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Attention: Council Committee on Mobile Broadband Services Market
Inquiry
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CELL C RESPONSE TO THE DRAFT MOBILE BROADBAND SERVICES MARKET INQUIRY REGULATIONS

1. We refer to the Authority's published **GG 44337** dated 26 March 2021 regarding the Draft Mobile Broadband Services Market Regulations.
2. Cell C Limited ("Cell C") welcomes the draft Mobile Broadband Services Regulations as a major step towards facilitating competition in the mobile broadband market. Our response to the draft regulations includes further recommendations on the findings and remedies identified by the Authority.
3. Cell C requests that this letter, including the documents attached to this letter, be treated as strictly confidential in terms of section 4D of the ICASA Amendment Act, No. 2 of 2014. This is due to the commercial and financial nature of the information, which, if disclosed to the public and/or third parties, could cause harm to the commercial or financial interests of Cell C.
4. Cell C looks forward to engaging with the Authority should the Authority schedule public hearings on these draft regulations.

Yours sincerely

Mr Themba Phiri

Executive Head: Regulatory

ICASA MOBILE BROADBAND SERVICES REGULATIONS 2021

COMMENTS ON ICASA DRAFT REGULATIONS DOCUMENT: MAY 2021

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1 Background and context

1. ICASA has invited comments from interested parties on the Draft Mobile Broadband Services Regulations (“Draft Regulations”), published in the Government Gazette on 26 March 2021. Cell C has participated in the Mobile Broadband Services Inquiry during all six phases. Cell C submitted detailed comments Authority’s Discussion Document, and presented its views during public hearings on 26th October 2020.
2. The aim of this document is to consider whether the Draft Regulations take into consideration Cell C’s earlier comments and to critically analyse the impact these will have on the relevant markets. ICASA has found ineffective competition in a number of markets, and the remedies should be proportional to these market failures.
3. Cell C welcomes the finding that MVNO markets are not characterised by ineffective competition, noting future developments and MVNO requirements contained in the Spectrum Invitation to Apply (ITA). Nevertheless, we note the reporting requirements for MVNO services, which we support as there are various potential abuses (such as margin squeeze) which could hamper competition in these markets going forward. We suggest that the active monitoring of prices in MVNO and roaming markets should entail more detailed reporting and analyses.
4. In the markets that were identified as characterised by ineffective competition, the remedies are fairly muted, and it is not clear that they are indeed proportional. The proposed regulations largely consist of new reporting requirements for MTN and Vodacom. While this may be a step in the right direction, it is not clear that such ‘light touch’ regulations are proportional to the market failures identified by ICASA.
5. Also, the metrics required to calculate average effective rates are vague and can be manipulated by MNOs. ICASA will have to be more specific about the formulas and the format in which the data is to be submitted.
6. Cell C welcomes the fact that roaming markets have been identified as problematic, as there are only two sellers of such services. Cell C is increasingly dependent on roaming services, and welcomes the proposed filing of roaming agreements (to ICASA) and price monitoring.
7. However, Cell C is of the view that ‘self-reporting’ by incumbents, e.g. as suggested in 1.7, will be ineffective. ICASA requires incumbents to submit evidence to show that any margin squeeze is cost based or temporary. In para 2 of then remedies, ICASA indicates that it will monitor retail and wholesale prices, and particularly margin squeeze. It is not clear that ICASA will have the ability to compare the specific access charges (wholesale) e.g. paid by roaming customers, with the associated retail rates. Relying on the incumbents to identify and self-report and margin squeeze is an impractical solution.

8. Cell C therefore recommends that ICASA refines the reporting requirements, to include more clarity about the format and level of detail required in the submissions. ICASA should also indicate how it will use this information and what further interventions it contemplates. In its current form, the regulations are largely theoretical, as it is unclear how they are supposed to address the concerns identified by ICASA in most of the relevant markets it investigated.

