MTN'S RESPONSE TO THE ICASA DRAFT MOBILE BROADBAND SERVICES REGULATIONS AND FINDINGS DOCUMENT IN MOBILE BROADBAND SERVICES INQUIRY

28 May 2021

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1. **INTRODUCTION AND EXECUTIVE SUMMARY**

1.1 On 26 March 2021, the Independent Communications Authority of South Africa ("ICASA") published its Draft Mobile Broadband Services Regulations under section 67(4) of the Electronic Communications Act, No. 36 of 2005 (the "Draft Regulations"), as well as their Findings Document in Mobile Broadband Services Inquiry (the "MBSI") (the "Findings Document") in Government Gazette No. 44337.

1.2 Mobile Telephone Networks Proprietary Limited ("MTN") would like to thank ICASA for the opportunity to comment on the Draft Regulations and Findings Document, as we believe our continued engagement with ICASA provides for a transparent and structured consultation process, which is essential for supporting a well-functioning communications sector.

1.3 MTN has engaged actively and constructively with ICASA throughout the MBSI and has provided input into the inquiry on several occasions, including:

1.3.1 providing a submission to ICASA on 10 October 2017 in respect of ICASA's Priority Market Study, which was the precursor to the MBSI;

1.3.2 participating in public hearings in respect of ICASA's Priority Market Study, in 2018;

1.3.3 providing a submission on the ICASA MBSI Discussion Document, dated 27 February 2020;

1.3.4 participating in a one-on-one meeting with ICASA in respect of the MBSI, on 1 October 2020;

1.3.5 participating in a further public hearing in respect of the MBSI, on 27 October 2020;

1.3.6 providing a letter to ICASA regarding MTN's supplementary submission in respect of the MBSI public hearings, dated 11 November 2020; and

1.3.7 providing an additional submission to ICASA in respect of the MBSI, dated 24 February 2021.

1.4 Despite these extensive engagements, MTN respectfully submits that ICASA has not adequately considered the input that MTN has provided. As a consequence, MTN believes that several areas of the Findings Document are fundamentally flawed.

1.5 At the outset, MTN believes it is crucial to address ICASA's continued treatment of MTN and Vodacom on a combined basis:

1.5.1 ICASA appears to find that MTN is "dominant" or possesses substantial market power, on some kind of collective basis with Vodacom (e.g. Table 1 of the Findings Document reports MTN and Vodacom's market shares on a combined basis). This approach entirely ignores the fierce competition that occurs between MTN and Vodacom. ICASA has neither alleged nor provided evidence that MTN and Vodacom do not compete. It also ignores the competitive constraints other Mobile Network Operators ("MNO") impose on Vodacom and MTN as different and independent operators. Furthermore, it ignores the fact that MTN is a far smaller player than Vodacom and is in many ways more comparable to Telkom, as set out in detail in MTN's letter to ICASA dated 24 February 2021. Please see a copy of this letter attached hereto as "**Annexure MTN1**".

1.5.1.1 MTN and Vodacom have competed vigorously at the wholesale level for more than 25 years, investing tens of billions of Rands each year on a sustained basis into their respective network infrastructures. MTN has been an essential rival to Vodacom in this regard, as no other operators have invested as heavily in rolling out their network infrastructures to provide mobile coverage at a national level.

1.5.1.2 The competition between MTN and Vodacom has driven substantial procompetitive outcomes for more than 25 years (and indeed paragraph 22 of the Findings Document recognises that significant procompetitive consequences have arisen). These outcomes include the expansion of mobile connectivity to rural areas; the repeated introduction of newer technology layers, such as 2G, 3G and now 4G access, including to these rural areas; the rapid growth in mobile data volumes coupled with drastic decreases in effective data prices; and substantial and timely improvements in network speeds and quality.

1.5.1.3 Yet, as an operator, and in terms of the resources and profits available to it, MTN is far smaller than Vodacom. For instance, based on an analysis of national subscriber numbers, MTN's market share dropped from 40% to less than 30% between 2011 and 2020. Vodacom's market share remained steady over this period, ranging from around 43% to 45%. Moreover, in FY2020, Vodacom SA generated approximately 55% higher revenues than MTN SA's revenues. In the same year, Vodacom SA had an EBITDA value approximately 64% higher than MTN SA's, suggesting that Vodacom is significantly more profitable than MTN. MTN is more similar in scale to Telkom in terms of post-paid subscriber numbers and revenues, and Telkom far exceeds MTN in terms of data volumes (as set out in detail in MTN's submission dated 24 February 2021).

1.5.2 By treating MTN and Vodacom on a collective basis, ICASA ignores the substantial evidence of effective competition and incorrectly finds that MTN is a dominant operator with considerable market power. This, in turn, causes ICASA to irrationally bias its findings and recommendations against MTN. This will likely have a detrimental impact on competition in the provision of mobile data services, thereby having the opposite effect of what ICASA is hoping to achieve.

