SUBMISSION TO ICASA ON ITS DISCUSSION DOCUMENT FOR THE MOBILE BROADBAND SERVICES MARKET INQUIRY

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1. INTRODUCTION

1.1. On 29 November 2019, the Independent Communications Authority of South Africa ("ICASA") published a discussion document on its market inquiry into mobile broadband services[1] ("the discussion document") and invited written submissions in respect of the document. This document sets out the submissions of the Competition Commission in respect of the discussion document. This submission draws heavily on the Commission's Data Services Market Inquiry ("DSMI") report published on 2 December 2019 and the DSMI report should be considered as being included in this submission to ICASA.

1.2. The discussion document assesses four broad markets: spectrum, site access, roaming, and MVNO and APN services. Within each of these market it a) identifies and defines markets, b) determines the effectiveness of competition, c) identifies licensees with significant market power ("SMP"), and d) identifies suitable pro-competitive remedies where competition is ineffective.

1.3. We lay out our submissions according to each of these four broad markets, focusing primarily on the recommendations reached in the discussion document but also aspects of the analysis where pertinent. The Commission's overall view is that:

1.3.1. Retail mobile data prices are too high which is evident from international price comparisons but also profitability analysis of the larger networks compared to their operations in other regions, which is consistent with the international price benchmarking evidence. The discussion document also finds that prices are too high in the retail market, although the conclusions are not as strong as they ought to be.

1.3.2. An assessment of profitability of operators, market structure and market dynamics amongst other factors shows there is clearly ineffective competition across wholesale and retail markets. Operators also hold SMP in these markets. The discussion document also identifies markets with ineffective competition and operators with SMP, however there is additional evidence

[1] ICASA "Discussion Document on the Market Inquiry into Mobile Broadband Services in South Africa"

which shows that there are significant and substantial concerns with competition in mobile broadband.

1.3.3. Given the state of the mobile data markets, and the record of market failure and persistent concentration in the wholesale and retail markets, as well as the persistence of first-mover advantages among other concerns, there is a need for strong and robust remedies. The Commission's view is that the remedies proposed in the discussion document are for the most part too weak and unlikely to have the desired effect.

1.3.4. The need for strong and robust remedies is further emphasised by impending roll-out of new technology (5G) which will require significant investment and resources, and may lead to the exclusion of smaller players, the entrenchment of dominance and a perpetuation of uncompetitive market structures in future.

2. RETAIL MARKET

2.1. In ICASA's assessment of retail markets, on the product market side, it considered an aggregated market for retail mobile services (including voice, SMS and data services). On the geographic side, it finds that there are *"sub-national markets at least as narrow as the local and metropolitan municipality level*"[2]. The discussion document then considers barriers to entry, market shares, international price comparisons and the role of voice services and finds there is ineffective competition at the retail level. It identifies Vodacom and MTN as having significant market power. In terms of remedies it determines that wholesale remedies are preferable and thus there are no recommendations within its discussion of the retail market.

2.2. While the specific findings of ineffective competition and SMP on the part of Vodacom and MTN are themselves consistent with the conclusions of the DSMI final report, the Commission submits that the assessment of retail competition more broadly is inadequate and can be improved. In summary, our submissions on the assessment of competition in the retail market are as follows (we provide more detail further below):

2.2.1. The Commission disagrees with the definition of local geographic markets rather than national, as competition dynamics are clearly national.

[2] Discussion document, para. 35

Furthermore, defining geographic markets using municipal boundaries is arbitrary and not properly justified by the discussion document. This raises concerns for the analysis and the conclusions reached.

2.2.2. The analysis fails to consider future dynamics in competition and specifically the implications of the impending roll-out of 5G technology. This may have substantial implications for competition given the ability of the largest firms to make the significant investments in infrastructure that are required and the potential entrenchment of their dominant positions. Remedies must therefore be strong and forward looking.

2.2.3. The international price benchmarking analysis can be significantly strengthened by using more recent data and using data for more countries over a longer period, which shows conclusively how the relative position of South Africa has deteriorated over time. Complementary analysis also reinforces the international price benchmarking results and should be added to the discussion document. Specifically, the profitability of Vodacom and MTN in South Africa being higher than their operations in other regions is consistent with the high prices observed in South Africa relative to their own operations in other regions, as well as in the international price comparisons. The better performance of more competitive post-paid products in South Africa relative to prepaid also shows that the performance on prepaid data bundle price relative to other countries is of particular concern.

2.2.4. The interpretation of the international pricing data in isolation of other evidence is also of concern to the Commission. The selection of countries along with the approach can impact on the ranking of South Africa. For instance, some comparisons make use of a subset of countries, some use the cheapest bundle whilst others make use of the largest operator, and in some countries there is no comparator bundle. Rankings also change over time as markets of differing levels of maturity evolve and the expectation that data prices should fall due to scale and other effects. Indeed, tracking such trends may be more important as any static ranking assessment. Similarly, examining how prepaid ranking compares to postpaid is also informative as this holds other variables constant. This is why comparisons need to be complemented by other analysis.

2.2.5. In terms of the non-price factors considered by the discussion document, the discussion document fails to justify or explain its analysis. It limits much of its assessment to a subset of arbitrarily defined “advanced countries”. The mechanisms for supposed relationships between prices and factors such as speed and coverage are not described. Evidence on these relationships even within the discussion document is also contradictory. The Commission’s assessment in the DSMI shows there is no strong relationship between prices and these non-price factors. Including all countries in the assessment of the discussion document shows that South Africa’s higher speeds and coverage should, if anything, be associated with *lower* prices.

2.2.6. The discussion document’s assessment of retail competition can also be strengthened through the consideration of additional evidence. As considered in detail in the Commission’s DSMI report, an assessment of profitability of the large operators shows high levels of profits that are consistent with market power and a clear lack of competition in the market. Furthermore, the Commission’s assessment of market dynamics shows that Vodacom and MTN have not responded to aggressive pricing of Cell C in the past and Telkom more recently. This shows that the two largest firms price independently of the challenger networks which shows a lack of effective competition in the market.

2.2.7. Lastly, a key dynamic in the mobile data services market in South Africa is the structure of pricing whereby poorer, low-volume consumers face higher ‘per megabyte’ prices or are forced to purchases restricted, short-validity data bundles which are of lower utility. This points to a significant market failure where poorer customers who do not have the alternatives for internet access that richer consumers have, are exploited to a greater degree. Exploitative price discrimination strategies require dominance to implement. ICASA should consider the structure of pricing in its discussion document in addition to the level of pricing.

2.3. We discuss our submissions in more detail below.

Geographic markets and assessment of competition

2.4. The analysis of pricing and market shares at a municipal level is a useful exercise in gaining some understanding of local areas of strength, especially as it informs the assessment of roaming and infrastructure access. However, the Commission disagrees with the definition of local markets along the lines of municipal boundaries. The national dynamics in the market mean that the market is more likely national in scope. The Commission's submissions are as follows:

2.4.1. Even if markets were to be local, the geographic market definition exercise in the discussion document does not explicitly consider how narrow or broad the local markets may be. It implicitly assumes in the first instance that municipalities would be an appropriate boundary for such local markets. The analysis starts with municipalities as a *"relatively narrow geographic area"*[3] but does not argue why this might be narrow. The risk here is that the delineation of local markets on the basis of municipal boundaries has been arbitrarily determined and thus the findings on dominance at the municipal level are flawed. While the analysis by municipality is certainly useful, it is not clear that is can be used to make findings on dominance in local markets. In fact, there is ultimately little to suggest that an assessment on a national basis is not adequate.

