MTN RESPONSE IN RELATION TO ICASA'S NOTICE REGARDING THE AUTHORITY'S ANALYSIS OF THE REVIEW OF PRO-COMPETITIVE CONDITIONS IMPOSED ON LICENSEES IN TERMS OF THE CALL TERMINATION REGULATIONS OF 2014 IN ACCORDANCE WITH SECTION 67(8) (a) OF THE ECA IN GOVERNMENT GAZETTE NO. 45426 DATED 5 NOVEMBER 2021

DATE: 11 JANUARY 2022

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INTRODUCTION

Mobile Telephone Networks Proprietary Limited ("MTN") would like to thank the Independent Communications Authority of South Africa ("the Authority") for the opportunity to comment on Notice No. 45426 ("the Review Notice") published in accordance with section 67(8)(a) of the Electronic Communications Act, No.36 of 2005, ("the ECA").

MTN notes that the Authority has considered the data submitted by licensees' and international precedent, for its review of pro-competitive conditions.

In submitting its written comments, MTN confirms it would like an opportunity to make an oral submission to the Authority should the Authority deem it necessary to hold public hearings in this regard.

MTN's submission is structured in two parts:

1. General commentary.

2. Specific comments to various sections of the Review Notice.

PART 1: GENERAL COMMENTS

1.1The regulatory process for the review of pro-competitive conditions

MTN appreciates the stakeholder consultation session held with the Authority on 11 June 2021, where ICASA ostensibly explained that in terms of a review process ICASA is first obliged to "decide whether to modify the pro-competitive conditions set by reference to a market determination" (section 67(8)(a) (ii) of the ECA). While MTN agrees with this approach, MTN requests clarity on the end-to-end review process, specifically regarding what the timelines and consultative approach will be during this review especially relating to the calculation methodology.

The Authority described four phases to the review process. **It describes it as follows:**

Phase 1 (Commencement of the review and request for information): Immediately following the publication of the Notice, ICASA will publish on its website a questionnaire or request for information ("the RFI") from market participants and stakeholders. ICASA will then hold a workshop with relevant stakeholders, and thereafter invite stakeholders to submit any questions of clarity in respect of the RFI before submitting the information requested in the RFI.

Phase 2 (Discussion Document), ICASA publishes a Discussion Document in the Government Gazette, which will be informed by the information submitted by stakeholders in Phase 1, as well as by research or benchmarking exercises conducted by ICASA.

Phase 3, **(Public hearings on the Discussion Document),** if deemed necessary, ICASA will hold public hearings and confirm the details of the hearings in a notice to be published on its website.

Finally, P**hase 4 (Findings Document)** where ICASA will publish a summary of its finding in the Government Gazette and on its website.

In terms of the above description:

- The Review Notice clearly states that a market failure still exists in the call termination market, and declares all licensees providing service in the relevant market to have SMP – so the Authority appears to have concluded Phase 1 and is commencing with Phase 2;

- While the Review Notice states that previous pro-competitive conditions remain relevant, it stops short of deciding whether to modify some or all the pro-competitive conditions imposed during the previous regulatory period in line with the principle of proportionality, and which the Authority may impose various remedies to the licensees.

The Review Notice then suggests that:

- The Authority *may* hold public hearings on issues raised in the context of the review process;
- After taking into consideration *written* representations, the Authority will publish a Findings Document, *if relevant* (it is unclear to MTN, why the Authority would plan to hold hearings if its Findings Document will only take account of written submissions but MTN submits that in the event that the Authority does hold public hearings, the submissions made during the publics hearings ought to be taken into consideration as well to satisfy the principles of administrative law in South Africa;

The above suggests that there may in fact be another phase to this process (aimed at determining the suitable termination rates). It is not clear at all to MTN when or how the decision to proceed to this phase will take place – nor which methodology will be used to determine suitable termination rates, nor at what time during the process the Authority may make such a determination

It is very important to note that the information provided as part of the Questionnaire published on 28 May 2021 (mainly revenues, traffic and subscriber information) **cannot** guide the Authority to produce costing models based on actual financial or costing information as this information requested is not suitable for that purpose. MTN is unclear how or when costing data, will be collected from licensees, interpreted, modelled, and consulted upon in a timely manner. In fact, MTN is of the view that the Authority, having found a lack of competition in the relevant market under discussion, must embark on and finalise a costing methodology exercise.

