

The Independent Communications Authority of South Africa

For Attention: Dr. K Modimoeng, Acting Chairperson

By Email: marketinginquiry2018@icasa.org.za

Copied to: The Competition Commission of South Africa

For Attention: Tembinkosi Bonakele, Commissioner and Themba lethu Buthelezi, Acting Divisional Manager: Market Conduct

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- PRIVATE AND CONFIDENTIAL -

25 May 2021

Dear Sirs/Madams

**SUBMISSIONS RELATING TO THE DRAFT MOBILE BROADBAND SERVICES REGULATIONS
PUBLISHED BY ICASA PURSUANT TO SECTION 67(4) OF THE ELECTRONIC
COMMUNICATIONS ACT, 2005**

1. Introduction

- 1.1 We act on behalf of a leading South African internet services provider ("**our Client**") which has instructed us to make this submission to the Independent Communications Authority of South Africa ("**ICASA**") for and on its behalf, as an interested person.
- 1.2 Due to the very nature of our Client's business and its ongoing vertical relationship with, and dependence on Vodacom Proprietary Limited ("**Vodacom**") and/or Mobile Telephone Networks Proprietary Limited ("**MTN**") for certain products and services required by our Client to conduct its business, our Client wishes to remain anonymous so as not to jeopardise or prejudice its business relationship with Vodacom and/or MTN. We trust ICASA finds this in order given the sensitive nature of the submissions set out below.
- 1.3 The purpose of this letter ("**Letter**") is to make various submissions to ICASA for and on behalf of our Client in connection with the "**Draft Mobile Broadband Services Regulations**" ("**Draft Regulations**") and the "**Findings Document on Mobile Broadband Services Inquiry**" ("**ICASA Findings**") which were published by ICASA in the Government Gazette No. 44337



on 26 March 2021 under notice no. 272, pursuant to section 67(4) of the Electronic Communications Act, 2005 (“**ECA**”).

1.4 Our Client supports ICASA’s efforts in the mobile broadband services industry and wishes to thank ICASA for the Draft Regulations and the ICASA Findings.

1.5 Following a careful and considered review of the Draft Regulations and the ICASA Findings, our Client wishes to submit the following for ICASA’s consideration:

1.5.1 several minor proposed amendments and additions to Regulations 7 and 8 of the Draft Regulations which, in our Client’s view merely supplement and support the *raison d’être* of the Draft Regulations – kindly see paragraph 2 of this Letter in this regard; and

1.5.2 a request to reconsider and amend the ICASA Findings and the Draft Regulations in relation to the effectiveness of competition in “*Upstream market 3a*” and the determination of significant market power in respect of both “*Upstream market 3a*” and “*Upstream market 3b*” (as set out in the Draft Regulations) – kindly see paragraphs 3 and 4 of this Letter in this regard.

1.6 Capitalised terms used in this Letter and not otherwise defined in this Letter shall bear the meanings ascribed to such terms in the Draft Regulations, unless stated otherwise or the context indicates otherwise.

2. **Proposed Amendments to Regulations 7 and 8 of the Draft Regulations**

2.1 Whilst our Client supports and agrees with the pro-competitive terms and conditions in relation to the SMP operators as set out in Regulation 7, our Client respectfully submits that the following additions and amendments be made to Regulation 7:

2.1.1 insert the following sentence at the end of paragraph 2:

“Additionally, to the extent that any category of retail price is below any wholesale price in relation to any SMP operator, the Authority shall immediately inform the Competition Commission thereof and shall provide all such supporting documentation to the Competition Commission as the Competition Commission may require from time to time.”

2.1.2 insert a new paragraph 3 as follows:

*“To the extent that any category of retail price is below any wholesale price in relation to any SMP operator (“**Inflated Wholesale Price**”) and the SMP operator has not provided the Authority with satisfactory evidence and explanations showing that the differential is cost based or temporary, the Authority shall be entitled to require the SMP operator to:*

- a) *reduce its wholesale price to a wholesale price which is less than the lowest comparable retail price; and*
- b) *credit or reimburse any customer which purchased from the SMP operator at the Inflated Wholesale Price, with an amount equal to the difference between the retail price and the Inflated Wholesale Price,*

for a period which is equal to the period during which the SMP operator charged the Inflated Wholesale Price.”

2.1.3 insert a new paragraph 4 as follows:

“In addition to the required reporting on retail and wholesale prices, any SMP operator must submit detailed and fully auditable supporting data and evidence of the cost per Gigabyte for total data used. This cost is to include only the direct network costs applicable to provide a wholesale data service and any indirect costs and overhead costs are to be excluded from the calculation of the cost per Gigabyte of total data used.”