2 Do the proposed regulations address the market failures identified by ICASA?

2.1 Key Findings that merit regulatory intervention

9. ICASA finds that MTN and Vodacom have significant market power (SMP) in the retail markets, upstream market 1 (market for site infrastructure access), and upstream market 2 (wholesale national roaming). It seems that in all the retail and site access markets, ICASA deems Vodacom and MTN to be dominant, as a result of vertical relationships. While the market share threshold for dominance is not exceeded in all local markets, it therefore seems that ICASA is not applying the methodology of local market definition, but rather accepting that both Vodacom and MTN are in any event dominant at a national level. These vertical relationships are not defined in the Schedule, but further elaborated on in para 98. In para 153 ICASA explains that: “MTN and Vodacom are also in vertical relationships between their upstream site infrastructure and downstream activities”.
10. In the same section, ICASA mentions that it has received a number of complaints from stakeholders regarding foreclosure of access to incumbent site infrastructure, high wholesale roaming and other wholesale charges. It also mentions that the Competition Commission raised concerns about wholesale site access, national roaming and APN charges. ICASA therefore concludes (para 98) that MTN and Vodacom have SMP in terms of the Act.
11. This is the classic problem that arises in telecommunications markets, where incumbents are vertically integrated and has market power at one or more levels of the supply chain. ICASA recognises the fact that this problem extends to all geographies, as it is the large market share of the incumbents in the retail market that drive their behaviour in the site access (and roaming) markets.
12. Cell C therefore agrees that both Vodacom and MTN have market power in all markets that have been characterised by ineffective competition, regardless of the exact geographic market definition. The other side of the coin also applies. As pointed out by Cell C in their previous submission on the Draft Findings, it makes no sense to characterise Cell C as dominant in certain local areas.

13. It is unclear whether ICASA finds that MTN and Vodacom are also dominant in markets 3a (MVNO market) and 3b (APN services). ICASA does not find ineffective competition in the MVNO market. It also states (para 221) that “there is no evidence that any participant in this market has significant market power”. Vodacom and MTN are late entrants in the MVNO market, but this does not mean that they will not be able to leverage their dominance from adjacent markets into the MVNO market. As we elaborate on below, while ICASA does not find ineffective competition in the MVNO market, and does not find a need to regulate the APN market (see para 226), it nevertheless introduces monitoring requirements for both.
14. Cell C welcomes this, as these markets are also open to price abuses, especially margin squeeze as we elaborate on below.

2.2 Proposed regulations

15. All remedies and proposed regulations are restricted to the SMP operators (Vodacom and MTN).
16. The proposed remedy for the ineffective competition in the site access market, is regular reporting to ICASA of parties that require access to sites, and whether requests were approved or not, with reasons. Further detail that has to be reported i.t.o. site access includes average effective charges for the sites, updated lists of all sites, all charges for sharing of sites, as well as other technical detail of the site.
17. The remedies for the roaming market also include regular reporting to ICASA with supporting data on effective prices paid for roaming services by each customer, for each roaming contract, any contractual price variations, technical details of the site and volumes used by site. Cell C welcomes this move towards monitoring of roaming agreements, as smaller mobile network operators are effectively price takers and have limited negotiating power.
18. For retail markets, there is a requirement to provide a report and supporting data to ICASA on effective retail prices paid by end users for data services. This is calculated at a very high level by dividing total revenue for data with total volume of data used (Gigabytes).
19. Further sub-categories for which the same calculation should be performed, include prepaid, hybrid and post-paid, consumer and business segments, data used during peak and off-peak periods, by province, within provinces, by urban and rural, etc.
20. For MVNO and APN (markets 3a and 3b), a report and supporting data should be provided to ICASA with effective wholesale prices paid by ECS and ECNS licensees for MVNO and APN services. This should be split by wholesale customer. The requirement to report MVNO effective prices does not follow logically from the assessment of competitiveness. ICASA does not find the MVNO market to be ineffective i.t.o. competition, but proposes the same remedy as for the other markets.
21. These reports should be provided to ICASA on a quarterly basis.

22. Finally, there is a provision to prevent a margin squeeze abuse by one of the dominant operators. This provision seems quite vague, in that the operator is required to submit detailed and auditable evidence to ICASA when ‘any category of retail price is below any wholesale price’. There is an additional requirement for the operator to show that this differential is cost based or temporary. ICASA indicates that this is the way in which they will monitor retail and wholesale priced, and by implication margin squeeze. We expand on this aspect in section 3 below.