2.4.2. The discussion document states that *"prices, usage and costs … vary between geographical areas"*[4] and later states that *"(d)ifferences in demographics and cost factors by region are likely to result in differences in prices and usage across regions"*[5] . However, there does not appear to be any kind of pricing analysis conducted despite the assertion that *"(a)verage prices and usage vary significantly by geography in South Africa"*[6]. Notwithstanding the lack of such an analysis, differences in average prices and usage do not provide any indication of local geographic markets. Operators market a wide variety of products nationally and the mix of consumption of these products will naturally differ across consumers and areas. Indeed, the same pricing is available to

[3] Discussion document, para. 31
[4] Discussion document, para. 33
[5] Discussion document, para. 34
[6] Discussion document, para. 33

consumers nationwide, which also indicates a national rather than local dynamic to pricing.

International price comparisons

2.5. One way in which the discussion document considers whether competition in the retail market is effective is to compare South Africa's prices against international prices. The discussion document concludes that South Africa's prices are neither extremely high, nor very low when compared to other countries, while South Africa is held to perform well against other African countries in terms of quality of access and on par with a number of countries considered to be its peers. However, the discussion document also finds that there are indications of possible market failure.

2.6. The Commission agrees that there is concern at the retail level in terms of pricing with pricing substantially higher than many other countries. However, there is a risk that the price comparison analysis and findings in the discussion document could be misinterpreted. The Commission is of the view that the exercise can be complemented in a manner that will strengthen the assessment and allow for more definitive and robust findings on price.

2.7. The discussion document begins by considering comparisons of prices, relying on a few key pieces of data to inform its findings, including the data of the ITU, Research-ICT Africa ("RIA") and the Alliance for Affordable Internet. The Commission engaged in similar comparisons in its DSMI final report. However, the analysis can be complemented or improved in a number of areas.

2.7.1. The discussion document presents ITU pricing data for 2016[7] , published in 2017, in Figures 6 to 8 (and the scatter plots of price relative to quality measures in Figures 13, 15 and 16). However, this is not the most recent data available. ITU's 2018 Measuring the Information Society Report is available and contains pricing data for 2017. This should be included in the analysis.

2.7.2. The more recent data was used in the DSMI final report and reveals that South Africa's position is in fact worse than that presented in the discussion

[7] It contains the lowest price at which a customer could obtain a 500MB mobile bundle for a prepaid, handset-based package from the largest mobile operator (in terms of subscribers) for each country.

document. The new data illustrates that South Africa's relative pricing has worsened, a finding that strengthens the view that competition is ineffective. The Commission's assessment using ITU's updated pricing data illustrated that South Africa's ranking worsened from 94th using the earlier data to 102nd using the later data as discussed more thoroughly in the Commission's DSMI report[8]

2.7.3. In terms of the data of the RIA, the discussion document presents data for Q4 2018 (in Figure 11) however, later data has been available. The Commission's DSMI final report which can be referred to by ICASA included data up to and including Q3 2019. Most likely, even more recent data is available again.

2.7.4. One aspect of the RIA data that should be better capitalised on, which will in turn strengthen the findings of the discussion document, is the trend over time. While the discussion document does present some analysis across six large countries[9] over time, the analysis can be broadened significantly. The Commission, in the DSMI final report, considered a far broader group of countries, looking at 37 countries from Q3 2015 to Q3 2019[10] and 12 countries from Q2 2014 to Q3 2019[11]. The analysis clearly shows South Africa has performed increasingly poorly over time relative to the other countries, which is consistent with a market that lacks effective competition. The DSMI final report also conclusively shows that this observation is independent of exchange rate movements, as shown in Tables 47 and 48[12]. The Commission can provide ICASA with the original data and workings for its analysis of the RIA data presented in the DSMI report.

2.7.5. When considering the RIA data, the discussion document mentions the lower price point of Rain. However, we submit this is not meaningful for an assessment of whether market price levels are too high or not for a number of reasons. Firstly, RIA itself excludes Rain due its size and thus its limited relevance in the market. Secondly, Rain is only available on the LTE technology and thus would tend to be limited to wealthier users and a limited geography. Thirdly, it is not comparable to the data bundles of the main four operators. Here consumers are purchasing an additional data bundle in addition to an

[8] DSMI final report, section 3.3
[9] South Africa, Nigeria, Morocco, Egypt, Ghana, Kenya. See Discussion document, Figure 10
[10] DSMI final report, Figure 26 and Figure 27
[11] DSMI final report, Figure 24 and Figure 25
[12] DSMI final report, Appendix B, p. 279

existing service which can be used for voice or SMS as well. Rain's product is data-only and would tend to complement the service of one of the four operators in practice. The discussion document itself points to the role of voice services in its assessment of competition.

2.7.6. While acknowledging that there are challenges associated with international pricing data[13], the discussion document does not consider complementary evidence to understand and test the results. For instance, in the DSMI Report, the Commission itself showed that Vodacom and MTN's profitability in South Africa is typically much higher than their operations in other countries which is consistent with the international pricing evidence which shows that South Africa compares poorly (we discuss this in more detail further below). In addition, a consideration of international pricing comparisons for postpaid services shows that South Africa's relative performance is slightly better than for prepaid. This shows that despite the different country characteristics, operators in SA are able to achieve higher ranking in postpaid and therefore the prepaid outcomes which are materially inferior are indicative of concern regardless of where in the rankings SA lies.

2.8. Like the Commission in the DSMI, the discussion document has also considered non-price (quality) factors. Our submissions on this aspect are as follows:

2.8.1. Some caution should be noted around the interpretation and use of the GSMA Mobile Connectivity Index data that the discussion document appears to have used to measure speed and coverage. The speed and coverage figures in the GSMA data are normalised to fit into a 0 to 100 distribution. Thus a country that has 0 for coverage merely has the minimum coverage figure across all the countries, rather than no coverage. What this means is that the true difference between countries may be far less or more exaggerated that what the indexed values suggest. For example, Figure 12 in the discussion document suggests that South Africa has a download speed twice as fast as Morocco[14] but in truth this may not be the case at all.

[13] Discussion document, para. 47
[14] Note that we are unable to find the corresponding values in the 2017 GSMI Connectivity Index data.

2.8.2. The choice of comparator countries can have a significant effect on the inferences drawn from the price comparison analyses. When assessing non-price factors, the discussion document in many instances only considers a combination of BRICS countries and ITU "advanced" countries (using ITU data for prices), while in other cases considers only African countries (using RIA data for prices). However, the ITU itself does not define what constitutes an "advanced" country in the data source document referenced by ICASA under Figures 13, 15 and 16. The Commission suspects that the "advanced" classification is drawn from the GSMA, which classifies countries based on its Mobile Connectivity Index[15] score which is based on a large variety of factors (and does not define South Africa as an advanced country in any event[16]).