1.6 In this submission, we set out the primary issues with the Findings Document and the Draft Regulations. As a matter of economics, we focus on the parts of the Findings Document relating to aspects of market definition and the effectiveness of competition. However, we note at the outset that, to the extent that this submission does not address any parts of the Findings Document, this should not be construed as MTN agreeing with or accepting those aspects of the Findings Documents.

1.7 The rest of this response is structured as follows:

1.7.1 In part 2, MTN makes submissions in respect of ICASA's Draft Regulations, specifically in relation to ICASA's market definitions, and determinations in respect of significant market power and effective competition within those markets. MTN notes that ICASA has altered its market definitions in many respects, but still does not take many relevant factors into account when doing so. ICASA also fails to provide robust evidence in respect of is findings of SMP and ineffective competition. Accordingly, MTN submits that these market definitions and determinations are fundamentally flawed;

1.7.2 In part 3, MTN sets out the legislative process to which ICASA is bound in terms of section 67 of the Electronic Communications Act, No. 36 of 2005 (the "ECA"). ICASA's decision-making must be framed by section 67 of the ECA, and it must comply with the requirements of administrative law. MTN submits that ICASA has not complied with the requirements of administrative law in that it has considered irrelevant factors and failed to consider relevant factors, and thus made decisions that no reasonable decision-maker would have made;

1.7.3 Part 4 speaks to market definition and effectiveness of competition at the retail level. MTN submits that ICASA does not provide sufficient reasons to conclude that the geographic market is provincial – as opposed to national – in scope. On a proper utilisation of the hypothetical monopolist test (or SSNIP test), it is clear that the geographic market at retail level is national. In addition, MTN submits that ICASA has failed to consider the relevant factors which indicate vigorous competition in the retail mobile services market;

1.7.4 Part 5 deals with market definition and effectiveness of competition at the site infrastructure access level. MTN submits that ICASA's approach to defining both the product and geographic market at site infrastructure access level is flawed, in that ICASA does not include microsites in the product market, and incorrectly defines the geographic market as municipal – as opposed to national. Once again, a proper application of the SSNIP test indicates that the geographic market is broader than municipal and this is evidenced by the fierce competition between MTN and Vodacom which has resulted in both rolling out networks on a national basis, and continually upgrading and expanding these networks. In addition, from a demand-side perspective, there are likely to be many options for an operator within a given area. MTN further submits that ICASA's continued failure to recognise the vigorous competition between Vodacom and MTN results in an erroneous finding of ineffective competition in this market;

1.7.5 Part 6 deals with market definition and effectiveness of competition at the roaming level. MTN submits that ICASA has not provided any substantial evidence to support its claim that roaming for coverage is distinct from roaming for capacity. In particular, ICASA has once again not considered the role of supply-side responses. Moreover, MTN submits that ICASA's finding of ineffective competition relies on findings of historic conditions without properly considering the dynamics which have altered the market since then, and which indicate fierce competitive forces; and

1.7.6 Part 7 elaborates on ICASA's findings in respect of the vertical relationship between MTN's upstream and downstream activities. MTN submits that vertical relationships are not inherently anticompetitive, nor does vertical integration indicate dominance or significant market power. In fact, vertical integration and vertical agreements can have economic efficiency rationales that ICASA has not considered. Moreover, the fact that all operators in South Africa are vertically integrated means that competition takes place at all levels of the value-chain.

2. THE DRAFT REGULATIONS

2.1 Market definition

2.1.1 ICASA defines five markets:

2.1.1.1 Retail market: which comprises mobile retail services provided in regional geographic areas, i.e. *provincial areas split by urban and rural*. MTN disagrees with ICASA's geographic market definition of the retail market and submits that the retail market is national for the reasons set out at 4.1 below.

2.1.1.2 Upstream market 1: which comprises wholesale site infrastructure access in *local and metropolitan municipalities*. MTN submits that ICASA's exclusion of microsites from the wholesale site infrastructure market is incorrect. The geographic market is national in scope for the reasons set out in 5.1 below.

2.1.1.3 Upstream market 2: which comprises wholesale national roaming services *for coverage purposes*. MTN submits that ICASA has not provided robust evidence to support its contention that the product market in respect of roaming should exclude roaming for capacity purposes. MTN submits that the roaming market includes roaming for coverage and capacity for the reasons set out in 6.1 below.

2.1.1.4 Upstream market 3a: which comprises wholesale national mobile virtual network operator ("MVNO") services.

2.1.1.5 Upstream market 3b: which comprises wholesale access point name services (including resellers).

2.2 Effectiveness of competition and significant market power determination

2.2.1 ICASA states that competition is ineffective in the retail market and upstream markets

1, 2 and 3b.