2.3 Are these regulations sufficient to address identified market failures?

2.3.1 General remarks

23. The proposed regulations contain mostly requirements for MTN and Vodacom to submit certain reports and underlying data to ICASA on a quarterly basis. In general, the regulations require high level data to be submitted, and the format is unclear. These reporting requirements also do not seem proportional to the competition issues identified, especially since it is unclear what ICASA will do with the information.
24. We note that in MVNO markets where no competitive concerns have been identified, ICASA also requires data to be submitted. Cell C believes this is appropriate, as ICASA will have data and information to pro-actively monitor this market as it develops.

2.3.2 Site access regulations

25. It seems from paragraph 1.1 of the Draft Regulations, that these regulatory requirements only apply to ‘macro site infrastructure’. Macro sites are defined (see para 133) as ‘referring to site infrastructure higher than 15m, or less than 15m) are typically used for coverage but also provides additional network capacity where needed’. This seems to exclude rooftops, indoor, micro, lamppost, billboards, and other infrastructure. Cell C has previously submitted a list of proposed essential facilities, and is of the view that the proposed regulations should apply to all of these facilities. For ease of reference the Cell C submission in this regard is duplicated below.
26. “The following facilities are essential to the supply of mobile services:
- a. All RAN sites, i.e. sites with masts more than 15m in height and less than 15m in height; rooftops; mobile “cows” (cell on wheels); distributed antennae systems; or any other in-building solutions, microcells, etc.
 - b. All RAN sites specifically used for transmission purposes, i.e. POPs (very high aggregation sites), repeaters (connecting two sites in rural areas), etc.
 - c. All transmission fibre, i.e. international links (via cable stations and undersea cable systems, national backhaul links, cross-border international links (i.e. SA to Zimbabwe), access network links (connecting access sites), etc.
 - d. All hosting facilities, i.e. data centres, etc.

27. In addition to the above, the following list also sets out further specific essential facilities:

- a. Any fibre optic cables on national long distance;
- b. Any backhaul circuits from cable landing stations;
- c. Any cable landing stations;
- d. Any satellite earth stations but not VSATs;
- e. Any undersea-based fibre optics cables;
- f. Any data centres (and racks and space within that centre);
- g. Any Telkom exchanges or exchange buildings;
- h. A meet-me room, carrier hotels;
- i. A multiplex;
- j. A satellite transponder;
- k. Any ducts and conduits for example and not limited to road reserves, in environmentally sensitive areas, or in heritage areas, where only one such facility might be allowed by road authorities;
- l. National roaming to allow access to such a service (which is itself provided over physical infrastructure or facilities) may be termed essential to provide equivalent technology coverage to all NR Providers and NR Receivers (i.e. 4G and 5G services);
- m. International gateways
- n. Masts.

28. The proposed regulations seem to only apply to macro sites (listed in 28a above), but excludes all other infrastructure included by Cell C as essential.

29. As indicated in Cell C's initial submission on priority markets, Section 43(8) of the ECA requires ICASA to prescribe a list of essential facilities. We submit that ICASA ought to prescribe this list, and that doing so would significantly enhance the capacity of licensees seeking access to such facilities to compete in the relevant markets".

30. Apart from the fact that the site access regulations only apply to one type of site (macro sites), it is unclear what remedy will be used, once ICASA finds that site access has been unreasonably denied or that access prices are too high. There are already existing mechanisms for complaints about the denial of site access, but the record of the CCC to deal with these complaints is notoriously ineffective. Access to sites can be denied by any player on the basis that it is not technically feasible. The proposed regulations will do nothing to prevent this going forward.
31. It is also unclear why the proposals contained in the Discussion Document have been omitted. In the Discussion Document, ICASA recommended accounting separation as a remedy for the site access and roaming markets.
32. For the site access market, an additional remedy was also suggested, namely re-drafting facilities leasing regulations as contemplated in the ECA along with more detailed guidelines. Site information would have to be published online, and a time limit for the considerations of requests and rules around when site sharing should be considered technically and economically feasible implemented. In addition, it would preclude the indefinite reserving of space on masts for the incumbent's equipment and facilitate the quicker roll out of new sites by the smaller operators.
33. None of these has made their way into the current proposed remedies.
34. Cell C is therefore of the view that the proposed site access regulations are wholly ineffective to deal with the failures identified by ICASA and elaborated on by many of the submissions, in addition to those of Cell C. The recommendation in para 164: "the process of defining essential facilities should be started" is welcome, but Cell C would like to see a stronger commitment from ICASA. Excluding other 'micro sites' from the process now, would mean that ICASA is missing an opportunity to obtain more information about these micro sites and identify problems as they arise. Given that ex ante regulations are forward looking, ICASA should use this opportunity to also obtain information about all types of sites and other essential facilities.
35. Cell C also notes that ICASA is of the view that site access will also be regulated as part of the Spectrum ITA requirements (para 165). Including a reference offer requirement and monitoring this for Tier 1 operators, is a good way to monitor and regulate site access. Given the current uncertainty about the spectrum assignment, it is important that this requirement be kept as part of the ITA requirements (or included in any amended future version).

