INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA

NOTICE 729 OF 2017

AMENDMENT OF THE CALL TERMINATION REGULATIONS, 2014

I, Paris Mashile, Acting Chairperson of the Independent Communications Authority of South Africa, hereby publish the amendment to the Call Termination Regulations, 2014 in terms of sections 4 (7) (b) and 67 (8) of the Electronic Communications Act, 2005 (Act No. 36 of 2005), to the extent reflected in the Schedule.

Paris Mashile
Acting Chairperson

THE INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA

The Independent Communications Authority of South Africa has, under section 67(8) of the Electronic Communications Act, 2005 (Act No. 36 of 2005), made the regulations in the schedule.

SCHEDULE

1. Definitions

In these regulations "the Regulations" means the regulations published by Government Notice No. 38042 of 2014.

2. Amendment of regulation 7 of the Regulations

Regulation 7 of the Regulations is hereby amended by the substitution for paragraph (b), of subregulation (5), of the following paragraph:

"(b) Price Control: Cost-based pricing:

For the period 01 October 2017 to 30 September 2018, a licensee identified in sub-regulation (4) must charge wholesale voice call termination rates to a mobile or fixed location as specified in Table 1:

Table 1: Terminations Rates

	Termination to a mobile location	Termination to a fixed location	
		W0N	B0N
1 October 2017 to 30 September 2018	**R0.13**	**R0.10**	**R0.10**

3. Amendment of Annexure A of the Regulations
Annexure A is amended by the substitution of table A1 and A2

"Table A1: Maximum rate for termination to a mobile location

	Termination rate
1 October 2017 to 30 September 2018	**R0.19**

"Table A2: Maximum rate for termination to a fixed location

	W0N	B0N
1 October 2017 to 30 September 2018	**R0.12**	**R0.12**

4. Short title and commencement

These regulations are called the Call Termination Amendment Regulations, 2017 and will come into effect on 1 October 2017.

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Findings document on the review of the 2014 pro-competitive remedies in accordance with section 67(8)(a) of the Electronic Communications Act No. 36 of 2005

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1. Introduction

Following the review of the 2010 Call Termination Regulations[1], the Independent Communications Authority of South Africa ("the Authority"), published the("2014 Call Termination Regulations") on 30 September 2014.The 2014 Call Termination Regulations determined that, the Mobile termination markets and the Fixed termination markets, as defined in regulation 3 of the 2014 Call Termination Regulations, remained ineffectively competitive and also that the following market failures continue to exist:

(a) A lack of provision of access;
(b) The potential for discrimination between licensees offering similar services;
(c) A lack of transparency; and
(d) Inefficient pricing.

To remedy the abovementioned market failures, the Authority imposed an obligation upon all licensees to charge fair and reasonable prices for wholesale voice call termination in terms of regulation 7(2) of the 2014 Call Termination Regulations. Additional obligations in the form of publication of a reference interconnection offer and price control (cost-based pricing) were imposed upon Vodacom Pty (Ltd), and MTN Pty (Ltd) in the Mobile termination markets, and Telkom SA SOC (Ltd) in respect of the Fixed termination markets in line with regulation 7(3) of the 2014 Call Termination Regulations.

2. An outline of the process followed

The Authority undertook a review of the 2014 Call Termination Regulations in line with regulation 8 of the 2014 Call Termination Regulations[2] read with section 67(8)(a) of the ECA.

[1] Call Termination Regulations, Government Gazette 33698, published on 29 October 2010.

[2] Regulation 8 states that "the Authority will review the markets for the wholesale voice call termination services, to which these regulations apply, as well as the effectiveness of competition and the application of pro-competitive terms and conditions in those markets when the Authority deems it necessary but not earlier than two (2) years from the date of publication of these regulations."

Section 67(8)(a) of the ECA states that:

"(a) Where the Authority undertakes a review of the pro-competitive conditions imposed upon one or more licensees under this subsection, the Authority must -

(i) review the market determinations (our emphasis) made on the basis of earlier analysis; and

(ii) decide whether to modify the pro-competitive conditions set by reference to a market determination…"

The Authority used a two-phased approach in undertaking the review in accordance with the provisions of the aforementioned section 67(8)(a)(i)(ii) of the ECA.

The Authority's public consultation process to implement section 67(8)(a) of the ECA included the following:

(a) Publication, on the Authority's website of a media statement and a questionnaire on 30 January 2017[3]. Publication of the Authority's intention to review the abovementioned pro-competitive measures in line with section 67(8)(a) of the ECA in the Government Gazette Notice (No 40603)[4] dated 8 February 2017.

(b) Receipt of letters with questions of clarity with regard to the questionnaire and process by Vodacom, Cell C and Telkom on 10 February 2017, and MTN on 14 February 2017.

(c) Publication of a media release[5] together with the briefing note[6] on questions of clarity with regard to the questionnaire on 1 March 2017.

[3] https://www.icasa.org.za/AboutUs/ICASANews/tabid/630/post/icasa-reviews-pro-competitive-conditions-imposed-on-licensees-in-respect-of-the-call-termination-regulations-of-2014/Default.aspx

[4] http://www.gpwonline.co.za/Gazettes/Gazettes/40603_8-2_ICASA.pdf

[5] https://www.icasa.org.za/AboutUs/ICASANews/tabid/630/post/update-on-the-review-of-pro-competitive-conditions-imposed-on-licensees-in-respect-of-the-call-termination-regulations/Default.aspx

[6] https://www.icasa.org.za/LegislationRegulations/FinalRegulations/TelecommunicationsRegulations/CallTermination/tabid/462/ctl/ItemDetails/mid/1457/ItemID/13935/Default.aspx

(d) A stakeholder briefing session on 15 March 2017. The purpose of this session was for the Authority to clarify the process in respect of the review of the pro-competitive conditions owing to process related questions raised by Vodacom, Cell C, Telkom in their respective letters dated 10 February 2017, and MTN's letter dated 14 February 2017.