2.8.3. The discussion document also does not provide any reason why the analysis of non-price factors should be limited to this restricted sample of BRICS and "advanced" countries, and indeed we do not believe that this is justifiable. The GSMA classification uses factors as diverse as gender equality and schooling levels but also factors that would create a clear endogeneity in the analysis such as mobile tariffs (i.e. prices), speeds, and coverage. Restricting the analysis to a group of countries based on a range of Mobile Connectivity Index results is thus clearly unjustifiable. We submit that, at a minimum, for each and every analysis conducted, at least one version including the entire dataset (i.e. all countries) should be included. As per the Commission's own assessment, there are 155 countries for which both ITU pricing data and GSMA Connectivity Index data are available[17] .

2.8.4. Increasing the number of comparator countries could have a particularly important effect on the cross-sectional regression analysis undertaken by ICASA. As indicated in the discussion document, the analysis is based on data for 24 countries over four years. The reason for this restriction appears to be that these countries had specific pricing data available over the four years. It is likely more prudent to use one year of ITU data in order to expand the number of countries used in the regression.

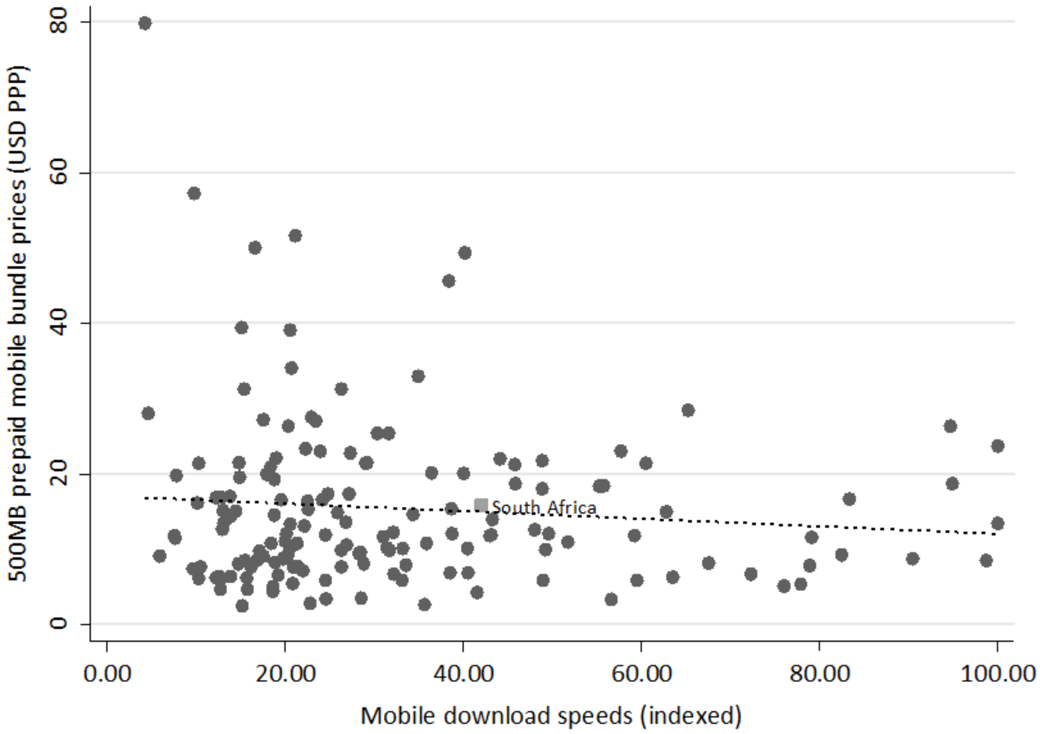
[15] GSMA, The State of Mobile Internet Connectivity, 2019
[16] It defines South Africa as a "Transitioner" rather than "Advanced" (GSMA, The State of Mobile Internet Connectivity, 2019, p. 51)
[17] DSMI final report, para. 755

2.8.5. There is also a lack of clarity regarding the nature of the data, the nature of the "hedonic" price regressions and how the entire analysis was undertaken. It is also unclear why the 'hedonic' prices are not presented anywhere or used in any other part of the analysis. The discussion document presents no justification or reason for such an approach.

2.8.6. Notably the regression analysis also contradicts the analysis of the relationship between price and certain quality factors earlier in the discussion document. One example of this is the relationship between prices and speed. The scatter plot analysis of data prices relative to mobile download speeds in Figures 12 and 13 suggests that higher prices in South Africa may be compensated for by better quality (higher speeds). The implicit suggestion is that prices and speed are positively related, although the expected nature of the relationship is never actually discussed in the discussion document. However, according to the regression analysis presented in Table 2, mobile download speeds are negatively associated with prices, which suggests that South Africa's higher speeds cannot explain South Africa's higher mobile data prices as they are expected to be associated with *lower* prices. This may be because higher speeds promote usage and scale in operations, reducing unit costs and permitting lower prices (except where market power is present).

2.8.7. In fact, constructing a scatter plot of speed against price for *all* available countries along with a fitted trend shows that, if anything, higher speeds are associated with *lower* prices, which would suggest that South Africa's performance is *poorer* when considering non-price factors. The following figure shows this scatter plot.

Figure 1: ITU 500MB prepaid mobile data vs download speeds - all countries

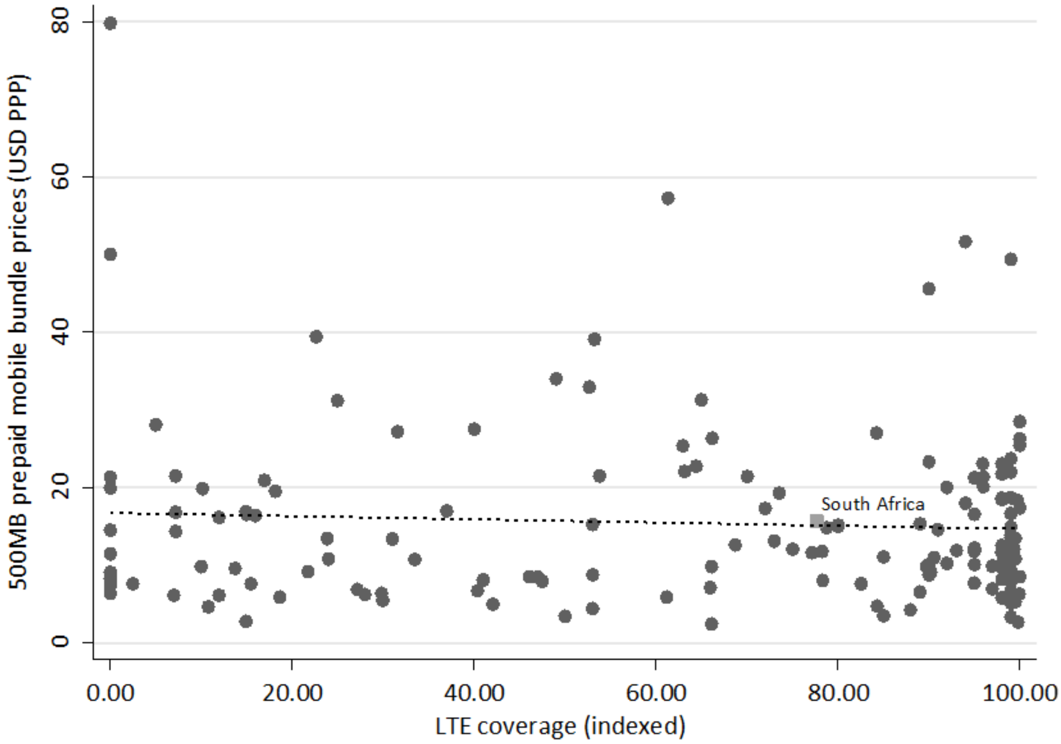


Source: ITU and GSMA 2017

Notes: ITU prices are USD PPP prices. Download speeds are indexed. Relationship is not statistically significant at the 10% level.