2.3.3 *Roaming Regulations*

36. Cell C, supports ICASA's finding that the roaming market is characterise by ineffective competition, as there are only two choices of network providers. It is also a welcome development that roaming agreements will now have to be filed and will give ICASA the opportunity to scrutinise them.

37. The Authority, taking into consideration changing market conditions (including patterns of price reductions) and submissions made, believes that at present a pricing remedy is not necessary in roaming markets on an ex ante basis. It notes that regulations that disincentivise dynamic competition and investment (such as price regulation) should be avoided insofar as they dampen incentives to roll out infrastructure and lead to a lack of differentiation in the market. The Authority also notes the remedy proposed by the CC that roaming rates should be at a discount to retail rates, unless an operator can provide convincing evidence that it is temporary or based on costs.
38. Furthermore, similar to the site access regulations, the roaming regulations now require all roaming contracts to be filed with ICASA, including prices and price variations. Further detail about wholesale national roaming volumes, used by site, should also be submitted to ICASA on a quarterly basis.
39. Cell C welcomes the fact that ICASA will now be able to scrutinise roaming agreements and associated costs. While a pricing remedy may be a radical remedy at this stage, Cell C would like to encourage ICASA to consider doing a cost study in order to understand whether the roaming charges bear any relationship to the underlying cost of the network, especially in cases where the network costs have mostly been recouped.

2.3.4 *Retail market regulations*

40. Similar to the above, ICASA requires retail price data from MTN and Vodacom on a quarterly basis. As we elaborate below, the price monitoring that is proposed is too broad and vague to yield any real insights. Furthermore, the essence of the problems identified i.t.o. retail data prices by the CC DSMI, are completely ignored by ICASA.
41. Mobile network operators increasingly use dynamic pricing and also run promotions consecutively. ICASA should consider adding promotions to the list of price categories in para 1.5. in order for it to effectively monitor prices in the retail market.

2.3.5 *MVNO and APN regulations*

42. In the ICASA Findings document, the following is stated in para 224: “The wholesale prices above retail prices, together with the price trends over time strongly suggests ineffective competition in the provision of APN services.” However, in para 226, the following is stated: “From the Authority’s assessment of the market, however, there is no evidence that entities in the market have significant market power. As such regulation of APN cannot be engaged in to remedy problems in this market.”
43. Subsequently, in para 227, ICASA states: “...the Authority’s view is that competition concerns in the retail market will likely be remedied through wholesale interventions including with respect to APN and MVNO price monitoring, set out in the draft Mobile Broadband Services Regulations.”

44. Given the Authority's finding that there is no ineffective competition in the MVNO and/or the APN market, it is unclear why reports and supporting data need to be submitted to the Authority on these markets. It is also not clear what the Authority's intention is with this information and data, or how price monitoring can be construed as a "wholesale intervention". No guidance is provided on how this will work in practice.
45. We show in the next section why the proposed regulations for MVNO access, APN and roaming markets, are not sufficient to prevent a margin squeeze by Vodacom and MTN. Cell C is of the view that active monitoring of MVNO and APN market prices will be important, both for ICASA to identify trends, but also to monitor for margin squeeze, as we explain next.