(e) After receiving responses to the questionnaire, the Authority published a Discussion Document on the review of the 2014 pro-competitive remedies in accordance with section 67(8)(a) of the Electronic Communications Act No. 36 of 2005 for public comments. Stakeholders and interested parties were given twenty-one (21) working days to make written submissions.

(f) The Authority received written submissions on the Discussion Document from the following stakeholders:

- Vodacom;
- MTN;
- Cell C;
- Telkom;
- The Internet Service Provider's Association ("ISPA"); and
- Switch Telecom.

3. Analysis of submission on specific comments on the Discussion Document

This section consists of five (5) sub-sections namely:

1. Market definition;
2. Methodology to evaluate effectiveness of competition;
3. Effectiveness of competition;
4. Significant market power determination; and
5. Pro-competitive conditions.

3.1. Regulation 3 – Market definition

After taking into account the analysis of the product and geographic dimensions, the Authority's preliminary view was that the definition of Mobile termination markets and Fixed termination markets as per the 2014 Call Termination Regulations remain appropriate.

3.1.1. Product market definition

3.1.1.1. Retail demand-side and supply-side substitutes

MTN indicated that is not clear how the Authority has analyzed retail demand-side and supply-side substitution with regard to current South African evidence.[7]

Vodacom indicated that it is not clear what factors and evidence the Authority considered in reviewing retail demand-side and supply substitutes with regard to OTT/ VoIP/ IM.[8]

Telkom indicated that the Authority did not take into account the prevalence of OTT/ VoIP/ IM services and the potential to provide competitive indirect constraint on termination services. Telkom also indicated that the Authority "…has not provided any detailed analysis to support this view, nor has it addressed the improved quality and usage of VoIP calling since the previous review process."[9]

Furthermore, Telkom indicated that there was no justification to treat fixed and mobile termination as separate markets given the rapid fixed-mobile convergence in the telecommunications market in South Africa and also based on international precedent.[10]

<u>The Authority's response:</u>
Despite the recent technological developments such as Voice over LTE, Wi-Fi calling, etc. and increased presence of OTT VoIP services such as WhatsApp, Skype, FaceTime, etc., the

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[7] MTN written submission on the Discussion Document P6
[8] Vodacom written submission on the Discussion Document P4-8
[9] Telkom's written submission on the Discussion Document P15
[10] Ibid

Authority is of considered view that these services exercise limited competitive constraints to traditional voice service mainly due to the following:

- Barriers to the use of OTT services owing to, among others, low smartphone penetration of approximately 33%[11], lack of compatibility between OTT applications (e.g. WhatsApp application is not compatible with Apple iMessage), both users must be connected to the Internet, etc.
- Poor quality of service compared to traditional voice service.
- VoIP apps provide only a minimal price advantage[12] compared to traditional voice calls[13].
- Average mobile voice minutes per user is still growing[14].

This is corroborated by the views expressed by the European Commission[15], the OECD[16] and industry commentators[17] that OTT services are not perfect substitutes for traditional voice service.

Licensees did not provide supporting forward-looking evidence and data about the extent of OTT use on their respective networks and substitutability for voice calls.

The Authority is of the view that fixed and mobile termination are separate markets due to notable differences between the two markets which were succinctly highlighted in the Explanatory Note of the final Call Termination Regulations of 2010.[18]

[11] Source: ICASA database of ICT Indicators.
[12] This is based on out-of-bundle rates of up to R2.00/MB.
[13] For example, subscribers may get a discount of up to 100% on MTN Zone and Vodacom4Less
[14] This was highlighted by Vodacom and MTN in their 2017 annual financial statements.
[15] Explanatory Note to the 2014 EC Recommendation
[16] OECD, *Developments in Mobile Termination*, 2012
[17] Ecorys, *Future electronic communications markets subject to ex-ante regulation*, September 2013. http://ec.europa.eu/information_society/newsroom/cf/dae/document.cfm?doc_id=3148; Analysys Mason, *The connected consumer survey: voice and messaging*, 2013; Analysys Mason, *OTT messaging services dominate in South Africa, but mobile voice will be more resistant to substitution*, 2016
[18] GG33698

3.1.1.2. Wholesale demand-side and supply-side substitutes

MTN acknowledged that there are no feasible demand-side substitutes and supply-side substitutes for voice call termination on a particular network location.[19]

Vodacom indicated that it agrees with the Authority in that there are currently no wholesale demand-side and supply-side substitutes.[20]

Switch Telecom stated that the Authority failed to identify a new market that has opened following the promulgation of the Numbering Plan Regulations, 2016 (GG 39861).[21]

ISPA indicated that subsequent to the publication of the Numbering Plan Regulations of 2016, there is a separate market for the origination of toll-free calls which shares many of the characteristics of the markets identified in the Discussion Document. ISPA recommended that this market should be categorised "…as the market for wholesale voice call origination services on the network of each licensee offering call origination services in South Africa to a toll-free number assigned from the National Numbering Plan."[22]

<u>The Authority's response:</u>
The provision of wholesale voice call origination service does not fall within the scope of this review and was therefore not considered by the Authority when reviewing the definition of termination markets.