2.2 Our Client respectfully submits that Regulation 8 be amended by:

2.2.1 deleting the phrase:

“but not earlier than three (3) years from the date of publication of these Regulations”;

2.2.2 alternatively, should ICASA not be amendable to the above requested amendment, by adding the following phrase to the end of the Regulation 8:

*“, provided that if during such three (3) year period the Competition Commission and/or the Competition Tribunal finds a SMP operator guilty of contravening any provision in the Competition Act, 1998 dealing with the abuse of dominance, vertical restrictive practices or horizontal restrictive practices, or enters into a settlement agreement with a SMP operator in respect of any such alleged contraventions (“**Competition Authorities Findings**”), then the Authority may undertake a review of the relevant markets for mobile services at any time so determined by the Authority but in any event not more than two (2) months following the date of the Competition Authorities Findings.”*

2.3 Our Client is of the view that the above amendments (“**Proposed Reg 7 and 8 Amendments**”) are required in order to:

2.3.1 assist ICASA to better monitor the various wholesale and retail pricing points in respect of mobile broadband services;

2.3.2 assist the Competition Commission in investigating and prosecuting any alleged contraventions of the Competition Act, 1998 (“**Competition Act**”) by Vodacom and MTN;

2.3.3 in respect of paragraph 2.1.3, enable the Authority to better understand and regulate the excessive prices currently charged to roaming partners, mobile virtual network operators (“**MVNOs**”), access point name (“**APN**”) resellers and consumers, particularly those consuming smaller data bundles. It will also provide the Authority with the opportunity to regulate pricing on a cost-plus basis where appropriate, should the Authority choose to do so; and

2.3.4 provide real and meaningful relief to the customers in the upstream wholesale national roaming coverage market, the upstream wholesale national MVNO market, and the upstream wholesale national APN services market. The latter aspect is

particularly important in our Client's view, as Vodacom and MTN continue charging wholesale prices in these markets which exceed that of retail prices charged to the end consumers of mobile broadband services – this practice has been demonstrated and substantiated by the prices per gigabyte which have been provided to ICASA.¹ By way of further example, kindly refer **Annexure A**, which clearly illustrates that the problem is not simply that wholesale prices are higher than retail prices, it is that wholesale prices can be up to 7.5 times higher than retail prices. It is impossible for APN resellers and MVNO's to be competitive on this basis and ultimately, this lack of competition will undermine the long-term benefits which consumers can obtain in a properly competitive downstream market. In this regard, our Client respectfully submits that internet service providers ("**ISPs**") have a long history of passing on any benefits obtained by them in the upstream markets, to consumers in the downstream market. This has been demonstrated regularly in the current FTTH market where concessions by FNO's (fixed network operators) to the ISPs such as doubling the line speed for the same price, are passed straight through to the consumer, almost without fail, effectively halving the consumers' data costs. There are similar examples in the ADSL industry: large ISPs such as Internet Solutions, MWEB, Vox and Afrihost sold ADSL GBs at prices well below the prevailing Telkom rates as soon as they were afforded the opportunity to do so (being when Openserve was introduced as the wholesale arm of Telkom). Accordingly, our client respectfully submits that if a lower wholesale rate is provided to MVNO's and APN Resellers, this will directly lead to a lower price per GB for end-consumers, particularly the lower LSM consumers who can only afford more costly prepaid low data bundles. These Draft Regulations present an opportunity for ICASA to bring an end to the anti-poor pricing currently prevailing in the mobile broadband market by enabling APN resellers and MNVOs to become proper competitors in the markets.

- 2.4 For so long as there are no regulations in place to promote a competitive wholesale pricing structure for the various upstream markets for MVNOs and APN resellers, any wholesale agreements which a MVNO or APN reseller wishes to concluded with a MNO is subject only to commercial negotiation with the MNO and given the lack of competitive constraints placed on Vodacom and MTN in the various upstream markets, these MNOs have limited incentive to agree to competitive wholesale prices and terms that may negatively affect the MNOs' retail operations.
- 2.5 As will be substantiated below, without the Proposed Reg 7 and 8 Amendments, our Client strongly believes that Vodacom and MTN will continue charging higher wholesale prices than retail prices and given their duopoly in the mobile broadband market generally,² their vertical integration, dominance, control of essential facilities and general SMP, the customers in the wholesale markets will remain mere price-takers with no bargaining power and no buyer power.

¹ See pages 51 and 58, paragraphs 185.2 and 224 of the ICASA Findings.

