 that MTC dominates the ICT sector investments and was responsible for 85% of total additional property, plant and equipment in the 2017 financial year. Telecom submits that they are not aware of any MVNO in their market yet, therefore an operator providing Call and SMS termination do not control "some infrastructure". Telecom thus submits that if the control of such infrastructure was not considered significant in the 2016 study and findings, Telecom does not understand how same is now significant in terms of the finding of this study when gap between what MTC owns and what Telecom control has only become wider. 9.3 Telecom further notes that the Authority considered the 4% of the Paratus fibre to be minimal in another category while Telecom's mobile infrastructure which is minimal compared to what MTC owns is being considered for purposes of declaring Telecom dominant in mobile. Telecom thus submits that it is therefore on these inconsistencies, that they require clarification on this point as to what "some infrastructure" means from a quantity point of view. In the even that "some infrastructure" that is necessary for the provision of the service in question means "any infrastructure", even where minimal, then Paratus should be added to table 26 for the evaluation and the Authority should explain how Paratus national data network will be considered in this criterion the same way Telecom's minimal infrastructure in mobile and data transmission has been considered.	CRAN submits that the Act does not provide a specific measure for it. It certainly does not mean any infrastructure since that would defy the purpose of defining dominant operators. It is to be understood in the context of 78 (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)." The 2016 assessment was mainly based on 78 (5). Telecom Namibia has been able to grow its subscriber and revenue base since 2016. Please also note that the markets in 2016 and 2019 were defined differently: mobile vs wireless end-user. 9.4 In the same way that CRAN did not find Telecom dominant in 2016 despite infrastructure ownership for wireless end-user access, Paratus is not found dominant in 2019. Section 78 (5) needs to be considered and taken into consideration here. The question CRAN has to answer is whether the owned infrastructure provides market power to the licensee.

	9.4 Furthermore, Telecom submits that without the clarification request, Paratus might as well become dominant in mobile too as it also controls some infrastructure in data transmission and has minimal infrastructure in mobile. Telecom submits that the Authority held that the reason why Telecom is dominant is because it operates a national mobile network and also has market power through its fibre network although no dominance was declared in fibre or fixed wireless services. Telecom thus maintains that Telecom's mobile infrastructure continues to be a fraction of what MTC owns and the gap has even widened compared to what it was in 2016. 9.5 Telecom further submits that although Telecom has infrastructure in fixed service, unlike with IMT based technologies where mobile services that can easily be made fixed-wireless by turning off the handshake from one Radio Access Network (RAN) site to the next, Telecom reiterates that some fixed-wireless technologies like WiMAX 16D do not support mobility, whether sufficient infrastructure is in place or not. Telecom thus submits that on this basis the Authority is therefore not accurate and that the finding is therefore inconsistent with the Authority's prior findings which were done by the same persons and consultant to the Authority and thus Telecom submits that the finding is not in line with the requirements of section 78. 9.6 Telecom submits that if the requirement as per the Act in section 78 (4) (b) is that as long as the licensee controls some infrastructure that is necessary for the provision of services in question, then the question of fibre access network contained hereinabove has relevance to Telecom's submission under point 9 as well. Telecom thus submits that the determination is therefore considered subjective in its current form and thus Telecom proposes that it be quantitatively defined.	
10.	Telecom submits that although they note the Authority's response in paragraph 18 of its letter dated 3 July 2020, in terms of Qualify criteria 3 and 4, it remains unclear what is meant by **"related market".** Telecom further requests that the Authority should provide a definition for related markets for clarity and certainty. Telecom further submits that they are cognisant of the provisions of section 78(4) (c) in that the related market need not be a telecommunications service and the licensee can use that dominance to exercise power in the market for the telecommunications services in question, however the Authority explained in its response in paragraph 18 that it can also be unrelated market which creates more confusion. Telecom thus request that the Authority provide clarity on this point.	CRAN submits that related market can be any market that allows a licensee to exercise market power. In the case on Telecom Namibia it is the dominance it exercises in the market for national data connectivity.