2.8.8. A similar contradiction is observed for LTE coverage, which is negatively related to price in the regression (although not always statistically significant), but the scatter plot analyses in Figures 14 and 16 are used to suggest South Africa's high data prices may be related to higher levels of LTE coverage. Again a scatter plot using all available countries suggests, if anything, a negative relationship between coverage and prices which would imply that South Africa performs more poorly when considering non-price factors. Once more, coverage may promote usage and build scale, which in turn may reduce unit costs, promoting lower prices (where market power is not present).

Figure 2: ITU 500MB prepaid mobile data prices vs LTE coverage - all countries



Source: ITU and GSMA 2017

Notes: ITU prices are USD PPP prices. 4G coverage is indexed. Relationship is not statistically significant at the 10% level.

2.8.9. Indeed, the Commission refers ICASA to its own assessment of non-price factors in the DSMI report[18]. The Commission's analysis of non-price factors and cost drivers and their influence on mobile data prices found that there does not appear to be a strong relationship between mobile data prices and any of data speeds and latency, LTE coverage, spectrum assignment, land area, population size, population density, urbanisation, and GDP per capita. During the course of the inquiry, operators have been unable to present any explanation of South Africa's higher prices on the basis of any of these non-price factors despite having the data available at least on their own operations. Our conclusion to that assessment is worth repeating here:

> *"In summary, Vodacom, MTN, and Telkom all criticised the Commission's benchmarking analysis for not taking into account specific non-price factors such as cost- and quality-related factors, which they argue could explain the higher prices for data in South*

[18] Section 11.2, p. 281-292

Africa. However, the operators themselves have failed to show any evidence for how these non-price factors would actually affect prices or the significance of these factors more broadly."[19]

2.9. A final submission from the Commission on the international price comparisons is that comparisons over time and across both postpaid and prepaid also offer important insights outside of pure ranking. South Africa's far better performance in postpaid relative to prepaid suggests outcomes and competition in prepaid are less effective. Similarly, the drops in ranking indicate that prices are not reducing as fast as peer countries. In short the performance of South Africa relative to other countries should be of considerable concern.

Complementary analysis

2.10. The discussion document considers barriers to entry, market share, international price comparisons, and the role of voice services in finding that the market is ineffectively competitive. In considering whether any operators possess SMP, the discussion document also consider vertical integration and market shares. However, the analysis of competition as presented appears to rely to a large degree on the international price comparisons which are subject to a number of caveats themselves. The competition analysis as well as the analysis of SMP can however be complemented and strengthened with the aid of additional evidence beyond what has been discussed above.

2.11. Firstly, one important piece of evidence that is detailed in the DSMI final report, and can complement the analysis in the discussion document, is profitability. A useful way of determining whether prices are high due to cost factors or due to operators exercising market power is to assess the profitability of the operators. The Commission conducted such an assessment in the DSMI by evaluating the profitability measures of the incumbent MNOs over time. Abnormal profitability is a strong and direct indicator of ineffective competition, market power, and the potential abuse of market power through excessive pricing.

2.12. Importantly, by assessing profitability measures and not just the final prices, the pricing effects of cost-drivers, such as spectrum, are implicitly accounted for, so a finding of

[19] DSMI final report, para. 809

higher than normal profits is far more likely to be indicative of ineffective competition at the retail level. Indeed, the Commission found in the final DSMI report that both MTN and Vodacom have been able to sustain abnormally high profits, exceeding that of their operations in other countries and beyond any reasonable measure of the cost of capital. We summarise the analysis here, but a full treatment can be found in the Commission's DSMI final report[20] .

2.12.1. First, the Commission analysed the incumbents' financial statements in terms of standard accounting ratios of profitability. This includes Earnings Before Interest, Taxes, Depreciation and Amortisation ("EBITDA") as a percentage of sales revenue and Return on Capital Employed (ROCE) over time as well as Earnings Before Interest (EBIT) margins. We then compared the various measures for the Vodacom and MTN against their operations in other countries. Vodacom's South African operations have consistently seen materially higher earnings before interest and taxes (EBIT) and earnings before interest, taxes, depreciation and amortisation (EBITDA) margins over time, as well as higher returns on capital employed (ROCE). MTN South Africa's ROCE is also higher than that of the MTN Group and in the context where the SA market share is amongst the lowest across the operations in the MTN Group.

2.12.2. Second, the Commission analysed the price-cost mark-ups of Vodacom and MTN over time, while also accounting for the cost of capital. High levels of profitability and mark-ups are indicators of market power and a lack of effective competitive constraints on pricing levels. Vodacom South Africa's overall mobile operations, inclusive of data and voice, have consistently delivered mark-ups of prices in excess over economic costs (which include a fair return on capital) over the past six years. This level of mark-ups is sufficiently high to establish a *prima facie case* of excessive pricing by Vodacom. A similar exercise for MTN reveals lower, but still positive and substantial mark-ups that are consistent with MTN having market power.

2.13. Secondly, another key aspect considered by the DSMI Report was the extent to which the larger operators have responded to the price changes of Telkom more recently and Cell C in the past. The Commissions considered this and the submissions of the operators in detail and found that there was no response from the larger operators to

[20] DSMI final report, Section 4.3

the pricing behaviour of the challenger networks. This shows that the larger two operators – Vodacom and MTN – are not competitively constrained by the challengers. The only possible evidence of potential pricing responses seemed to be on the post-paid data-only packages of Telkom, which represent a limited part of the market. This is discussed in more detail in Section 4.3.4 of the DSMI Report.

2.14. Thirdly, a key dynamic in the mobile data services market in South Africa is the structure of pricing whereby poorer, low-volume consumers face higher 'per megabyte' prices or are forced to purchases restricted, short-validity data bundles which are of lower utility. This points to a significant market failure where poorer customers who do not have the alternatives for Internet access that richer consumers have, are exploited to a greater degree. Exploitative price discrimination strategies require dominance to implement. This should be considered in any assessment of effectiveness of competition and is discussed in greater detail in Section 5 of the DSMI Report.