MTN requests clarity from the Authority regarding the time that will be allocated to the critical issues of costing standards, financial data collection and interpretation and cost modelling. These issues are likely to have a significant impact on MTN´s business. As such, we look forward to a transparent and consultative process in respect of costing standards that will be followed, financial data collection and interpretation and cost modelling. The Authority ran such a process 3 years ago and experience dictates that a similar process will need to be followed. As such, MTN urges the Authority to provide a clear plan of action, engagement process and timeline for the review and determination of suitable termination rates.

PART 2: SPECIFIC COMMENTS

QUESTION 1: PRODUCT MARKET DEFINITION

Do you agree with the Authority's preliminary conclusion on the product market definition? Please explain the reasons for your answer and provide the relevant factual or other evidence supporting your views.

It is the Authority's preliminary view that **"The definitions of Mobile termination markets and Fixed termination markets in terms of Regulation 3 of the Regulations remains unchanged."** Regulation 3 defines Mobile termination and Fixed termination markets in terms of the service they encompass, namely mobile and fixed call termination services, respectively. Calls originating abroad are not part of the defined markets. MTN notes the Authority's preliminary view on product market definition.

Further comments on specific preliminary views expressed by the Authority are stated in sections (i) to (vii) below.

(i) Retail demand-side substitution for mobile off-net voice calls

MTN notes the Authority's view that mobile to fixed (M2F) calls are not close enough substitutes for off-net voice calls. The same applies for SMS.

For on-net calls to constrain MTRs originating customers would have to switch to the destination network or acquire multiple SIM cards in response to a SSNIP in mobile termination services. The Authority has not provided evidence in support or against such behaviour in response to a SSNIP, but MTN notes multi-SIM ownership is rife in South Africa.

MTN submits Over-The-Top services (OTT) and Voice over Internet Protocol (VoIP) can be substitutes for off-net calls. MTN acknowledges that the trend towards bundling voice and data as well as on and off-net voice services makes call by call switching decisions in response to a SSNIP less obvious. However, OTT calls have become increasingly popular as generic means to avoid standard voice call costs in general. The Authority should continue to monitor these trends.

(ii) Retail demand-side substitution for fixed off-net voice calls

MTN notes the Authority's view that "it is highly unlikely that on-net ("fixed to fixed") F2F voice calls are an effective substitute for M2F voice calls". For on-net fixed voice calls to be a substitute for mobile to fixed ("M2F") voice calls there would have to be similar fixed line and mobile penetration numbers as substitution is impossible or impractical in absence of a fixed line originating the call. Fixed line penetration is significantly lower than mobile penetration in South Africa. Furthermore, calls from a fixed location can only substitute for calls from a mobile phone to the extent the caller is at the fixed location, further reducing the potential for substitution.

MTN also notes the Authority's preliminary view "that the potential switch to mobile to mobile (M2M) will be ineffective as a demand-side substitute for M2F and off-net F2F and will therefore not constrain wholesale voice call termination ". In MTN's view, SSNIP on FTRs may not have a sufficiently large impact on its accounts to justify changes to its retail pricing that may render such increase in FTRs unprofitable. Furthermore, M2M substitution is not an option for calls to many businesses, who only provide a fixed line number.

For the same reason, MTN agrees with the Authority's preliminary view that "F2M voice calling is not likely to pose an effective competitive constraint on fixed termination rates".

With regards to OTT substitution, MTN believes similar reasons apply as for call terminating on mobile networks (see previous section) and submits that the Authority should continue to monitor OTT calling substitution trends.

(iii) Retail supply-side substitution for mobile and fixed calls

MTN notes the Authority's preliminary view that there is no potential retail supply side substitute.

(iv) Wholesale demand-side substitution

MTN notes the Authority's view that there are currently no wholesale demand substitutes.

(v) Wholesale supply-side substitution

MTN notes the Authority's view that there are currently no likely wholesale supply substitutes.

(vi) Common pricing constraints

Network operators are not able to effectively price discriminate termination services by telephone number. As a result, call termination services to all customers of an operator should be included in one call termination market as opposed to markets encompassing only individual telephone numbers.

MTN agrees with the Authority's preliminary view that there is no common pricing constraint linking the wholesale voice call termination rates set by different licensees. Operators who benefit from asymmetric termination rates do not usually lower their termination rates to the levels of the other operators. This suggests that in practice they are not constrained by the termination rates of other operators. The absence of such constraint suggests that call termination markets should be limited to traffic terminating on individual operators, as opposed to all terminating traffic on all operators.

QUESTION 2: GEOGRAPHIC MARKET DEFINITION

Do you agree with the Authority's preliminary conclusion on the geographic market definition? Please explain the reasons for your answer and provide the relevant factual or other evidence supporting your views.