3.1.1.3. Common pricing constraints

MTN agrees with the Authority that no common pricing constraint applies to relevant voice call termination services for all subscribers to each individual network defined.[23]

[19] MTN's written submission on the Discussion Document P6
[20] Vodacom's written submission on the Discussion Document P8
[21] Switch Telecom's written submission on the Discussion Document P1-2
[22] ISPA's written submission on the Discussion Document P2
[23] MTN's written submission on the Discussion Document P7

Vodacom disagrees with the proposed determination as it is of the view that it differs fundamentally from the 2010 and 2014 determinations, which states that "… licensees do not price discriminate between termination charges for calls made to all the different subscribers on their networks, the relevant market be broadened to call termination to all subscribers on a particular network". Vodacom agrees with the 2010 and 2014 determinations.[24]

The Authority's response:

The Authority determined that there is no need to change its position with regard to the 2010 and 2014 Common pricing constraints determination.

3.1.2. Geographic market definition

MTN supports the Authority's view that voice calls originating outside of South Africa do not fall within the geographic scope of termination markets and suggested such voice calls be excluded and the market definition be revised to reflect this.[25]

Vodacom agreed that voice calls originating outside of South Africa should be excluded from the market definition. Vodacom recommended that the market definition be amended to clearly exclude voice calls originating outside of South Africa.[26]

ISPA does not agree with the Authority's view that "…voice calls originating outside of South Africa and terminating in South Africa do not fall within the geographic scope of Mobile termination markets and Fixed termination markets." ISPA indicated that such "…view is at odds with that expressed in the Authority's correspondence to ISPA date 20 March 2016, which clearly stated that there is no differentiation in where the call was originated for the purpose of defining call termination markets."[27]

The Authority's response:

Currently, international originated voice calls terminating in South Africa attract a charge equivalent to the termination rate for voice calls originating within and terminating in South Africa

[24] Vodacom's written submission on the Discussion Document P8
[25] MTN's written submission on the Discussion Document P7
[26] Vodacom's written submission on the Discussion Document P8
[27] ISPA's written submission on the Discussion Document P2

despite the economics of national termination market being different to international termination market.

This has resulted in operators in other countries charging South African operators termination rates higher than the national termination rates resulting in negative balance of payments or outflow of funds from South Africa to other countries. The amendment will afford South African operators, including ISPA members, an opportunity to charge operators in other countries reciprocal or commercial termination rates.

Termination rates for international originated voice calls terminating on a mobile and fixed location within the Republic of South Africa should be subject to commercial agreement.

The amended market definition aims to exclude internationally originated voice traffic terminating on a mobile and/or fixed location within the Republic of South Africa.

3.2. Regulation 4 – Methodology

The Authority's view was that there was no need to amend the approach to evaluate the effectiveness of competition in the Mobile termination markets and Fixed termination markets as per section 67(4A) of the ECA.

MTN stated that it was not evident how the Authority applied the methodology on a forward-looking basis.[28]

Vodacom indicated that there is no need to amend the Hypothetical Monopolist Test method for market definition. Vodacom also indicated that there was no need to amend the specified approach in the evaluation of effectiveness of competition in the defined markets as per section 67(4A) of the ECA.[29]

<u>The Authority's response:</u>
The Authority refers MTN to section 3.2 of the Discussion Document.

[28] MTN's written submission on the Discussion Document P7
[29] Vodacom's written submission on the Discussion Document P9

3.3. Regulation 5 – Effectiveness of competition

The Authority's view was that the following market failures continue to exist:

(a) A lack of provision of access,
(b) The potential for discrimination between licensees offering similar services,
(c) A lack of transparency, and
(d) Inefficient pricing.

3.3.1. Legislative requirements

The Authority's view was that the definition of Significant Market Power in terms of Section 67(5) of the ECA remained largely unchanged.

Vodacom, MTN, Cell C, Telkom, ISPA and Switch Telecom did not comment on the Authority's view with regard to Legislative requirements.

3.3.2. Relevant markets

In 2010 the Authority determined that the relevant downstream markets were:

- "The national retail market for mobile access and calls (mobile retail market)
- The national retail market for fixed line access and calls (fixed retail market)"[30]

The Authority also stated that it would consider the *"impact that relevant downstream retail markets may have on competition[31]."* In 2014, the Authority continued with this approach throughout its review of each determination made on the assessment of competition. The Authority maintained this approach again in respect of the 2017 review.

MTN acknowledged that the Authority's review of the relevant downstream retail markets has no impact on the analysis of competition assessment of the Mobile termination markets and Fixed termination markets in respect of section 67(8) review process.[32]

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[30] GG 33121:51
[31] Ibid
[32] MTN's written submission on the Discussion Document P8

Vodacom indicated that although the Authority is required to consider indirect constraints at the retail level to the wholesale call termination service, the Authority has not defined downstream retail markets in terms of section 67(4) of the ECA nor has made a determination on the effectiveness of competition in the downstream retail markets. In addition, Vodacom indicated that *"…downstream markets are also irrelevant in the assessment of the wholesale voice call termination markets."*[33]

<u>The Authority's response:</u>

The Authority is required to consider indirect constraints at retail level to the wholesale call termination service as termination service is a derived demand from retail services. The Authority defined the identified downstream retail markets in 2010 and sees no need to review the definition of these markets in terms of section 67(4) of the ECA.

The Authority acknowledges that downstream retail markets may not be relevant to the assessment of the wholesale voice call termination markets.

3.3.3. Actual and potential existence of competitors

3.3.3.1. Wholesale voice call termination

The Authority's view was that there is still no evidence to justify changing the 2014 determination and there are no competitors in the defined markets.

Telkom indicated that it does not agree with the Authority's view that there are no competitors in the defined markets as it is of the view that the Authority has not undertaken "…a thorough analysis of the competitive constraint on termination posed by VoIP and OTT providers in the South African market."[34]

<u>The Authority's response</u>

See the Authority's response to Retail demand-side and supply-side substitutes.