² See page 23, paragraph 82 of the ICASA Findings.

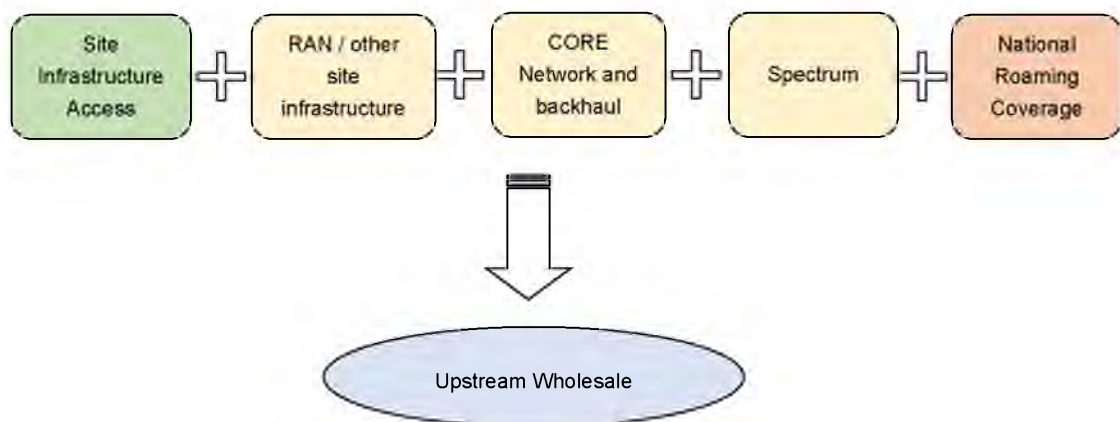
3. Proposed Amendments to Regulation 5 of the Draft Regulations: Ineffective Competition in “Upstream market 3a: wholesale national mobile virtual network operator”

3.1 Our Client agrees with ICASA’s determination in Regulation 5 that there is ineffective competition in the “Retail market”, “Upstream market 1”, “Upstream market 2” and “Upstream market 3b”. However, our Client respectfully submits that there is also ineffective competition in “Upstream market 3a”.

3.2 Our Client’s reasons for this view are as follows:

3.2.1 Only a mobile network operator (“MNO”) can create or facilitate wholesale MVNOs, as the MVNO requires access to or control of a radio access network (“RAN”), backhaul, spectrum and coverage, all of which can only be provided by MNOs. The quality and extent of the upstream wholesale MVNO which a MNO supports will be determined and limited by the MNOs infrastructure (mainly RAN) and resources (spectrum and coverage). In other words, if the MNO does not have radio coverage in rural areas, then any MVNO utilising that MNOs infrastructure will similarly not have coverage in rural areas, unless that MNO has entered into a roaming coverage agreement with another MNO which does have radio coverage in such rural areas.

3.2.2 Very simply then, the supply chain required for the supply of wholesale MVNO services consists of the following elements:



3.2.3 From the above it is clear that the upstream wholesale MVNO market is dependent on, amongst other things, the wholesale site infrastructure access market, the infrastructure itself (RAN, backhaul) and other resources (such as spectrum) at a minimum and in all likelihood also the wholesale national roaming coverage market (given that Vodacom and MTN are the only parties able to offer significant national coverage). If there is ineffective competition in the upstream wholesale site infrastructure access market and the upstream wholesale national roaming coverage market (as ICASA has found) and there is ineffective competition in the downstream retail market (as ICASA has found), then it follows that the inefficiencies in these two upstream markets (which have clearly been carried through to the downstream retail

market) must have a direct and similar effect on competition in the upstream wholesale MVNO market.

3.2.4 Accordingly, to the extent that ICASA has found that there is ineffective competition in “Upstream market 1”, “Upstream market 2” and “the Retail market”, it must, with respect, logically also conclude that there is ineffective competition in “Upstream market 3a”. In this regard, we note the Competition Commission’s findings in the Data Services Market Inquiry Final Report dated, 2 December 2019 (“**CC Data Inquiry Report**”) wherein it is stated that:

“The two largest incumbents [Vodacom and MTN] have had no incentive to offer such [wholesale MVNO] services as an MVNO is unlikely to capture customers (sic) which they themselves are not capable of capturing, whilst Telkom Mobile has not invested in the technical capabilities to offer such services.