11.	11.1 Telecom submits that on page 27, table 25, the Authority specifically responded in paragraph 19 of its letter dated 03 July 2020, that one **"yes"** in any criteria is sufficient to declare dominance of an operator in a specified market. Telecom further submits that what is conspicuous is that both **Nampower and Paratus attained "yes"** in the same criteria 2 under table 26, but dominance was only assumed to **Nampower and Telecom Namibia.** Telecom insists that the Authority elaborates the findings of that table and why Paratus is not declared dominant, which is in conflict with the Authority's response in paragraph 19 of the letter dated 03 July 2020. 11.2 Telecom further submits that in general there is a quantifier under all tables referencing the following: ***"Do the 4 criteria give the licensee the ability to exercise market power"-*** Telecom submits that this looks at the **criteria and not the licensee**, and that generally the same observation should apply to all licensees, thus, if the conclusion is yes for one, it would automatically be yes for all and vice versa, especially under table 25, where **"No"** is concluded for Paratus only.	CRAN submits that the information in question was not clearly enough expressed and has been updated in the updated market study. It now reads as follows: "Section 78(5) provides that CRAN must also 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.
12.	12.1 Telecom submits that on page 27, table 26, criteria 3, that Telecom is considered to have dominance in a related market which from the last paragraph on page 27 refers to the national data transmission. Telecom reiterates that the Authority should define related market and explain which related market Telecom has dominance in connection to mobile and for which it scored a **"yes"** under criteria 3 under table 26. Telecom further submits that the Authority should also indicate why and how the alleged dominance in the related market contributed to dominance in mobile or how the two markets are considered related markets. 12.2 Telecom also submits that **under table 24,** it is highlighted that the quantifying point is either yes or no, yet segments are marked as **N/A** which determination we cannot find any applicability in the Act or Regulations. It follows that the process applied in this dominance study is selective rather than objective. Furthermore, that all operators, including Paratus and MTN has **"control of some infrastructure that is necessary for the provision of services,"** including mobile and therefore should all be declared dominant. Telecom further submits that if the intention of the law was to have all operators declared dominant, the segmentation in different markets then finds no jurisdiction and there is a complete disconnect between the study, the findings and what the Act requires of the Authority to compile. Telecom submits that **Surely it has never been to list all operators as dominant overall!**	The Act does not specify this in more detail on purpose. A related market could also mean market for electricity, for example. 12.2 N/A has been replaced with No. For a discussion of how 78 (4) and (5) are to be applied see above.

13.	Telecom submits that in terms of page 28, table 27, they main that Telecom Namibia is not able to exercise market power in accordance with Section 78 (5) both in terms of revenue, market share or infrastructure and for that reason the Authority erred in declaring Telecom Dominant in mobile. Telecom further submits that it reiterates its sentiments and conclusions under paragraph 12.2 herein. **B: Dominance in terms of the Communications Act and Applicable Regulations:** The Act defines dominant carrier as follows: “dominant carrier” means a carrier which the Authority has determined in accordance with section 78 of the Act to hold a dominant position in the market for telecommunications services;	In terms of Forward-looking CRAN is of the opinion that Telecom exercise market power due to its nation-wide network population coverage and dominance in national data transmission market. Telecom managed to grow it mobile subscribers and revenues since 2016.  ***HHI based on active SIM cards (GSMA)***
14.	14. Telecom submits that Section 78 of the Act reads as follows: **Determination of dominant position** (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 <u>dominant position in the market.</u> (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 –	Relevant markets are the markets deemed to require ex-ante regulation, as outlined in the approach section.

(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).

15. Telecom submits that in furtherance of its function, and in accordance with the provisions of Section 78 of the Act, the Regulator has defined the markets in the telecommunications sector and determined dominance of the licensees in the said sector.

16. Telecom further submits that they refer to Government Notice 214 of 28 June 2016 which determined the different markets:

Market 1: Fixed and mobile call termination market;
Market 2: Wired end user access market;
Market 3: National data transmission market; and
Market 4: Wireless end user access market.

17. Telecom submits that they were determinant to be dominant (alone or together with other service providers) in all but Market 4, the mobile market.

18. Telecom also submits that in 2018, CRAN made Regulations to Ensure Fair Competition in the Telecommunications Sector published in Government Notice 179 of 2018. The purpose of these regulations is clear.

19. Telecom submits that those regulations do not refer to a dominant carrier, but to a dominant licensee. A licensee includes a carrier. See Section 47 of the Act:

"47 (1) Subject to section 38(12) and (13), the duties imposed by this Part are imposed upon all holders of technology and service neutral licences.
(2) Subject to section 38(12) and (13), the duties imposed by this Part are owed to holders of technology and service neutral licences.
(3) Unless the context indicates otherwise, a reference to "carrier" is construed as a reference to the licensee who owes the duty or to whom the duty is owed as the case may be in accordance with the provisions of subsection (1), (2), determinations made in terms of section 38(12) or regulations made in terms of section 38(13).

	20. Telecom also submits that a dominant licensee is defined as follows: "dominant licensee" means a licensee determined to be dominant in a relevant market as contemplated in section 78 of the Act" 21. Telecom submits that Relevant market is also defined as: "relevant market" means any of the markets referred to in regulation 5, having been determined by the Authority with reference to a product or service market and a geographic market, taking into account the functional and temporal dimensions of the market; Telecom thus submits that it is clear that the legislator intended to create separate markets relevant to the separate products and services, hence the use of the word "relevant" before "market". Telecom further submits that it is their sentiments and conclusion under paragraph 12.2 are reiterated in conjunction with the provisions of the Act as stipulated herein. Furthermore it is Telecom's view that the Regulator has compromised the integrity of the study and that the process of allowing Telecom's comments, which gives assurance that the process and considerations can be rectified where an error has been identified.	