[33] Vodacom written submission on the Discussion Document P 9

[34] Telkom written submission on the Discussion Document P 17

3.3.3.2. Relevant downstream markets

The Authority's view was that it sees no need to change the 2014 determination and there are no competitors in the defined markets.

MTN noted that the Authority's review of the relevant downstream retail markets had no impact on the analysis of competition assessment of the Mobile termination markets and Fixed termination markets in respect of a section 67(8) review process

Vodacom indicated that although the Authority is required to consider indirect constraints at the retail level to the wholesale call termination service, the Authority has not defined downstream retail markets in terms of section 67(4) of the ECA nor has made a determination on the effectiveness of competition in the downstream retail markets. In addition, Vodacom indicated that *"…downstream markets are also irrelevant in the assessment of the wholesale voice call termination markets."*

<u>The Authority's response</u>
The Authority is required to consider indirect constraints at retail level to the wholesale call termination service as termination service is a derived demand from retail services. The Authority defined the identified downstream retail markets in 2010 and sees no need to review the definition of these markets in terms of section 67(4) of the ECA.

The Authority acknowledges that downstream retail markets may not be relevant to the assessment of the wholesale voice call termination markets.

3.3.4. Level, trends and concentration and history of collusion

3.3.4.1. Wholesale voice call termination

The Authority's view was that the possibility of collusion in the wholesale termination market is irrelevant for the assessment of competition in the wholesale call termination market.

Vodacom, MTN, Cell C, Telkom, ISPA and Switch Telecom did not comment on the Authority's view with regard to the Level, trends and concentration and history of collusion in respect of wholesale voice call termination.

3.3.4.2. Relevant downstream markets

The Authority's view was that the downstream markets remain highly concentrated as was the case in the 2010 and 2014 review process.

MTN noted that the Authority's review of the relevant downstream retail markets had no impact on the analysis of the competition assessment of the Mobile termination markets and Fixed termination markets in respect of a section 67(8) review process

Vodacom indicated that although the Authority is required to consider indirect constraints at the retail level to the wholesale call termination service, the Authority has not defined downstream retail markets in terms of section 67(4) of the ECA nor has made a determination on the effectiveness of competition in the downstream retail markets. In addition, Vodacom indicated that "…downstream markets are also irrelevant in the assessment of the wholesale voice call termination markets."

The Authority's response

The Authority is required to consider indirect constraints at retail level to the wholesale call termination service as termination service is a derived demand from retail services. The Authority defined the identified downstream retail markets in 2010 and sees no need to review the definition of these markets in terms of section 67(4) of the ECA.

The Authority acknowledges that downstream retail markets may not be relevant to the assessment of the wholesale voice call termination markets.

3.3.5. Overall size of each of the market participants

The Authority stated that both fixed and mobile termination markets still remain highly concentrated despite the slight decrease in the Herfindahl-Hirschman Index (or HHI) in both markets based on information received from Telkom, Neotel, Vodacom, Cell C and MTN based on the questionnaire published on 30 January 2017.

The HHI for mobile decreased from 3803 in 2009 to 3698 in 2016 while HHI for fixed decreased from 8774 to 8472 during the same period. Typically, a HHI of 1800 and above indicates a market that is highly concentrated.

Switch Telecom stated that the figures indicate that "…despite a large number of new entrants competing in the fixed market, Telkom continues to enjoy a significant lead in market share and new entrants are gaining market share too slowly." Switch Telecom further stated that "…the Authority has placed disproportionate emphasis on the mobile market."

Vodacom, MTN, Cell C, Telkom and ISPA did not comment on the Authority's view with regard to the Overall size of each of the market participants and the level of concentration in the Fixed termination markets and Mobile termination markets.

<u>The Authority's response</u>
The Authority has noted Switch Telecom's submission.

3.3.6. Control over essential facilities

The Authority view was that wholesale call termination represents a "bottleneck service" therefore allowing the service provider to "set the price for call termination above competitive levels."

Vodacom, MTN, Cell C, Telkom, ISPA and Switch Telecom did not comment on the Authority's view with regard to Control over essential facilities.

3.3.7. Impact of technological advantages or superiority of a given market participant

3.3.7.1. Wholesale voice call termination

In 2010 and 2014, the Authority determined that the impact of technological advantages or superiority of a given market participant is not relevant given "*absolute barriers to entry"* and therefore, licensees face *"no existing or potential competitors"* in the provision of wholesale voice call termination service.

The Authority indicated it was not aware of any technological breakthroughs, nor are these being envisaged within the timeframe of this review, that would allow for an alteration in the dynamics of wholesale voice call termination services. The Authority's view was that it sees no need to change this determination and is of the view that for the period under review this factor is not relevant for the analysis of the effectiveness of competition.

Vodacom, MTN, Cell C, Telkom, ISPA and Switch Telecom did not comment on the Authority's view with regard to the Impact of technological advantages or superiority of a given market participant in respect of wholesale voice call termination.

3.3.7.2. Relevant downstream markets

In 2010 and 2014, the Authority discussed the relative importance of spectrum assignment and particularly the equitable assignment of spectrum. The Authority's view was that spectrum assignment does not have a significant impact on the assessment of competition in the wholesale call termination markets, but *"it may be relevant when considering the appropriate pro-competitive remedies."*

MTN agrees with the Authority's view that spectrum assignment does not have a significant impact on the assessment of competition in the wholesale call termination markets. In addition, MTN agrees with the Authority that spectrum may be relevant when considering appropriate pro-competitive remedies.