As a result, the bargaining dynamics do not favour MVNOs getting competitive wholesale access. They have limited viable options other than Cell C, and the Cell C network is not the lowest cost network in any event.”³

“[T]here is a strong incentive for MNOs to deny access to MVNO’s due to the risk of sales cannibalisation”.⁴

(our emphasis)

3.2.5 ICASA has also noted that “there is no evidence that any participant in the market has significant market power”, and “based on this and given the changes in the market the Authority does not believe there is ineffective competition in the wholesale market for MVNO services”.⁵ Our Client respectfully submits that even if one were to agree that no firm has SMP in the market, that does not automatically or necessarily mean that there is not ineffective competition in that market. By way of illustration:

3.2.5.1 Vodacom stated that “it is better for an MNO to host an MVNO on its network, and earn consequent wholesale revenues, than having that MVNO hosted on a rival network”.⁶ If this were indeed the case, it would mean that MNOs should be incentivised to enter the upstream wholesale MVNO market and compete with Cell C for MVNO customers and thereby facilitating effective competition.

3.2.5.2 However, this has not occurred as Cell C still has almost 100% of the upstream wholesale MVNO market and despite this large market share, there is no competitive pressure being exerted on Vodacom and MTN to enter the market.⁷ This is a clear indication that competition in the upstream wholesale MVNO

³ See page 23, paragraph 27.1 of the CC Data Enquiry Report.

⁴ See page 204, paragraph 549 of the CC Data Inquiry Report.

⁵ See page 58, paragraphs 220 to 222 of the ICASA Findings.

⁶ See page 205, paragraph 557 of the Competition Commission’s findings in the Data Services Market Inquiry Final Report dated, 2 December 2019 (“**CC Data Inquiry Report**”).

⁷ See page 205, paragraph 557 of the CC Data Inquiry Report – “Cell C has been unable to exert this form of competitive pressure on Vodacom and MTN since it is not able to offer MVNOs network access at a quality comparable to what Vodacom and MTN offer their customers”.

market is ineffective and/or compromised. Our Client also submits that the mere ability of a firm to enter a market does not demonstrate that the market has or is susceptible to effective competition.

3.2.6 Furthermore, ICASA has found that there is ineffective competition in the “*Upstream market 3b: wholesale access point name services (including resellers)*”. Our Client respectfully submits that the market dynamics of the upstream wholesale APN services are very similar to that of the upstream wholesale MVNO market for the following reasons:

3.2.6.1 the APN reseller sells services of a MNO, which services are largely defined by the MNO;

3.2.6.2 the APN reseller has very little bargaining power to define the services to be sold as the APN reseller is wholly dependent on the infrastructure (RAN) and resources (spectrum and coverage) of the MNO in order to be able to conduct its business (much like the MVNOs are wholly dependent on the MNOs).

3.2.7 Accordingly, to the extent that ICASA has found that there is ineffective competition in “*Upstream market 3b*” it must, with respect, also conclude that there is ineffective competition in “*Upstream market 3a*”.

3.2.8 It is our Client’s understanding that “*the changes in the market*” which ICASA refers to in the ICASA Findings are (i) the new MVNO partnership between Pick n Pay and MTN; and (ii) that the invitation to apply (“*ITA*”) for high demand spectrum requires that MVNO offers be provided by the applicant MNOs. Our Client respectfully submits that in relation to the other markets considered by ICASA, it did not take into account the effect of the ITA and that ICASA has specifically noted that:

“within the short to medium term (the next 3 years), these changes [wholesale open access network (“WOAN”) and spectrum assignments] in the market are unlikely to have a substantial impact.”⁸

Accordingly, these future changes will not have a short-term effect on competition in the upstream wholesale MVNO market either, and similarly, a single new MVNO partnership will not have a substantial effect on competition in this market either.

3.3 For the reasons stated above, our Client therefore respectfully requests that Regulation 5 be amended to include the “*Upstream market 3a*” as being a market in which ineffective competition prevails.

4. **Proposed Amendments to Regulation 6 of the Draft Regulations: Significant Market Power Determination for “*Upstream market 3a: wholesale national MVNO*” and “*Upstream market 3b: wholesale APN services (including resellers)*”**

4.1 Whilst our Client agrees with ICASA’s determination in Regulation 6 that MTN and Vodacom are dominant and have SMP in the “*Retail market*”, “*Upstream market 1*”, and “*Upstream*

* See page 14, paragraph 50 of the ICASA Findings.

market 2", our Client respectfully submits that MTN and Vodacom also have SMP in relation to the remaining two markets, being "Upstream market 3a: wholesale national MVNO" and "Upstream market 3b: wholesale APN services (including resellers)" (***the Remaining Wholesale Markets***).