2.15. Finally, the Commission also thinks it is important in a regulatory context to not just take a static analysis, but a further element that is necessary in the retail market and the other markets is a forward-looking assessment of the state of competition, SMP and accordingly the need for intervention. The impending roll-out of 5G technology may have substantial implications for competition. Currently only two firms, Vodacom and MTN, likely have the capability and financial resources to invest in such technology on a large scale, or to support the entry of other players through agreements that benefit them. These operators have a distinct advantage over the smaller players currently, and thus the advent of new technology has the potential to entrench the dominance of the incumbent operators. What this means is that remedies must be strong to effect change in the current market but also forward looking in anticipating how the market will change. Market inquiries must consider future changes in such dynamic markets.

3. SPECTRUM

3.1. In the discussion document, ICASA engages in a market definition exercise for spectrum, finding a broad market across frequency bands[21] that is national in

[21] Discussion Document, para. 79

geographic scope.[22] Based on this market definition, ICASA finds that the market is relatively concentrated.[23] However, ICASA does not find any competition concerns regarding current spectrum holdings shares especially with respect to the potential concern where too much spectrum is held by one player, although ICASA notes that spectrum caps will need to be considered in future assignments in order to ensure that this remains the case.[24] As such, ICASA does not identify any operator with significant market power.[25] However, ICASA recognises that spectrum assignment can have a significant impact on competition in downstream markets and, therefore, recommends that spectrum be assigned as soon as possible in a pro-competitive manner.[26]

3.2. The Commission agrees that a) spectrum be assigned as soon as possible, as delays raise costs unnecessarily and b) the assignment should be pro-competitive by design, as actual assignments can have a significant impact on competitive forces in the downstream market. The Commission's DSMI report specifically recommends that new assignments of spectrum should be asymmetric in favour of smaller operators.[27] The Commission has also made specific submissions on spectrum including the design of the spectrum assignment process prior to the release of the Information Memorandum ("IM")[28] and on the IM itself.[29]

3.3. Further to the above, the Commission makes the following additional submissions regarding the assessment of spectrum:

3.3.1. We do not consider it useful to define a market for spectrum which should rather be considered as an input into the wholesale markets. Importantly, there is no secondary market for spectrum and thus there is no real competitive dynamics or even a price to be considered. We suggest that this is treated as such or at least explicitly recognised in the discussion document.

3.3.2. The consequence of using this approach and the resultant finding of no significant market power amongst the operators is that it implies that wholesale interventions should not be applied in the spectrum "market". While ICASA

[22] Discussion document, para. 80
[23] Discussion document, para. 84
[24] Discussion document, para. 89
[25] Discussion document, para. 94
[26] Discussion document, para. 96
[27] See for instance section 6.3.1 of the DSMI final report
[28] Submission to ICASA, 20 September 2019
[29] Submission to ICASA, 31 January 2020

does recognise the competitive impact of spectrum assignment downstream and recommends pro-competitive assignment (as a general point regarding spectrum rather than a remedy for ineffectively competitive markets), it should also be recognised that the assignment of spectrum itself can be regarded as a wholesale intervention that can ultimately address ineffective competition in the retail market, much like any other wholesale intervention.

3.3.3. ICASA's acknowledgement of the potential role of spectrum caps in future assignment design reflects the Information Memorandum ("IM") released on 1 November 2019,[30] which provides for the use of spectrum caps but requested further submissions on how spectrum caps should be implemented in the context of the auction. To the extent that the discussion document provides a firmer direction on spectrum and the use of spectrum assignments as a wholesale remedy, there is a risk that the IM's approach to spectrum caps differs from the discussion document. Of particular significance is the mention of spectrum caps on particular spectrum bands such as the critical sub-1Ghz spectrum[31] which must be an important consideration for the IM. Moreover, reference to a 37% cap in the UK in the discussion document may infer that this is appropriate in the context of South Africa, but which is plainly not the case as outlined in detail in the Commission submission on the IM.

4. SITE ACCESS

Findings

4.1. ICASA's market definition exercise concluded on a preliminary basis that the market for site access is distinct from the market for roaming.[32] ICASA did not take a firm view on the geographic boundaries of the market and considered both national and sub-national markets.[33] The latter are held to be at least as narrow as local and metropolitan municipalities. Barriers to entry assessed in the discussion document include municipal wayleaves[34] and smaller operators submissions regarding refusal

[30] ICASA IM, Government Gazette Notice No. 42820, para. 5.5
[31] Discussion Document, para. 87
[32] Discussion document, para. 103
[33] Discussion document, para. 105
[34] Discussion document, para. 106

to provide access by operators with market power as well as other conduct.[35] ICASA considers the market to be extremely concentrated based on market share calculations,[36] largely in favour of the incumbent operators, both nationally and at the local level although Telkom was also found to be dominant locally in 11 municipalities.[37] Using estimates provided by MTN and Vodacom for OPEX and Cell C, MTN, and Vodacom, ICASA determined that site access prices are not significantly above costs.[38]

4.2. In a similar vein to the retail market analysis in the discussion document, the Commission submits that caution should be exercised in the assessment of market shares and dominance at a local level.

4.2.1. While utilising municipal boundaries for an analysis may be an interesting exercise given the delineation of the data, there is no basis to believe that the scope of a local market would bear any resemblance to a municipal boundary.

4.2.2. This is important as a finding that Telkom or Cell C is dominant in a particular municipality may be misleading and merely a feature of the specific boundaries and placement of sites.

4.2.3. Furthermore, in assessing competitive effects, the discussion document should recognise the bargaining dynamics that are likely to be at play. Even to the extent that a Cell C has a high share of a particular area, its ability to increases prices to other operators is severely constrained due to its need to negotiate access to sites in other areas. The reciprocal nature of arrangements, and in particular the stronger position of Vodacom and MTN who have many more sites, means that there is unlikely to be any market power based on higher shares in a local area.

4.3. A further concern with the discussion document is the focus on sites, rather than facilities more broadly. For instance, the final findings of the priority markets inquiry decided that ducts and poles should be included.[39] Access to ducts and poles is likely just as crucial as the sites themselves when considering the upstream inputs in the value chain. More broadly, the final findings of the priority markets inquiry included

[35] Discussion document, para. 108
[36] Discussion document, para. 109
[37] Discussion document, para. 114
[38] Discussion document, para. 122
[39] ICASA Priority Markets Discussion Document, p. 28, para. 4.3.1.2

facilities in the upstream infrastructure markets, the wholesale supply of mobile network services and the retail market for mobile services.[40] The discussion document should either include all facilities in its consideration or consider additional markets for access to other types of facilities.

4.4. It is also not clear whether the site market share analysis refers to the primary 'owner' of the site or where sites are shared. For instance, where Cell C uses space on a Vodacom site, it is not clear whether this counts as a site for Vodacom, or a site for Vodacom and a site for Cell C (the notes to Figure 24[41] suggest the former is the case). Furthermore, it appears that all sites were included in the analysis which would mean that where a site is not shared with anyone else (self-supply) it is included in analysis. While this is likely the correct approach, this should be stated explicitly.

4.5. Furthermore, the apparent finding of ineffective competition is not explicitly stated nor are operators with SMP identified. The identification of operators with SMP is key as recommendations should not apply equally to operators without SMP.