The Authority's preliminary view is that **markets should be defined nationally and exclude traffic originating abroad**.

MTN agrees with this view. Competitive conditions in the relevant markets, with a single player in each market, are comparable across South Africa, making a geographic segmentation unnecessary.

MTN also supports not restricting its freedom to price termination of calls originating abroad. Pricing freedom for internationally originated calls mitigates the risk of a wealth transfer from South African consumers to consumers abroad and provides operators with adequate bargaining power.

MTN agrees with the Authority's assessment that the impact of excessive international termination rates on licensees' revenue and traffic volumes as well as the prevalence of OTT services in the international calling market disincentivise licensees from charging excessive international termination rates.

QUESTION 3: FIXED AND MOBILE CONVERGENCE

Do you agree with the Authority's preliminary conclusion on fixed and mobile convergence? Please explain the reasons for your answer and provide the relevant factual or other evidence supporting your views.

MTN agrees with the Authority's preliminary view that mobile voice services and fixed services are not provided in the same market.

Whereas call termination on mobile networks must contribute towards using the access network, termination on fixed networks does not. The access connection in fixed networks is a different service, paid for separately by the retail subscriber in the shape of line rental. Furthermore, there is a cost specific to the provision of mobility, including a range of network elements which a fixed network does not need. Whereas fixed local loop is dedicated and traffic insensitive, a wireless access network is shared and highly traffic sensitive. As a result, cost structures of fixed and mobile termination services are fundamentally different. International practice in setting call termination rates reflects this difference: most Regulatory Authorities who price-regulate call termination continues setting different rates for fixed and mobile networks.

MTN disagrees with the Authority's expectation for cost differences between fixed and mobile termination to diminish under 5G technology. This is because MTN expects similar efficiency gains in fixed networks as in mobile networks and 5G and the above technical and economic distinctions remain.

QUESTION 4: METHODOLOGY

Do you agree with the Authority's preliminary conclusion on the methodology used? Please explain the reasons for your answer.

It is the Authority's preliminary view that there is **"no need to amend the specified approach in the evaluation of effectiveness of competition in the defined markets as per clause 67(4A) of the ECA."** The approach is outlined in Regulation 4 of the Call Termination Regulations.

MTN believes that an assessment of effectiveness of competition is superfluous in markets where definition necessarily implies there cannot be any competition, as is the case in the proposed markets. In the context of other markets, the methodology outlined in Regulation 4 is flawed given its over reliance on structural measures of competition (e.g., market share) at the expense of performance measures of competition such as profitability and other measures of competition such as price, productivity, and innovation.

QUESTION 5: EFFECTIVENESS OF COMPETITION

Do you agree with the Authority's preliminary conclusion on the assessment of effectiveness of competition? Please explain the reason for your answer and provide the relevant factual evidence supporting your views.

It is the Authority's preliminary view that **"Competition in Mobile termination markets and Fixed termination markets will be ineffective in the absence of regulation. Therefore, the four market failures as per regulation 7(1) of the Regulations will continue to exist without regulatory intervention."**

These presumed market failures identified by the Authority include the following:

(a) A lack of provision of access.

(b) The potential for discrimination between licensees offering similar services.

(c) A lack of transparency.

(d) Inefficient pricing.

MTN notes the Authority's finding that "Competition in Mobile termination markets and Fixed termination markets will be ineffective". This is unsurprising as, by definition, there cannot be any competition at all in the aforementioned markets, which are limited to individual operators' networks.

MTN notes the Authority's views on b) and d) but submits that since price regulation is in place since 2010, there is little factual evidence of what operators might do in the absence of it.

QUESTION 6: SMP IN MOBILE AND FIXED TERMINATION MARKETS

Do you agree with the Authority's preliminary conclusion on SMP in the Mobile termination markets and Fixed termination markets? Please explain the reason for your answer and provide the relevant factual evidence supporting your views.

It is the Authority's preliminary view that "**Each individual Electronic Communications Network Service (I-ECNS) and individual Electronic Communications Service (I-ECS) licensee that offers wholesale voice call termination services in South Africa still has 100% share of the market in respect of voice calls terminating on its network and has Significant Market Power ("SMP") as defined in section 67(5) of the ECA."**

This section provides that: A licensee has significant market power in a market or market segment if that licensee-

(a) is dominant;

(b) has control of an essential facility; or

(c) has a vertical relationship that the Authority determines could harm competition.