4.2 Section 67(5) of the ECA states that "a licensee has significant market power in a market....if that licensee:

4.2.1 *is dominant (as defined in the Competition Act);*

4.2.2 *has control of an essential facility; or*

4.2.3 *has vertical relationships that the Authority determines could harm competition."*

4.3 As set out in more detail below, our Client believes that Vodacom and MTN are not only dominant in the Remaining Wholesale Markets, but also have control over essential facilities and have vertical relationships which ICASA should find could harm or negatively affect competition.

4.4 Dominance

4.4.1 In order for a firm to be "dominant" as defined in the Competition Act, its market share must exceed certain percentages or that firm must have "market power" (being "the power of a firm to control price, to exclude competition or to behave to an appreciable extent independently of its competitors, customers or suppliers.").⁹

4.4.2 Our Client agrees with ICASA's view that,

"the Authority's primary role is to regulate on a forward-looking, 'ex-ante' basis, and so finding market power only after concluding that there has been an abuse is not a proper approach".¹⁰

On this forward-looking basis, our Client respectfully submits that Vodacom and MTN are dominant in the Remaining Wholesale Markets as they have "market power" in respect of these markets. A detailed analysis of each factor which demonstrates such "market power" is set out in **Annexure B** to this Letter.

4.4.3 **Annexure B** will show that Vodacom and MTN are the largest MNOs in both size and strength. They have coverage levels of 99% nationally and are the only two MNOs with such a degree of national coverage.¹¹ There are only two other MNOs which have a much smaller degree of coverage and market share generally. Accordingly, the broader market of MNOs is very concentrated. As set out in paragraph 3, only a MNO can supply upstream wholesale MVNO services. Accordingly, the upstream wholesale MVNO market is similar to the upstream wholesale roaming coverage market, where again, only MNOs can provide wholesale national roaming for coverage purposes.

⁹ See section 1 of the Competition Act.

¹⁰ See page 28, paragraph 98 of the ICASA Findings.

¹¹ See page 48, paragraph 172 and page 53, paragraph 192 of the ICASA Findings.

4.4.4 Our Client respectfully submits that the structure of, and concerns relating to, the upstream wholesale national roaming coverage market will accordingly be mirrored to a significant extent in the upstream wholesale MVNO market (from a supply side perspective). As submitted in paragraph 3.2.6, the market dynamics of the upstream wholesale APN services market are very similar to that of the upstream wholesale MVNO market and by extension, similar to the upstream wholesale roaming coverage market. Accordingly, given that ICASA has already found that Vodacom and MTN are dominant in the upstream wholesale roaming coverage market, they must logically also be dominant in the Remaining Wholesale Markets.

4.5 Control Over an Essential Facility

4.5.1 Section 1 of the ECA defines:

4.5.1.1 an “essential facility” as “an *electronic communications facility or combination of electronic communications or other facilities that is exclusively or predominantly provided by a single or limited number of licensees and cannot feasibly (whether economically, environmentally or technically) be substituted or duplicated in order to provide a service in terms of this Act*”;

4.5.1.2 an “*electronic communications facility*” to include, amongst other things, wire, cable, antenna, mast, radio apparatus or any other thing which can be used for, or in connection with, electronic communications including such things as are necessary for controlling connectivity of the various electronic communications facilities for proper functionality, control, integration and utilisation of such electronic communications facilities; and

4.5.1.3 “*electronic communications*” to mean “*the emission, transmission or reception of information, including without limitation, voice, sound, data, text, video, animation, visual images, moving images and pictures, signals or a combination thereof by means of magnetism, radio or other electromagnetic waves, optical, electromagnetic systems or any agency of a like nature, whether with or without the aid of tangible conduct, but does not include content service*”.

4.5.2 Our Client respectfully submits that:

4.5.2.1 electronic communications facilities would include the facilities which a MNO must necessarily control, such as masts, cables, antenna and radio apparatus, site infrastructure and access to such site infrastructure which form part of an MNO’s RAN;

4.5.2.2 as illustrated in paragraph 3, these facilities are required in order to enable a MNO to supply not only end users with electronic communications such as voice and data services, but would also be required for a MNO to supply the Remaining Wholesale Markets (the MVNOs and APN resellers can then in turn, in using these facilities of the MNO, also supply electronic communications such as voice and data services to end users). In other words, without the MNO granting access to these electronic communications facilities to a MVNO or

APN reseller, such a MVNO or APN reseller will be unable to participate in the downstream retail market for electronic communications; and

- 4.5.2.3 on a national coverage basis, these electronic communications facilities of the MNOs are exclusively or predominantly provided by a single or limited number of licensees (namely MTN and Vodacom) and cannot feasibly (whether economically, environmentally or technically) be substituted or duplicated in order to provide a service. In this regard, ICASA has found that:

*“there remains a persistent duopoly in many regions in South Africa” and “there are significant barriers to entry in markets for infrastructure...these include (i) the high cost of building sites, (ii) the need for minimum efficient scale...” and that “barriers to entry [for the retail mobile services market] are substantial for the reasons set out in the Discussion Document”.*¹²

- 4.5.3 Accordingly, each of Vodacom and MTN have control over essential facilities required in order to participate in the Remaining Wholesale Markets and therefore must enjoy SMP in these Remaining Wholesale Markets.