Vodacom indicated that although the Authority is required to consider indirect constraints at the retail level to the wholesale call termination service, the Authority has not defined downstream retail markets in terms of section 67(4) of the ECA nor has made a determination on the effectiveness of competition in the downstream retail markets. In addition, Vodacom indicated that *"…downstream markets are also irrelevant in the assessment of the wholesale voice call termination markets."*[35]

[35] Vodacom's written submission on the Discussion Document P9

The Authority's response

The Authority is required to consider indirect constraints at retail level to the wholesale call termination service as termination service is a derived demand from retail services. The Authority defined the identified downstream retail markets in 2010 and sees no need to review the definition of these markets in terms of section 67(4) of the ECA.

The Authority acknowledges that downstream retail markets may not be relevant to the assessment of the wholesale voice call termination markets.

3.3.8. Firms' access to capital markets and financial resources

3.3.8.1. Wholesale voice call termination

In 2010 and 2014, the Authority determined that firms' access to capital markets and financial resources is *"not considered relevant in this market."*

The Authority's view was that it sees no need to change this determination for the period under review and is of the view that for the current period under review this factor is not relevant for the analysis of the effectiveness of competition.

Vodacom, MTN, Cell C, Telkom, ISPA and Switch Telecom did not comment on the Authority's preliminary view with regard to Firm's access capital markets and financial resources in respect of wholesale voice call termination.

3.3.8.2. Relevant downstream markets

In 2010, the Authority referred to the discussion on access to capital markets to how this may or may not affect countervailing buying power.

In 2014, the Authority determined that access to capital markets plays a role in determining the effectiveness of competition to the extent that different licensees face different weighted average costs of capital. The Authority's view was that it sees no need to change this determination.

Vodacom, MTN, Cell C, Telkom, ISPA and Switch Telecom did not comment on the Authority's preliminary view with regard to Firm's access capital markets and financial resources in respect of Relevant downstream markets.

3.3.9. Dynamic characteristics of the market, including growth, innovation and products and services differentiation

MTN welcomed the Authority's acknowledgement of the prevalence and growth in OTT services, Wi-Fi calling and VoIP (3G/ VoLTE). MTN, however, indicated that "…it is not evident how the Authority has taken this phenomenon into consideration, if at all."[36]

<u>The Authority's response</u>
Notwithstanding the Authority's acknowledgement of the prevalence and growth in OTT services, Wi-Fi calling and VoIP, the Authority is still of the view that this factor is not relevant for the analysis of the effectiveness of competition. Please refer to the Authority's responses with regard to point 3.1.1 Product Market definition.

3.3.10. Economies of scale and scope

The Authority's view was that economies of scale and scope are still relevant in the assessment of the effectiveness of competition. The criterion remains 20% of the share of termination minutes.

MTN raised a concern about the relevance of economies of scale and scope and 20% share of termination minutes' criterion in the assessment of the effectiveness of competition given that each licensee controls 100% of its own termination market. In addition, MTN stated that economies of scale and scope is only relevant to considering appropriate pro-competitive remedies.

Vodacom disagrees with the Authority's proposed determination that economies of scale and scope are still relevant in the assessment of effectiveness of competition and that the criterion remains 20% of the share of termination minutes. Vodacom indicated that it is in agreement with the 2010 and 2014 determinations that economies of scale and scope are irrelevant because they

[36] MTN's written submission on the Discussion Document P 9

have no impact on market power in the specific call termination market, given the nature of the market definition and are only relevant in terms of assessing appropriate procompetitive remedies.[37]

The Authority's response

The Authority acknowledges that economies of scale and scope are not relevant in the assessment of the effectiveness of competition in the relevant market.

3.3.11. Nature and extent of vertical integration

3.3.11.1. Wholesale voice call termination

The Authority determined in 2010 and 2014, that *"a vertically integrated service provider may have an advantage over its competitors, as access to sales and supply markets might be more easily attainable for the integrated firm. Vertical integration also makes it possible to leverage market power into adjacent markets (both upstream and/or downstream)."*

Vodacom indicated that there is no relevance of the nature and extent of vertical integration in the context of wholesale call termination as it has no impact on the effectiveness of competition in the wholesale voice call termination markets.[38]

The Authorities response

The Authority is still of the view that vertically integrated operator *may* have an advantage over its competitors.

3.3.11.2. Relevant downstream markets

The Authority's view was that this factor was not relevant for wholesale voice call termination.

Vodacom, MTN, Cell C, Telkom, ISPA and Switch Telecom did not comment on the Authority's view with regard to the nature and extent of vertical integration in respect of relevant downstream markets.

[37] Vodacom's written submission on the Discussion Document P9
[38] Vodacom's written submission on the Discussion Document P10

3.3.12. Market and regulatory barriers to entry

3.3.12.1. Wholesale voice call termination

The Authority determined in 2010 and 2014, that *"there are absolute barriers to entry into the market – which means that the current dominance of firms providing wholesale call termination is unlikely to be challenged effectively by new competitors over the time of the current review…"*

The Authority's view was that it sees no need to change the 2010 and 2014 determination.

Vodacom, MTN, Cell C, Telkom, ISPA and Switch Telecom did not comment on the Authority's preliminary view with regard to market and regulatory barriers to entry in respect of wholesale voice call termination.

3.3.12.2. Relevant downstream markets

The Authority's view was that absolute barriers to entry in the downstream relevant markets continue to exist.

Vodacom, MTN, Cell C, Telkom, ISPA and Switch Telecom did not comment on the Authority's preliminary view with regard to Market and regulatory barriers to entry in respect of relent downstream markets.

3.3.13. Countervailing bargaining power

The Authority's view was that neither fixed nor mobile network operators can exert countervailing bargaining power to constrain the setting of high termination rates by a fixed or mobile operator.

Vodacom, MTN, Cell C, Telkom, ISPA and Switch Telecom did not comment on the Authority's preliminary view with regard to market and regulatory barriers to entry in respect of countervailing bargaining power.