3 Margin Squeeze prohibition

46. Cell C is of the view that the inclusion of margin squeeze as part of the draft regulations, is an important recognition of the impact that such behaviour can have on the market. However, the proposed regulation is very weak as it mainly relies on the incumbent to notify the authority of potential margin squeeze. In practice, this makes the regulation unworkable. Also, the ICASA regulations seem to be aimed at preventing a margin squeeze in the roaming market. This is just one aspect of the problem, as the MVNO market can also be open to such an abuse.
47. Cell C in its submissions explained how a margin squeeze will work in terms of both the MVNO access and roaming markets. The cost of mobile services for Cell C is impacted by the price it pays for roaming. That in turn determines the access price for the MVNO's hosted by Cell C. If the other MNO's are mandated to provide MVNO access as part of their spectrum conditions, then they may engage in margin squeeze behaviour vis-à-vis Cell C by providing MVNO services at a cost lower than the roaming service to Cell C. We note that this will be a contravention of the Competition Act and its prohibition of margin squeeze by a dominant firm. However, to prevent protracted litigation of this point, ICASA may want to specify *ex ante* that the price for MVNO access should allow for a sufficient return for the MVNO customer.
48. The regulation that is aimed at preventing margin squeeze (see para 1.7) is a requirement for an incumbent MNO (MTN and Vodacom) to submit evidence to ICASA 'in the event that any category of retail price is below any wholesale price'. The MNO can also submit evidence to show that 'this differential is cost based or temporary'. Such a regulation is far too vague and impractical to prevent margin squeeze, which is a technical abuse to identify. Firstly, the term temporary is not defined, and it is not clear what would qualify as temporary. Secondly, the formulation of 'any category of retail price is below any wholesale price' is similarly vague.

49. The CC's DMSI report contained a much more specific formulation: "Vodacom and MTN must reach agreement with the Commission within six months to ensure that their national roaming agreements with other networks are priced, at a minimum, at wholesale rates which reflect a reasonable discount on their own effective retail rates as measured by the average revenue per GB, with provision for annual downward revisions to reflect reductions in their own effective retail rates over time. If no such agreement is reached, the Commission will proceed to prosecution in respect of excessive pricing and/or exclusionary conduct. Ultimately the minimum pricing standards for national roaming should be incorporated into the amendments to legislation with powers for ICASA to regulate roaming agreements."¹
50. The new proposed regulations now require roaming agreements and effective roaming prices, to be submitted to ICASA. This is a welcome change, as previously this was not required. This will at least give ICASA insight into these agreements and introduce some transparency. However, relying on self-reporting by incumbent MNOs of suspected margin squeeze is not sufficient. If the dominant MNO does not report this, it will take months for any competitor in the retail market to begin to suspect that such an abuse has occurred. In practical terms, Cell C will note over time that some of its competitors charge prices in the retail markets which are below the access price it pays for roaming. Given the complexity of mobile data retail prices, this may take a long time. The prosecution could take further extended periods of time, during which Cell C will be losing market share and suffering from these anti-competitive actions.
51. While we note that ICASA will also monitor prices, we believe a more targeted approach is required to prevent margin squeeze. ICASA should consider the more specific recommendation of the CC in this regard. While a price remedy may be premature at this stage, ICASA could develop a cost model, utilising inputs from the industry, in order to understand cost structures better.
52. A similar approach can then be followed for MVNO access pricing, ensuring that a cost-based model is used by the incumbents, with a reasonable margin. One option ICASA can consider is to provide an indication of what a reasonable margin may be, rather than determining a minimum cost price, as different MNOs will have different costs.
53. While margin squeeze has now been incorporated as a self-standing abuse in the Amended Competition Act, this is an *ex post* remedy. If ICASA is serious about preventing future margin squeeze abuses in the markets identified as not competitive, then this is the perfect opportunity to introduce more effective *ex ante* regulation to prevent this.

¹ Competition Commission Data Market Inquiry Final Report, para 53.2.

4 Are these regulations compatible with other regulatory processes?

54. ICASA explicitly recognises that the Broadband Services Inquiry cannot be seen in isolation. It refers to the CC DSMI, the current ICASA ITA and the imminent licensing of the WOAN. All of these are interrelated and the ICASA regulations will only be effective if they also fit into the broader regulatory processes.