4.6 Vertical Relationships Which Could Harm Competition

- 4.6.1 The ECA relies on the Competition Act’s definition of “*vertical relationships*”. Section 1 of the Competition Act defines a vertical relationship as “*the relationship between a firm and its suppliers, its customers or both*”.

- 4.6.2 It is common cause that Vodacom and MTN have their own infrastructure (RAN), spectrum, and ability to supply products and services directly to customers, and that they are accordingly vertically integrated (that is, they do not rely on other market participants in order to be able to sell data to consumers for example).

- 4.6.3 In the ICASA Findings, ICASA noted the following in relation to the site infrastructure access:

“MTN and Vodacom are also in vertical relationships between their upstream site infrastructure and downstream activities. This could harm competition, since each operator has a reduced incentive to provide access to its site infrastructure, as this would result in lower downstream market shares and profit margins. MTN and Vodacom are also in vertical relationships with each other in relation to site sharing that they provide each other with paired site access to a significant extent. While this arrangement has benefits for these licensees and consumers since costs are lower, this vertical relationship could harm competition since space on site infrastructure might not be available for third parties, entrenching MTN and Vodacom’s market positions. MTN and Vodacom are therefor in vertical relationships between their upstream site infrastructure and downstream activities that could harm

¹² See pages 21, 23 and 38, paragraphs 73, 82 and 144 of the ICASA Findings.

competition, and this means that each of these licensees have significant market power in markets for site infrastructure."¹³ (our emphasis)

4.6.4 Similarly, ICASA noted the following in relation to the retail market in the ICASA Findings:

4.6.4.1 there is a "lack of dynamism" in the urban and rural subscriber markets and that this is likely "linked to barriers to entry for challenger networks...and to competition problems in the market for voice services."¹⁴

4.6.4.2 "in relation to vertical integration, Telkom broadly agrees with the Authority's view that concentration in wholesale markets is linked to concentration in the retail market."¹⁵

4.6.4.3 "The Authority's consideration of the degree of vertical integration in the markets in the Discussion Document is not really contradicted, save for the claim that there ought to be evidence of abuse of market power, such as foreclosure. However, the Authority's primary role is to regulate on a forward-looking, 'ex ante' basis, and so finding market power only after concluding there has been an abuse is not a proper approach. In any event, the Authority has received a number of complaints from stakeholders regarding foreclosure of access to incumbent site infrastructure, high wholesale roaming and other wholesale charges, and the Competition Commission raised concerns about wholesale site access, national roaming and APN charges. There are therefore reasons to be concerned about foreclosure. The Authority therefore considers the vertical relationships the MTN and Vodacom have could harm competition. This means that MTN and Vodacom have SMP in terms of the Act."¹⁶ (also our emphasis)

4.6.5 Finally, ICASA noted the following in relation to the wholesale roaming market in the ICASA Findings:

*"with coverage levels of 99% and only two options available to purchasers of roaming for the purpose of national coverage, combined with significant barriers to entry, MTN and Vodacom are dominant and have significant market power in the market for national roaming. This is compounded by the fact that these companies are vertically integrated and incentives in the retail market may impact on their pricing of roaming at the wholesale level. MTN and Vodacom therefore have SMP due to their vertical relationships that could harm competition."*¹⁷ (again, our emphasis)

4.6.6 Our Client respectfully submits that if MTN and Vodacom enjoy dominance in respect of the infrastructure and spectrum required to effectively compete or even participate

¹³ See page 45, paragraph 153 to 155 of the ICASA Findings.

¹⁴ See page 24, paragraph 85 of the ICASA Findings.

¹⁵ See page 25, paragraph 95 of the ICASA Findings.

¹⁶ See page 28, paragraph 98 of the ICASA Findings.