3.3.14. Conclusion on the assessment of effectiveness of competition

3.3.14.1. Assessment of competition

The Authority's view was that no new evidence has been submitted to persuade the Authority that the market for the provision of wholesale mobile voice call termination services and wholesale fixed termination services is effectively competitive. The Authority was of the view that competition in the wholesale voice call termination markets remain ineffective.

Vodacom is in agreement that competition in all the wholesale voice call termination markets may remain ineffective due to the structural characteristics (i.e. each operator holds 100% of the market share in its respective wholesale voice call termination market and barriers to entry) of the wholesale voice call termination markets. However, it is concerned that the Authority has not assessed fully the likely indirect constraint placed on call termination services by VoIP/OTT/IM services.[39]

The Authority's response:
Please refer to the Authority's responses with regard to point 3.1.1 Product Market definition.

3.3.15. Determination on market failures

The Authority indicated that each licensee faces no competition owing to the fact that other licensees have no option but to purchase termination service from the terminating licensee.

The Authority acknowledged that despite the recent technological developments such as Voice over LTE, Wi-Fi calling, etc. and increased presence of OTT VoIP services such as WhatsApp, Skype, FaceTime, etc., the Authority was of view that these services are not perfect substitutes for off-net voice calls for the period under review.

The Authority indicated that in the absence of a potential demand-side and supply-side alternative to the provision of voice call termination over a particular network, licensees could therefore act independently of competitors and retail subscribers in the setting of termination rates.

[39] Vodacom's written submission on the Discussion Document P10

The Authority's view was that the following four market failures identified in 2010 and 2014 continue to exist during the period under review:

- A lack of the provision of access
- The potential for discrimination between licensees offering similar services
- A lack of transparency
- Inefficient pricing

MTN indicated that it does not agree with the Authority's determination that market failures identified in 2010 and 2014 continue to exist. MTN is of the view that "…the market failure is the ineffective competition in the relevant defined termination markets due to the structural characteristics of the markets" [40]. MTN proposed the following wording in respect of market failure

"The Authority has identified the following market failure:

- Ineffective competition due to the absolute barriers to market entry [i.e. in that each operator has SMP in its own market for wholesale voice call termination]"[41]

Vodacom indicated that it agrees with the Authority's view and that the defined markets fail equally with regard to the identified market failures, subject to its concerns that the Authority has not assessed fully the likely indirect constraint placed on call termination services by VoIP / OTT / IM services.[42]

Cell C agrees with the Authority that the identified four market failures continue to exist.[43]

<u>The Authority's response</u>

The Authority has considered MTN's submission with regard to absolute barriers to entry to the identified markets in making the determination that market failures will recur in the absence of regulation. Please refer to the Authority's responses with regard to point 3.1.1 Product Market definition in response to Vodacom's concern regarding VoIP / OTT / IM services.

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[40] MTN written submission on the Discussion Document P 13
[41] Ibid
[42] Vodacom's written submission on the Discussion Document P10
[43] Cell C's written submission on the Discussion Document P7

3.4. Regulation 6 – Significant Market Power determination

The Authority's view was that each individual ECNS and individual ECS licensees that offers wholesale voice call termination services still has significant market power in its own market for wholesale voice call termination.

MTN agreed with the Authority's view that each I-ECNS and I-ECS has SMP in its market for wholesale voice call termination.[44]

Vodacom agreed with the Authority that "…in terms of section 67(5) each I-ECNS and I-ECS licensee has SMP in the market for wholesale voice call termination services on its network as defined." However, Vodacom raised a concern that the Authority "…has not assessed fully the likely indirect constraint placed on call termination services by VoIP / OTT / IM services…"

<u>The Authority's response:</u>
Please refer to the Authority's responses with regard to point 3.1.1 Product Market definition in response to VoIP / OTT / IM services.

3.5. Regulation 7 – Pro-competitive terms and conditions

3.5.1. The nature of pro-competitive terms and conditions

The Authority's view was that there was no reason for change in the use of behavioral remedies and also that these remedies were still relevant to address market failures in the markets for wholesale voice call termination services.

MTN indicated that it does not agree with "…the Authority's assertion to continue with behavioral remedies in respect of Regulation 7 (3)(a)(b) of the 2014 Call Termination Regulations for the following reasons:

[44] MTN's written submission on the Discussion Document P14

- MTN's proposes that a symmetric interconnection regime should be adopted on the grounds of economic efficiency;
- Asymmetry on the basis of economies and scale are for new entrants and limited in duration and not more than 4 years …;
- Asymmetrical regulation should be justified on the basis of exogenous cost differences only after the expiry of the "new entrant" time period."[45]

MTN raised a concern that the Authority did not "…address whether and how it plans to modify some or all of the pro-competitive conditions in line with the principle of proportionality, or how these relevant remedies will be applied to which licensee."[46]

Notwithstanding Vodacom's concerns that the Authority has not assessed fully the likely indirect constraint placed on call termination services by VoIP / OTT / IM services, Vodacom indicated that it agrees with the Authority's view that there is no reason for change in the use of behavioral wholesale remedies that regulate "*as deep into the network as possible*"[47] to address market failure.

Cell C agrees with the Authority's view that the use of behavioral remedies are still relevant to address the identified market failures. Cell C also indicated that "…the relatively stagnant market shares of the four MNO…reflect the fact that the regulatory measures that have been put in place to address the four market failures have not stimulated competition in the wider or the narrow market."[48]

<u>The Authority's response:</u>
The Authority is of the view that the 2014 behavioral remedies (i.e. charge of fair and reasonable prices for wholesale voice call termination, publication of a reference interconnection offer and price control (cost-based pricing)) are still relevant in order to address the four market failures which may recur in the absence of regulation.