4.6. The discussion document also fails to explicitly consider forward-looking, dynamic aspects of the market. Specifically, the impending roll-out of 5G technology will require significant investment and there is a belief that 5G will be more reliant on facilities sharing. Smaller operators will again be at the mercy of the incumbents, with a persistently weak bargaining position in getting access to sites and equipment. This will again open the market to potential abuse of market power with larger operators able to inhibit smaller players by refusing access to these facilities.

4.7. The forthcoming release of additional spectrum and the obligations regarding coverage and speed that would be imposed on licence winners are likely to disadvantage smaller operators, such as Rain, Telkom and Cell C, further. The imposition of such obligations will place smaller operators in a weakened position where access to sites of large operators is a necessity in terms of their licences.

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[40] ICASA Priority Markets Discussion Document, p. 45, para. 5
[41] Discussion document, p. 69

Recommendations

4.8. The discussion document's recommendation for addressing the identified competition issues in the market is to re-draft the Facilities Access Regulations along with more detailed guidelines.[42] The regulations would include a requirement to publish site information (sharing opportunities) online, specify time limits for the consideration of requests for access, and provide rules regarding technical and economic feasibility. The discussion document expects the regulations would also preclude the indefinite reserving of space on masts for the host's own operations and facilitate expedited roll-out of sites by the smaller operators. Further to this, the discussion document recommends accounting separation for the provision of sites to allow transparency in costs and pricing.[43]

4.9. The Commission agrees that changes are required in respect of the facilities leasing regulations. In the DSMI Report, the Commission recommends a number of changes to the facilities leasing space, including both regulatory and legislative changes (the latter of which of course ICASA itself cannot implement).[44] While the proposed amendments by ICASA do attempt to address the competition issues identified by market participants as described in the discussion document of refusal or constructive refusal to provide access to facilities, it is not clear that the proposed remedies would ultimately have the desired impact. This is partly because the proposed remedies to not address the crux of the concerns: the nature of bargaining dynamics in the market.

4.9.1. While operators may engage in mutually beneficial passive infrastructure sharing arrangements to reduce operating or capital costs, there remain persistent complaints on gaining access to facilities and whether access is granted on fair commercial terms. This is recognised by the discussion document. It was also recognised in submissions to the priority markets inquiry of ICASA as well as submissions made to the Commission in the course of the DSMI. These complaints tend to arise where there is inequity in passive infrastructure holdings between parties to the agreement and thus these complaints generally emanate from Cell C and Telkom.

[42] Discussion document, para. 128
[43] Discussion Document, para. 129
[44] DSMI final report, section 9.3.2

4.9.2. Refusal of access, or strategies that amount to a constructive refusal (such as prohibitively high access prices) provide an incumbent with a competitive advantage over a newer rival as it either struggles to serve certain customers, or it incurs additional costs in doing so. This restricts the expansion and competitive significance of the new rival. Moreover, even where the incumbent does provide access, the necessity of sites, the costs of self-building, and the inferior locations available for new sites, mean that the larger incumbent operators have significant bargaining power in negotiating site access prices and terms. There is evidence that smaller operators are facing higher prices for access than larger operators.[45] This bargaining dynamic will remain in the market as the share of site ownership is unlikely to change to any significant degree.

4.9.3. Of course, the discussion document's own analysis points to an ineffectively competitive market with SMP for Vodacom and MTN. Thus, one expects that the concerns observed in the market are the result market power and the resultant bargaining dynamics.

4.10. Given the above, the Commission is of the view that the proposed remedies will not have any real impact on site access or the challenges that the discussion document is intending to address:

4.10.1. In terms of information on site locations, there is no indication from submissions that site information published online will address concerns. The concerns evidently focus on existing, known sites that the smaller operators are well aware of and allege that they cannot gain access to on reasonable terms.

4.10.2. Enforcing time limits would not prevent a refusal to provide access, but would merely hasten such a position being reached. Again, the incentive and ability to refuse access stems from the SMP of the large operators and as such time limits are unlikely to have any impact by themselves.

4.10.3. With respect to specifying rules regarding technical and economic feasibility, further clarification on this point is required. These terms exist in the current

[45] DSMI final report, section 6.7.3

legislation[46] and Facilities Leasing Regulations[47] and the Commission understands that there would be no barrier to guidelines or further regulations on these aspects being released without redrafting the Facilities Leasing Regulations. Moreover, as the DSMI report shows, the Commission has recommended that ICASA define essential facilities (as it is required to do).[48] This will also require a detailed consideration of the meaning of technical and economic feasibility. New developments in site sharing must also be carefully considered in such a process. More active sharing or 'deep passive sharing' as Vodacom refers to it[49] is occurring which pose new obstacles and therefore justifications for denying access.

4.10.4. Acting against the reservation of space on the mast, or even defining technical and economic feasibility, may have some value, but given the bargaining and competition dynamics this is again unlikely to prevent a refusal to provide access as the larger firms can simply engage in constructive refusals by specifying other terms or setting prices that are too high. In other words, merely ensuring site access is provided does not mean that the access will be effective or provided on reasonable terms. Without addressing pricing concerns in addition to other concerns, remedies on site access are unlikely to have any substantial impact.

4.10.5. Furthermore, it is not only a constructive refusal to deal that is of concern here. The mere fact that a challenger operator faces relatively high costs for site access will impact its ability to compete with incumbents downstream, contributing to uncompetitive outcomes. Thus, one must also be concerned with a "raising rivals' costs" theory of harm.

4.11. The omission of a pricing element in the proposed remedies in the discussion document appears to be driven by the findings that site rental prices are not at a substantial premium to the costs of providing access through building it. However, the Commission has concerns regarding the analysis and believes there is scope for further analysis. This is detailed below:

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[46] Electronic Communications Act, 2005 (Act No. 36 of 2005), Chapter 8, 43(4)(a)
[47] Facilities Leasing Regulations of 2010, para. 2.1 and 2.2
[48] DSMI final report, para. 734.1
[49] Vodacom's submission to the DSMI in respect of the provisional report on 14 June 2019 (non-confidential), p. 121

4.11.1. There is evidence that smaller operators are facing higher prices for access than larger operators.[50] It is not clear from the discussion document whether these differences have been considered when comparing access prices to costs. Of course, regardless of the cost of self-building, if smaller operators face higher prices than larger operators for site access, this will feed through into the competitiveness of wholesale markets that rely on site access.

4.11.2. Furthermore, in addition to the above, it is not clear that the evidence relied on by the discussion document is sufficient. It is not clear from the discussion document whether ICASA received or collected site pricing information from MTN and Vodacom. The estimates of OPEX and CAPEX provided to ICASA by the MNOs do not appear to be sufficiently reliable estimates such that firm conclusions can be drawn. The discussion document itself states that it is not clear what is included or excluded in numbers provided to it and used in its analysis. ICASA has previously relied on cost models to estimate the cost of wholesale access in terms of mobile termination rates. A similar exercise would be useful regarding site access, given the repeated complaints from challenger operators that access prices are too high.