¹⁷ See page 53, paragraph 192 of the ICASA Findings.

in the wholesale roaming market, wholesale MVNO and APN markets, and given ICASA's own findings in relation to the vertical relationships within the upstream wholesale site infrastructure access market, roaming market and the downstream retail market which are potentially harmful to competition, such as:

- 4.6.6.1 concentration in wholesale markets;
- 4.6.6.2 incentives in the retail market may impact on Vodacom and MTN's pricing of roaming at the wholesale level; and
- 4.6.6.3 reduced incentive for Vodacom and MTN to provide upstream wholesale products and services at all as this would result in lower downstream market shares and profit margins for them,

then these same concerns regarding vertical relationships must apply to the upstream wholesale MVNO market and upstream wholesale APN market (as the dynamics in these two markets are very similar to that of the wholesale roaming market – see paragraph 3).

- 4.7 Accordingly, our Client respectfully submits that ICASA should find that MTN and Vodacom have SMP in the upstream wholesale MVNO and APN markets.

We trust that ICASA finds the above in order. Should ICASA have any queries or wish to discuss the content of our Letter in more detail, please do not hesitate to contact us.

Yours faithfully



Falcon and Hume Incorporated

Per: Lizanne Odendaal

ANNEXURE A – EXAMPLE OF RETAIL PRICING VS WHOLESALE PRICING

Example 1:

In April 2021, MTN announced revised retail data prices for consumers (kindly refer to <https://mybroadband.co.za/news/cellular/393999-mtn-launches-new-prepaid-bundles-10qb-for-r99.html>).

In terms of this revised pricing, MTN will charge consumers R149 (which includes VAT) for 20GB. This equates to an effective retail price (excluding VAT) of approximately R6.48 per GB.

Comparatively, MTN charges a wholesale data price (excluding VAT) to APN resellers and MVNOs of approximately [REDACTED] per GB.

On this basis, the wholesale data price is approximately [REDACTED] times more than the retail data price.

Example 2:

In May 2021, MTN announced yet another revision to its retail data prices for consumers (kindly refer to <https://mybroadband.co.za/news/cellular/397449-mtn-cuts-prepaid-data-prices-and-launches-new-bundles-including-60qb-and-90qb.html>).

In terms of the revised pricing, MTN has introduced a larger 90GB data bundle at R699 (which includes VAT). This equates to an effective retail price (excluding VAT) of R6.75 per GB.

Our client is not aware of any corresponding decrease in the wholesale data prices charged by MTN. Accordingly, if one again assumes a wholesale data price (excluding VAT) of [REDACTED] per GB, this new retail data price is still more than [REDACTED] times cheaper than the wholesale data price.

ANNEXURE B – MARKET POWER ANALYSIS

ICASA considers as relevant for purposes of establishing “*market power*”, the “*capacity to provide these [wholesale MVNO] services*”,¹⁸ and our Client agrees with ICASA’s view in this regard.

ICASA has found that Vodacom and MTN have the capacity to supply upstream wholesale MVNO. If one assumes for a moment that Vodacom and MTN enter the upstream wholesale MVNO market and start competing with Cell C, our Client believes that one is able to demonstrate that they will be able to exercise “*market power*” in this market. For purposes of demonstrating “*market power*”, we set out below each of the factors which would typically be considered in establishing whether a firm has “*market power*”:

a) **Control price:**

An indicator or test of “*market power*” is the ability of a firm to profitably raise prices above the competitive level. Such an increase in price may result in the firm losing some demand for products / services, however, the nature of the demand facing a firm with “*market power*” is such that it can nonetheless profit from increasing its price above the competitive level.

The power to control prices can also be demonstrated by drawing inferences from the various characteristics of competition in the industry generally, and a firm’s conduct and performance. These include the relative size of the firm, barriers to expansion facing the firm’s competitors, barriers to entry facing potential competitors, buyer power, the firm’s conduct and the firm’s profitability. Each of these elements are discussed below:

(i) **Relative size of the firm:**

Vodacom and MTN are the largest MNOs in both size and strength. They have coverage levels of 99% nationally and are the only two MNOs with such a degree of national coverage.¹⁹ There are only two other MNOs which have a much smaller degree of coverage and market share generally. Accordingly, the broader market of MNOs is very concentrated. As set out in paragraph 3, only a MNO can supply upstream wholesale MVNO. Accordingly, the upstream wholesale MVNO market is similar to the upstream wholesale roaming coverage market, where again, only MNOs can provide wholesale roaming for coverage purposes. Our Client respectfully submits that the structure and the concerns relating to the upstream wholesale roaming coverage market will accordingly be largely mirrored in the upstream wholesale MVNO market (from a supply side perspective). As submitted in paragraph 3.2.6, the market dynamics of the upstream wholesale APN services market are very similar to that of the upstream wholesale MVNO market and by extension, similar to the upstream wholesale roaming coverage market.