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[45] MTN's written submission on the Discussion Document P14
[46] Ibid
[47] Vodacom's written submission on the Discussion Document P10
[48] Cell C's written submission on the Discussion Document P8

3.5.2. The 2014 Call Termination regulations pro-competitive terms and conditions

To address the identified market failures, the Authority imposed pro-competitive remedy on all licensees to charge fair and reasonable prices for wholesale voice call termination in terms of regulation 7(2) of the 2014 Call Termination Regulations.

The Authority imposed additional pro-competitive remedies (cost-based pricing and publication reference interconnection offer) on Vodacom, MTN and Telkom in terms of regulation 7(3) of the 2014 Call Termination Regulations

Even though market failure continues to exist, the Authority indicated that it was pleased that the 2014 Call Termination Regulations have at least achieved the following:

(a) A more efficient and effective access regime;
(b) A dynamic retail environment; and
(c) Continued access and investment in electronic communications networks in South Africa.

MTN agrees with the Authority's view that the 2014 Call Termination Regulations achieved "…improved efficiency of the access regime, a more dynamic retail environment and continued investment in networks"[49] due to the use of a glide path and Long-Run Incremental Cost plus cost standard.

Vodacom indicated that it is not clear "…how the Authority intends to proceed with pro-competitive conditions as it has not as part of the review under section 67(8)(a) made any determinations on the pro-competitive conditions…"[50]. Vodacom further indicated that "…section 67(8)(b) and (c) inform and guide the operation of paragraph (a), and that any assessment by the Authority of a review under this subsection should therefore contain an assessment under paragraphs (b) and (c)."[51]

[49] MTN's written submission on the Discussion Document P14
[50] Vodacom's written submission on the Discussion Document P11
[51] Vodacom's written submission on the Discussion Document P11

<u>The Authority's response:</u>

The Authority is of the considered view that the following pro-competitive terms and conditions imposed on licensees in 2014 are still relevant.

The Authority has concerns raised by licensees regarding the time required to finalise this review process. The Authority will publish a notice extending the period of validity of regulation 7 of the 2014 Call Termination Regulations in the Government Gazette. The Authority envisage to finalise the process to determine new mobile and fixed termination rates by no later than 30 September 2018.

4. Analysis of submission on general comments on the Discussion Document

4.1. MTN

<u>The regulatory process for the review of pro-competitive conditions</u>

While MTN agrees with the Authority's approach to first review pro-competitive remedies imposed on licensees in respect of the 2014 Call Termination Regulations in terms of section 67(8)(a) (ii) of the ECA, "…MTN requests clarity on the end-to-end review process, specifically with regard to what the timelines and consultative approach will be during this review especially relating to the calculation methodology of the applicable termination rates."

With regard to the Authority's two-phased approach in undertaking the review of the 2014 pro-competitive conditions in accordance with section 67(8) of the ECA, MTN indicated that the notice states that:

- a market failure still exists in the call termination market, so the Authority appears to have concluded its analysis for Phase 1;
- the Authority declared all licensees providing wholesale voice termination service in the relevant market to have SMP, which appears to suggests that the Authority has initiated Phase 2;

- that the 2014 pro-competitive conditions remain relevant, but is silent on section 67(8)(a)(ii) of the ECA.

MTN raised a concern with regard to the next phase as paragraph 4 of the notice appears to suggest that there may be phase 3 to this review process aimed at determining the suitable termination rates.

MTN further raised a concern "…about the time [to the deadline of 30 September] that will be allocated to the critical issues of costing standards, financial data collection and interpretation, cost modelling, and the concept of asymmetry"[52]. In addition, MTN is of the view that "these issues are likely to have a significant impact on MTN´s business, and the Authority appears to be silent on such critical issues."[53]

MTN recommended that the Authority "…follow the 2014 process as an established precedent, and …provide a clear plan of action, engagement process and timeline for the determination of suitable termination rates."

MTN raised a concern that paragraph 4 of the notice seems to "…suggests that there may in fact be a phase 3 to this process (aimed at determining the suitable termination rates)"[54]. In addition, MTN stated that it is not clear at all when or how the decision to proceed to phase 3 will take place – nor which methodology will be used to determine suitable termination rates.

Glide path

MTN recommends that the Authority maintain the glide path principle to avoid significant business model shock so that operators can adopt to the new access regime without having to dramatically and instantly rebalance their business plan/ business model

Cost standard

MTN recommend the retention of LRIC+ cost standard as it allows for recovery of common costs and does not impair forward-looking investment decision.

[52] MTN's written submission on the Discussion Document P5
[53] Ibid
[54] Ibid

4.2. Vodacom

Asymmetry

Vodacom is of the view that there can no longer be any justification for asymmetry and that the Authority should determine a single mobile termination rate and single fixed termination rate to all licensees. Vodacom further indicated that international best practice is to set symmetric termination rates for new entrants at the time of entry (based on exogenous cost differences) and short term in nature with a clear glide-path to symmetry.

Cost standard

Vodacom stated that it supports a single cost standard that applies to all licensees offering wholesale call termination services and is of the view that LRIC+ remains the most appropriate cost standard. Vodacom further stated that LRIC+ reflects economies of scale and scope and provides appropriate forward looking market signals to new entrants.

Top-down and bottom-up cost models

Vodacom stated that it supports the principle of the use of a combination of top-down financial cost models and a transparent bottom-up network engineering model that are the products of proper consultation processes.

Vodacom indicated that it disagrees with the determination that different types of mobile network operators (1x large mobile network operator and 1x small network operator) and fixed network operators (1x large mobile network operator and 1x small network operator) be modelled. Vodacom stated that a single cost based mobile termination rates and a single cost based fixed termination rates applicable to all licensees should be determined with reference to the underlying costs of a hypothetical efficient mobile and fixed operator respectively.