Given the narrow market definitions, each market player has SMP on its own termination market. Such SMP results from being dominant as the only market participant.

QUESTION 7: PRO-COMPETITIVE TERMS AND CONDITIONS

Do you agree with the Authority's preliminary conclusion on pro-competitive terms and conditions? Please explain the reason for your answer and provide the relevant factual evidence supporting your views.

The Authority's preliminary views are:

(i) "Each licensee is required to charge cost-based termination rates determined by the Authority using the top-down and bottom-up cost models in terms of the Regulations."

(ii) "only new entrants should be allowed to charge temporary high termination rates: for a limited period of up to three years upon entry, to account for cost differences, if any, between new entrants and the incumbents. The transitional period of three years, as opposed to perpetual asymmetry, will encourage new entrants to be efficient and grow their market share."

(iii) "Vodacom, MTN and Telkom are required to publish on their websites a RIO, after approval by the Authority in terms of the Regulations."

MTN agrees with (i). It is in line with international practice and its benefits have been described in economic theory. However, the methodology to derive cost-based rates should be rational and robust. It should be based on the LRAIC+ cost standard and a hypothetical efficient operator (HEO). This cost standard does not jeopardize the recovery of common costs, nor significantly impair forward-looking investment decisions. There should be one model of one HEO for the mobile network and one model of one HEO for the fixed network. MTN also submits the spectrum costs, QoS, and coverage obligations attached to the forthcoming ITA must be specifically considered when computing the new MTRs. MTN urges the Authority to maintain a glidepath approach should a change in current termination rates be required. The use of a glide-path avoids significant business model shock and operators can adapt to the new access regime without having to instantly rebalance their business plan and business model.

MTN agrees with (ii). Asymmetries sustained over time have not proven to be effective and reward inefficiency. Similarly, market share-based thresholds reward gaming and inefficient scale. The standard approach is to sunset such remedies over a limited period.

An empirical study to assess efficacy of asymmetric rates in increasing levels of competition, measured in terms of new entrant market shares, found the following:

"Our empirical findings reveal that entrant performance under regulatory regimes of asymmetric MTRs fared no better than under symmetric MTRs. This result is not surprising. Economic theory suggests several reasons why MTR regulation would not achieve its intended goal of assisting entrants' competitive market positions. The asymmetry in rates distorts competition and competitors' incentives. For example, a rival firm has a reduced incentive to increase the size of its network and its subscribership if, by doing so, it would end up being compelled to charge a lower, asymmetric MTR. Similarly, when an operator can receive a higher MTR because it has higher costs, it has less incentive to invest in measures that would reduce its costs and therefore its prices."[1]

Asymmetric MTRs justified by low market shares and sustained over more than a decade are very rare nowadays as they may entrench inefficiencies in

[1] https://www.criterioneconomics.com/docs/did-asymmetric-mobile-termination-rates-help-entrants-gain-market-share.pdf

small operators who fare better staying small. The lack of a strict sunset clause compounds this perverse incentive.

The European Commission – amongst others – supports this view:

"The persistence of a higher termination rate would not be justified after a period long enough for the operator to adapt to market conditions and become efficient over time and could even discourage smaller operators from seeking to expand their market share." [2]

The ERG also recognised the detrimental effects of prolonged asymmetry in its Common Position on Symmetry:

"Allowing asymmetric termination rates differences [sic] over a too long period of time can lead to inefficiencies and be detrimental to competition and welfare. For example, it will provide limited incentives to cost minimization, distort price signals and high-cost operators will be allowed to pass their inefficiencies on to consumers. In addition, it could provide MNOs with an unjustified advantage when competing against other MNOs, such as in retail mobile services"[3]

MTN agrees with (iii) but believes that all individual Electronic Communications Network Service (I-ECNS) and individual Electronic Communications Service (I-ECS) licensees offering wholesale voice call termination services in South Africa should publish a RIO as the market failure averred by the Authority would apply to all call termination markets, not only those of MTN, Vodacom and Telkom.

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[2] COMMISSION STAFF WORKING DOCUMENT accompanying the COMMISSION RECOMMENDATION on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU EXPLANATORY NOTE C (2009) 3359, p.9; https://ec.europa.eu/smartregulation/impact/ia_carried_out/docs/ia_2009/sec_2009_0600_en.pdf

[3] ERG Common Position on Symmetry, p. 82; https://www.berec.europa.eu/doc/publications/erg_07_83_mtr_ftr_cp_12_03_08.pdf

MTN looks forward to engaging with the Authority on these critical issues during the next phase of the review process.

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