4.1 Compatibility with Spectrum ITA and the WOAN

55. Cell C submit that ICASA should consider the findings of the Competition Commission study and recommendations on Data Services Market Inquiry. The DSMI has made very specific recommendations regarding high prices. ICASA is primarily also concerned with facilitating competition and lowering prices. High prices are simply the outcome of the market failures that ICASA identifies hence the findings of the CC inquiry in DSMI should be taken into account.
56. Similarly, the reference to the spectrum ITA seems very high level. Specifically, the WOAN is aimed at alleviating some of the upstream access issues, around spectrum, sites and roaming. If ICASA is serious about taking a forward looking view, it should at least consider a scenario where the spectrum is allocated more equally (according to the proposed lots in the ITA) and where the WOAN will create upstream competition in the markets where it found ineffective competition. The WOAN will effectively be a new entrant, and given that vertically integrated MNOs cannot be shareholders in the WOAN, will hopefully address some of the current market failures. This does not mean that ICASA should not proceed with the proposed regulations in wholesale markets, but perhaps include a glide path towards less intervention, if the WOAN becomes a successful wholesale operator. We do agree however with ICASA (see para 50) that new competitive pressure due to spectrum assignments and the WOAN, is not likely to increase significantly within the next three years (the proposed reference period for the new regulations). This is especially true in the light of the ongoing litigation which has caused further delays in the spectrum auction and licensing of the WOAN.
57. We also note that the proposed regulations for the wholesale markets are not onerous, as they relate mainly to reporting requirements and no actual changes in current behaviour. The quarterly submission of data and reports by the incumbents, will at least allow ICASA to monitor if competition increases once the WOAN is operational.

4.2 Compatibility with the recommendations of the CC DSMI

58. The ICASA proposed remedies focus primarily on wholesale markets. However, it also requires MTN and Vodacom to submit reports and supporting data on effective retail prices paid by end user customers for data overall, calculated by dividing total revenue for data with total volume of data used.

59. This seems too crude a measure to get any insights from. At most, ICASA will have a view of the average effective retail prices by certain sub-categories, and their trends over time. It will not have a view of overall prices in the market, or indeed of price competition, as this reporting requirement does not apply to smaller players.
60. More importantly, the CC DSMI found that while data prices were on average higher than certain international benchmarks, this finding did not apply to all packages. Some of the larger data packages were priced more competitively but were not pro-poor, as lower income people generally buy smaller packages. The CC DSMI was therefore primarily concerned with the price differentials (per Gigabyte) of different data packages. There is no way that the ICASA remedies can pick this up or do anything to address this inequality i.t.o. price differentials.
61. We also note that the CC explicitly referred to this issue in their submissions to ICASA. See e.g. para 78: “The Competition Commission stated that the assessment of retail competition more broadly can be improved. In particular, the Authority should consider the structure of retail pricing whereby the poor are charged high prices per megabyte or are forced to purchase data bundles of lower utility (i.e. restricted and short-term validity bundles)”. As already mentioned, the proposed remedies are not sufficiently nuanced to address these issues identified by the CC.
62. Cell C would recommend that ICASA actively monitors the retail prices of the incumbents. ICASA already has the tariffs filed by all operators and would theoretically already be able to monitor these. However, it would be advisable for ICASA to share information with the CC (in line with the Memorandum of Understanding between ICASA and the CC), so that price movements can be actively monitored to also prevent any pricing abuses by the dominant operators.

4.3 On-net/ off-net price differentiation.

63. ICASA mentions in para 99 that both Cell C and the CC recommended that ICASA considers the problem of on-net and off-net price differentiation. The submission from the CC therefore supports Cell C’s contention that the so called “club effect” persists and is hindering competition. This club effect occurs when a licensee charges less to call on-net (within the same network) than to call off-net (to a different network). Subscribers are encouraged to subscribe to the same network to benefit from the lower on-net calls – calls that take place within a community or a club. By reducing on-net prices only, the club increases in size. The increase in their subscriber base results in an increase in their economies of scale and scope – something that smaller operator such as Cell C has always lacked.
64. At the time that Cell C complained about this (2014), the CC recommended that this feature be further investigated by ICASA, but nothing has since happened in this regard. From the list of proposed remedies, it is clear that ICASA is not planning to address this during the current round of regulations. It is unclear to Cell C how this position can be adopted, when another regulator has specifically requested ICASA to look at this issue.

5 Concluding Remarks

65. In general, Cell C welcomes the conclusion of the Mobile Broadband Inquiry and the proposed remedies. In line with the comments set out in this document, Cell C believe that more detail is required for some of the proposed remedies to work in practice. Cell C would welcome any opportunity to expand or meet with the Authority in this regard.