4.11.3. The sharing of sites with more than two operators has not been factored into the cost calculations for site access. The discussion document acknowledges this and notes that site owners do not offer discounts in these instances.[51] The practice of site sharing is fairly pervasive and the practice does imply that site costs overall are lower than estimated in the discussion document for the larger operators. Further attention can be given to this as ICASA would appear to have information on how many sites are shared and with how many operators. It is also not clear that the impact of newer types of sharing such as active sharing, or Vodacom's "deep passive sharing", have been considered.

4.11.4. Similarly, the analysis does not consider the fact that some or all of the CAPEX on existing sites has already been recouped by incumbent operators (which is also likely to be as a result of first-mover advantages). Thus, the average cost of providing access to sites is likely to be lower than estimated, which implies

[50] DSMI final report, section 6.7.3
[51] Discussion document, para. 122

that there is a greater disparity between the prices charged by site owners and the costs of providing access.

4.11.5. In essence, given that the larger operators' costs are subsidised by the challenger operators, the costs for incumbents will be less given that CAPEX has already been recouped at least to some degree, and that challenger operators may face higher prices for site access, challenger operators are forced to incur larger costs upstream than the incumbents with market power. The result is that the larger, incumbent operators have a significant cost advantage over the smaller operators. Their first-mover advantage therefore allows them to generate additional revenue, effectively subsidising their network. This has consequences for competition.

4.11.6. In short, the cost of a particular site is likely to be higher for the sharer than the incumbent. This again points to an important and substantial imbalance that the remedies must account for in a substantial way.

4.12. Once these factors are considered in the discussion document's analysis, it is likely the findings will more accurately reflect the complaint of challenger operators – that prices are frequently uneconomical – and highlight the need for price regulation for site access, although it may not be necessary to institute cost-based price regulation, at least for facilities that are not designated as essential. For instance, in the case of smaller operators being charged higher prices for access than the incumbent operators, a simple rule of non-discrimination in pricing and services relative to operators with SMP may be sufficient. The incumbent operators are more likely to offer mutually beneficial terms to each other, as their site holdings are relatively similar and, as a result, their bargaining positions are likely to be more evenly matched.

4.13. Notwithstanding this, the Commission urges ICASA to proceed with the process of defining essential facilities. ICASA has previously communicated to the Commission that there is no apparent purpose to do so given that electronic communications facilities leasing is an obligation, and irrespective of whether a facility is designated as an essential facility, it is still subject to technical and economic feasibility. However, as described in the DSMI report, the Commission is of the view that such an exercise would provide greater clarity on what constitutes an essential facility and what may be considered in an assessment of technical and economic feasibility. Furthermore, access price regulation may only be feasible for essential facilities. There is uncertainty regarding whether wholesale rate regulation would be feasible unless the facilities are designated as essential.[52] The Commission suggests in the DSMI report that a stricter cost standard such as cost-based access be applied to essential facilities, while a less strict standard be applied to non-essential facilities.[53]

5. ROAMING

Findings

5.1. ICASA defined a narrow market for the provision of a national roaming service.[54] The geographic scope was assessed at a local level although it is not clear whether it was defined as such.[55] ICASA identified site infrastructure capacity, switching costs, and the length of contractual agreements as barriers to entry.[56] High levels of concentration were found in 234 municipalities[57] with MTN and Vodacom identified as having significant market power, with market shares of in excess of 45% in a number of municipalities[58] and SMP in rural areas in particular.[59]

5.2. Essentially, the discussion document finds that with respect to roaming, *"intervention is warranted"*[60] and the Commission agrees with this statement, as is evident from its findings in the DSMI.

5.3. We do submit that caution is required in the assessment of the market shares and SMP. The roaming market again provides an example of where calculating market shares on the basis of municipal boundaries is informative but problematic when treating these boundaries as geographic markets in and of themselves. In this case market shares are measured by the number of sites, thus in certain municipalities only Vodacom is dominant while in others only MTN is dominant[61]. However, given that MTN and Vodacom essentially have universal coverage in South Africa, any area

[52] DSMI final report, section 6.7.2
[53] DSMI final report, para. 734.1
[54] Discussion document, para. 141
[55] Discussion document, para. 152
[56] Discussion document, para. 156-157
[57] Discussion document, para. 164
[58] Discussion document, para. 162
[59] Discussion document, para. 160
[60] Discussion document, para. 181
[61] Discussion document, para. 184

where only MTN and Vodacom are available to a subscriber would mean that market shares are more accurately described as 50-50. In any event, there would (by design) typically only be one site for each operator available at any specific place in South Africa. Thus, the fact that one municipality has more sites for one operator would not mean that one is dominant and the other is not.

5.4. While the discussion document acknowledges changes in the roaming market and the agreements that now include, for instance, seamless handover and LTE technologies, a forward-looking assessment is also necessary in order to anticipate further hurdles. Past experience shows that the inclusion of the latest technologies in roaming agreements was not immediate or automatic. This partly drove the slower take up of new technologies by the challenger operators which in turn affected their ability to compete. The remedies for roaming must consider the possibility that operators hosting roaming will delay inclusion of new technologies (i.e. 5G) in order to inhibit the growth of challenger operators.

Recommendations

5.5. Following its findings, the discussion document recommends that roaming be mandated in areas where roaming providers are dominant.[62] It also proposes that roaming regulations be introduced that would set out agreement principles, timeframes, procedures, service parameters and dispute resolution mechanisms.[63] In addition, the discussion document recommends that accounting separation be implemented to enhance transparency and allow ICASA to monitor pricing[64], while adopting a wait-and-see approach to outright price regulation given the dynamism of the market.

5.6. While the Commission agrees that remedies are needed in the roaming market, the Commission submits the remedies proposed in the discussion document are inadequate and not address the concerns identified. The Commission's view is that one key area in which the proposed remedies can be complemented and strengthened is with respect to the pricing of such agreements. Much of the analysis on roaming in

[62] Discussion document, para. 188.1
[63] Discussion document, para. 188.2
[64] Discussion document, para. 188.3

the discussion document is consistent with that of the DSMI final report, however there are some key differences that ultimately influence the nature of remedies.

5.6.1. In its analysis of prices, the discussion document finds that roaming access prices are high relative to retail prices and relative to modelled network costs,[65] while year-on-year roaming access prices have been decreasing.[66] The discussion document also identifies the quality of access to be a concern in the market, particularly in the historical context.[67] It also considers whether roaming access seekers have any countervailing power and finds that access seekers have some countervailing power as a result of there being two network operators with whom to negotiate (Vodacom and Telkom), switching is found to be easy, with the option of building own infrastructure also being present.[68] However, countervailing power is limited by the high cost of building their own infrastructure, contractual terms that lock seekers into contracts for extended periods of time and for high volumes, and the limited number of alternatives.[69]

5.6.2. Notwithstanding the issues identified by ICASA, it notes that there have been a number of changes in the market from the perspective of price, quality and coverage.[70] As such, it finds that roaming operators are likely to be able to compete more effectively on price in future. The discussion document notes concerns with prematurely introducing price regulation in a market with significant changes occurring and likely to occur in future. It thus resists including a pricing element in remedies, seeing it as *"hasty to implement strong remedies on pricing"*[71] .