(ii) **Barriers to expansion facing the firm’s competitors:**

Vodacom and MTN’s competitors in the Remaining Wholesale Markets (Cell C and Telkom) face significant barriers to expansion in these markets as the quality and extent

¹⁸ See page 57, paragraph 218 of the ICASA Findings.

¹⁹ See page 48, paragraph 172 and page 53, paragraph 192 of the ICASA Findings.

of their service offering is limited by their dependency on roaming on Vodacom and MTN's networks for national coverage. Accordingly, if Cell C is not able to negotiate appropriate roaming agreements with Vodacom and/or MTN, Cell C's ability to compete in or expand its offering in the Remaining Wholesale Markets will be severely curtailed.

(iii) **Barriers to entry facing potential competitors:**

As submitted above, our Client strongly believes that the structure and the concerns relating to the upstream wholesale roaming coverage market are largely mirrored in the Remaining Wholesale Markets (from a supply side perspective). Accordingly, it is respectfully submitted that all of ICASA's findings in relation to barriers to entry in the upstream wholesale roaming coverage market, will apply to the Remaining Wholesale Markets (see pages 51 and 52 of the ICASA Findings where ICASA notes that these barriers are high).

(iv) **Buyer power:**

MVNOs and APN resellers are entirely dependent on MNOs, and if MNOs refuse to deal with them on reasonable terms, MVNOs and APN resellers have no bargaining position or ability to force MNOs to so deal with them. They therefore have no buyer power and will be unable to effectively constrain the ability of Vodacom and MTN to raise / control prices in the Remaining Wholesale Markets.

(v) **Firm's conduct:**

ICASA concluded that historically the average price paid for roaming has often been higher than the average retail price for the roaming providers²⁰. This indicates that Vodacom and MTN have "*market power*" in the upstream wholesale roaming coverage market. As previously illustrated, this must also hold true for the Remaining Wholesale Markets given that these markets share very similar market dynamics with the upstream wholesale roaming coverage market.

b) Exclude competition:

The ability to exclude competition is usually present if a firm has the power to raise its competitors' costs, thereby reducing their ability to compete or excluding them from the market altogether.

Cell C and Telkom (the only other MNOs besides Vodacom and MTN) do not have vast national coverage (as has been established and set out in the ICASA Findings). Accordingly, if Vodacom and MTN start participating in the Remaining Wholesale Markets, they will most likely be able to offer better quality coverage to MVNOs and APN resellers than Cell C and Telkom. Should Cell C and Telkom wish to compete with Vodacom and MTN, they will have to rely on roaming agreements concluded with Vodacom and MTN. Accordingly, Vodacom and MTN will have the ability to raise the costs of Cell C and Telkom through such roaming agreements.

²⁰ See page 51, paragraph 185.2 of the ICASA Findings.

c) Behave to an appreciable extent independently of its competitors, customers or suppliers:

The ability to act independently of other market participants may be established where a firm is able to restrict market output or substantially reduce service, quality, variety or innovation for a significant period of time.

Vodacom and MTN are vertically integrated and accordingly have no suppliers on which they rely for purposes of supplying upstream wholesale MVNOs and upstream wholesale APN services (in other words, Vodacom and MTN have their own RAN, spectrum and any other infrastructure and products required to participate in the Remaining Wholesale Markets).

For the various reasons indicated in our points in a) and b) above, it seems clear that Vodacom and MTN should be able to act independently, to an appreciable extent, from Cell C and Telkom, and any customers in the Remaining Wholesale Markets and thereby most likely enjoy “*market power*” (as that term is utilised and understood by ICASA) in the Remaining Wholesale Markets.

Furthermore, the European Commission published the “*Framework, Relevant Markets and Principles*” communication 98/C 265/02 concerning interconnection in the telecommunications sector in its official journal (“*EC Paper*”). In paragraphs 68 and 69 of the EC Paper, the European Commission noted that:

“[i]n the telecommunications sector, the concept of ‘essential facilities’ will in many cases be of relevance in determining the duties of dominant [telecommunications operator]s. The expression essential facility is used to describe a facility or infrastructure which is essential for reaching customers and/or enabling competitors to carry on their business, and which cannot be replicated by any reasonable means. A company controlling the access to an essential facility enjoys a dominant position within the meaning of Article [102].”

Given all of the above, our Client believes that Vodacom and MTN are dominant in the Remaining Wholesale Markets.