Glide path

Vodacom indicated that it supports the implementation of a glide-path.

4.3. Cell C

Timetable for this review

Cell C is of the view that the Authority "…cannot meet the deadline of 30 September 2017 for the release of the new Call Termination Regulations without significant difficulty and perhaps a repeat of the very time-pressured 2 months of 2014."[55]

Cell C recommend that the Authority extend the validity of the current Call Termination Regulations "…to allow the current regime to continue until such time as the cost modelling exercise has been complement…in order to determine appropriate and proportionate pro-competitive remedies to address the four market failure that continue to exist."[56]

Continued lack of competition

Cell C indicated that "…relatively stagnant market shares of the four MNOs…reflect that the regulatory measures that have been put in place to address the four market failures have not stimulated completion…". In addition, Cell C indicated that the rate of asymmetry afforded to it and Telkom Mobile did not result in market share and traffic growth in the call termination market. Cell C further stated that it was not able to achieve the traffic forecast anticipated by Detecon while other operators have dramatically exceeded Detecon's forecast.

Top-down and Bottom-up models

Cell C raised concerns with regard to the application of top-down models developed by the Authority in 2014. In addition, Cell C raised a concern with regard to a lack of transparency of the 2014 bottom-up modelling process and also a number of significant concerns with regard to bottom-up models assumptions and predictions, especially for a small operator.

Cell C indicated that the new bottom-up models should properly capture roaming traffic and or costs.

[55] Cell C's written submission on the Discussion Document P5
[56] Ibid

Asymmetry

Cell C indicated that the position of small operators has not changed since 2014 and the existing remedies have not been adequate to address market failure as small operators still lack scale benefits relative to large operators. Cell C indicated that "termination rates must be set at cost of large operators and above cost of smaller operators to enable them to increase traffic on their networks, grow market share, increase their revenue market share, become sustainable, and compete effectively." [57]

4.4. Telkom

Parity

Telkom stated that ICASA should no longer make a distinction between the remedies applied to the mobile and fixed operators due to technological convergence and international best practice (Nigeria, Ghana, Namibia and Kenya).

Mobile termination rates

Telkom further stated that the overall level of mobile termination rates remains too high and should be reduced to allow smaller operators to compete more effectively with the incumbent mobile operators.

Fixed termination rates

Telkom indicated that fixed termination rates include the cost of building and maintaining the nationwide access network.

Mobile asymmetry

Telkom indicated that asymmetric mobile termination rates should continue to be applied but only to Telkom Mobile as Cell C is no longer a new entrant to the South African market and has benefited from asymmetric MTRs for many years. Telkom recommended "…an asymmetric approach to rates for termination be adopted in the pro-competitive remedies determined by the use of bottom-up and top-down cost models."

[57] Ibid

4.5. ISPA

ISPA indicated that there is a clear case for more aggressive asymmetry to be imposed in this market. ISPA is of the view that the same levels of asymmetry applied in the mobile termination markets should be applied in the fixed voice call termination market to facilitate greater competition to the ongoing dominance of Telkom in this market.

4.6. Switch Telecom

Switch Telecom indicated that the Authority has placed disproportionate emphasis on the mobile market due to differences in asymmetry between mobile and fixed termination markets. This has resulted in smaller non-SMP fixed operators (e.g. Switch Telecom) subsidizing much larger non-SMP mobile operators (e.g. Cell C, Telkom Mobile).

Switch Telecom recommend that the Authority apply the same asymmetric call termination rate for non-SMP operators in the fixed and mobile markets to promote competition in a market still dominated by Telkom.

5. The Authority's findings

After taking into consideration written submissions on the Discussion Document and analysis thereof, the Authority's findings with regard to the review of the 2014 pro-competitive conditions are as follows:

- **Regulation 3 on Market definition**

The Mobile termination markets and Fixed termination markets are defined as follows:

- Mobile termination markets: The market for wholesale voice call termination services on the network of each licensee that offers termination to a <u>mobile location</u> within the Republic of South Africa (excluding termination of internationally originated voice calls).

- Fixed termination markets: The market for wholesale voice call termination services on the network of each licensee that offers termination to a fixed location within the Republic of South Africa (excluding termination of internationally originated voice calls).

- **Regulation 4 on Methodology**

The Authority sees no need to amend the specified approach in the evaluation of effectiveness of competition in the defined markets as per the requirement of section 67(4A) of the ECA.

- **Regulation 5 on Effectiveness of competition**

The Authority has determined that the following four market failures in the Mobile termination markets and Fixed termination markets may recur in the absence of regulation:

- A lack of provision of access,
- The potential for discrimination between licensees offering similar services,
- A lack of transparency, and
- Inefficient pricing.

- **Regulation 6 on Significant Market Power determination**

The Authority declares that each Individual Electronic Communications Network Service and Individual Electronic Communications Service licensee that offers wholesale voice call termination services has Significant Market Power in its own market for wholesale voice call termination.

- **Regulation 7 on Pro-competitive terms and conditions**

The Authority has determined to retain the following pro-competitive terms and conditions to correct the market failures as per regulation 5 above:

- All licensees must charge fair and reasonable prices for wholesale voice termination.
- Publication of a reference interconnection offer and Price control (cost-based pricing).

6. Way forward

In light of the concerns raised by licensees regarding the time required to finalise this review process, the Authority will publish a notice extending the period of validity of regulation 7 of the 2014 Call Termination Regulations in the Government Gazette.

The Authority will publish a briefing note outlining the consultative approach and timeliness to determine new termination rates by no later than 30 September 2017.