5.6.3. However, the Commission submits that the evidence available strongly suggests that these changes will not be sufficient to allow roaming operators to compete effectively on price in the retail market. The latest roaming contracts provided to the Commission contain projected roaming rates at least until December 2020. The Commission's analysis of these roaming rates relative to projected effective retail mobile data prices, as measured by the average

[65] Discussion document, para. 169
[66] Discussion document, para. 167
[67] Discussion document, para. 170
[68] Discussion document, para. 171
[69] Discussion document, para. 174
[70] Discussion document, para. 178
[71] Discussion document, para. 186

revenue per GB, demonstrate that roaming rates are likely to remain persistently high. Indeed, unless contracts are renegotiated, it is expected that roaming access pricing will worsen relative to effective data prices in future. Further discussion and evidence of these findings are contained in the DSMI Report.[72]

5.6.4. Nonetheless, the Commission is alive to ICASA's concerns on pricing, which is precisely why the Commission has not suggested that cost-based price regulation be implemented. This is due to the dynamism in the market and concerns regarding infrastructure investment and the potential for cherry-picking behaviour. Given the evidence, the Commission finds that roaming seekers should at a minimum be able to compete in the retail market while accessing roaming services.

5.6.5. As such, in the DSMI report, the Commission recommends setting a price ceiling for roaming prices at the effective price per GB of the roaming provider. While ICASA may be reluctant to institute price regulations in terms of roaming in the current climate, the discussion document has noted clear concerns with current pricing outcomes and the Commission's assessment suggest that these concerns will grow over time. The Commission, therefore, submits that ICASA include in its final recommendations a requirement that operators with SMP provide roaming access at a price that reflects a reasonable discount on retail prices.

5.7. Over and above the position with respect to pricing remedies in the discussion document, the Commission agrees that accounting separation be implemented, as this would be essential for monitoring and enforcement of future roaming agreements. Indeed, the same recommendation for accounting separation in respect of MTN and Vodacom is made in the DSMI report.

5.8. In terms of mandating a roaming offer where roaming providers are dominant, it is unclear whether this recommendation will have any impact in the market by itself. While this might create some bargaining power for the roaming operators to enter into agreements, roaming agreements are already entered into on a commercial basis without enforcing mandatory offers. The combination of a mandatory roaming offer with

[72] DSMI final report, section 7.5.3

certain minimum standards on quality and other aspects, along with a pricing condition will be more powerful and effective, and indeed this closely resembles the Commission's recommendations in the DSMI report.

6. MVNO AND APN SERVICES

6.1. The discussion document considers a market for the wholesale supply of MVNO and APN services, and considers it likely that MVNO and wholesale APNs are part of the same market and that the market is national in dimension.[73] However, it does not ultimately conclude on the relevant markets. This is apparently because while it finds these services are ineffectively competitive, it argues any competition concerns at this level *"likely derive from market power upstream in respect of site access and roaming, and can therefore be remedied at those levels"*[74]. Thus, it also does not conclude on whether there is significant market power for the provision of wholesale access to MVNO and APN services[75] and it does not make recommendations in respect of this market.[76] Indeed, the discussion document is of the view that the remedies recommended for site access and roaming will improve competition in the market for MVNOs and APNs. The discussion document proposes to merely monitor developments with MVNO and APN services while roaming and site access remedies are effected.

6.2. The reason for the discussion document to simply not define markets on the basis of the apparent conclusion of ineffective competition is unclear. The Commission submits that the discussion document should resolve this aspect of the analysis. Specifically, we note that there is no market, and no market in the value chain presented by the discussion document, that would comprise the wholesale services of the operators (the services effectively supplied to their own retail businesses). Currently the only wholesale market in the value chain illustration is the market for roaming. The value chain itself, as presented, suggests that retail customers purchase roaming services which is incorrect as only other operators purchase roaming services. It is also not

[73] Discussion document, para. 195-197
[74] Discussion document, para. 201
[75] Discussion document, para. 202
[76] Discussion document, para. 203

clear what Vodacom and MTN's retail arm would purchase at a wholesale level when there is no wholesale access market in the value chain.

6.3. It is important to distinguish between interventions to fix wholesale competition and wholesale interventions that ultimately fix uncompetitive retail outcomes. Interventions to fix wholesale outcomes include roaming regulation, facilities access regulation and spectrum assignment. Interventions at a wholesale level to address outcomes at the retail level include obligations to supply wholesale access to MVNOs and APNs, preferably at competitive prices.

6.4. Thus, while the discussion document finds that a lack of effective competition in this wholesale market would be addressed through measures upstream (such as roaming and site access), it should still consider interventions at a wholesale level (rather than upstream) to the benefit of retail competition. In the DSMI final report, the Commission found that the level of MVNO activity in South Africa is inadequate[77] due to a lack of incentives to provide access amongst other factors, and the discussion document should explore the reasons for this too. What is also important to note is that promoting competition from MVNOs may be easier than introducing new operators and evidence suggests this may have considerable benefits for consumers.

6.5. The discussion document recognises the complaints around the pricing of APN and MVNO services and the apparent refusal to supply MVNO services by some operators. While there is room for more competitive MVNOs in the market, and indeed the IM is already calling for winners of new spectrum assignments to be obligated to provide access to at least three MVNOs, the role of the WOAN must be considered carefully by the discussion document. If the WOAN is realised as envisioned, there may be no need for regulations that promote access for MVNOs on other networks. This is because the WOAN's business case is based on providing wholesale access to MVNOs and the WOAN will not have an incentive to limit or deny network access to MVNOs.

6.6. Therefore heavy-handed regulation may not be necessary or appropriate. However, some guidance is most likely required in respect of these contractual arrangements. In line with the findings and recommendations of the DSMI final report, the Commission submits the following to complement the discussion document's wholesale remedies:

[77] See the discussion in section 7.3 of the DSMI final report.

6.6.1. Firstly, MVNO access prices should reflect a discount on the access provider's prevailing effective retail rates, as measured by the average revenue per GB.[78] It is important that MVNO access prices reflect a true wholesale rate that allows MVNOs to compete in the retail market.[79] While the DSMI report recommends legislative changes be considered in this regard,[80] to the extent that such price regulations can be implemented through the mobile broadband market inquiry this would be preferable. Given the direction of the IM and the business case of the WOAN likely being based on MVNOs, forcing the take-up of MVNOs may be unnecessary.

6.6.2. Secondly, ICASA should undertake to re-institute the regulatory accounting reporting requirements for Vodacom, MTN and Telkom Openserve, which we understand it already has powers to do. Furthermore, full accounting separation and reporting is also essential for monitoring of wholesale access.

7. CONCLUSION

7.1. In summary, the Commission submits that the state of the mobile data market in South Africa means that remedies need to be strong and robust. The advent of new technologies and the possibility of further entrenchment of dominance and anti-competitive market outcomes means that remedies must be carefully considered both in terms of current concerns and future concerns in a rapidly changing market context.

7.2. To the extent possible, ICASA may also consider recommendations around legislative changes as the Commission has done in terms of s67 of the ECA in the DSMI Final Report.

7.3. The Commission remains open to further engagement and looks forward to further interactions with ICASA following our submission.

[78] DSMI final report, para. 734.3
[79] DSMI final report, para. 738
[80] DSMI final report, para. 740