2.2.2 ICASA goes on to state that -

2.2.2.1 in the retail market, MTN and Vodacom have SMP in 2 and 7 markets, respectively, due to market shares and vertical relationships;

2.2.2.2 in upstream market 1, MTN and Vodacom are dominant in 8 and 39 local municipal markets, respectively, due to market share and vertical relationships, and therefore have SMP;

2.2.2.3 in upstream market 2, MTN and Vodacom are dominant as they are the only two players who provide roaming for coverage purposes and have vertical relationships, and therefore have SMP; and

2.2.2.4 No operator is dominant or has SMP in upstream market 3b.

2.2.3 MTN submits that on a proper definition of the relevant markets, and when assessed on its own (and not in combination with Vodacom), ICASA cannot find that MTN is dominant in the relevant markets. Moreover, MTN submits that an assessment of market shares and market concentration alone does not indicate ineffective competition in the relevant markets. Many other factors must be taken into account. ICASA acknowledges this in paragraph 218 of its Findings Document, where it states correctly that one had to consider the other factors before determining if Cell C has market power in respect of the wholesale provision of MVNO services (despite the fact that Cell C had a market share of 100% in respect of these services). The factors in respect of the MVNO segment included:

2.2.3.1 The ability of other operators to enter the market (i.e. barriers to entry);

2.2.3.2 There is competition *for* the market, and therefore market shares do not necessarily reflect competitive dynamics; and

2.2.3.3 Market shares should be assessed based on the capacity to provide services.

2.2.4 MTN illustrates the effective competition between it and Vodacom and other operators in the relevant markets in 4.2, 5.2, and 6.2 below. Further, simply because MTN is a vertically integrated firm, that does not automatically indicate that it has SMP, as set out in 7 below. MTN submits that it does not have SMP in any properly defined relevant market, and that the properly defined markets are characterised by vigorous competition.

2.3 **Procompetitive terms and conditions**

2.3.1 The Draft Regulations state that, as a dominant MNO with SMP in identified markets, MTN is obliged to keep and provide to ICASA various quarterly reports in respect of:

2.3.1.1 wholesale access to macro site infrastructure where MTN owns or controls the site;

2.3.1.2 effective prices paid for wholesale roaming services by each roaming customer;

2.3.1.3 wholesale national roaming data volumes;

2.3.1.4 effective retail prices paid by end-user customers for data services overall and across various categories; and

2.3.1.5 effective wholesale prices paid by ECS and ECNS licensees for MVNO and APN (including wholesale reseller) services.

2.3.2 ICASA also states that, where retail prices are below wholesale prices, MTN must submit detailed and auditable evidence showing that differential is cost-based or temporary. ICASA states it will monitor retail and wholesale prices to determine if the MNOs are engaged in a margin squeeze strategy. If it finds evidence that they are, it will refer the matter to the Competition Commission.

2.3.3 MTN submits that the terms and conditions are unduly onerous, in that they are not borne out by fact and ICASA has not provided evidence of a market failure as required by section 67 (4) of the ECA, in order to impose regulations. Further, MTN submits that there is already vigorous competition on a robust assessment of the relevant markets. The above reporting obligations, especially in markets where there is no market failure, are inappropriate and disproportionate remedies, are likely to be challenging to apply in practice, and are financially burdensome. Further, given that MTN is not dominant nor has SMP on a proper definition of relevant markets, subjection to these Draft Regulations is incorrect.

2.3.4 MTN further submits that it is inappropriate and irrational for ICASA to impose regulation regarding MVNO and APN services, as it has admitted that there are no operators with SMP in these markets. Moreover, ICASA has not provided any evidence of a lack of effective competition in these markets.

2.4 Schedule for review or revision of markets

2.4.1 ICASA states that it will review markets and the effectiveness of competition when necessary, but no earlier than three years from the date of publication of the Draft Regulations.

2.4.2 MTN submits that the schedule for review is too lengthy, especially given the increasingly fast-paced dynamism characterising mobile telecommunications services, and rapid technological advancements in the relevant markets. MTN is also concerned that the review period is left to the discretion of ICASA and does not provide a firm commitment for review. The implications of this discretionary review period are that the severe impact of regulation on incorrectly defined markets (such as reducing incentives to invest and innovate) would be compounded if left unremedied for long periods. Accordingly, MTN submits that the Draft Regulations be reviewed no later than 18 months from publication of the final regulations.

2.5 **Contraventions and penalties**

2.5.1 ICASA sets the penalties for infringement of the Draft Regulations at a fine not exceeding the greater of R5 million or a maximum of 10% of annual turnover for every day during which the contravention continued.

2.5.2 MTN submits that the penalties for infringement are excessive and disproportionate given that they would be levied on operators that failed to provide ICASA with a quarterly report as set out in the Draft Regulations and not for unlawful conduct that would have an impact on any market.

3. LEGISLATIVE PROCESS

3.1 ICASA's inquiry into mobile broadband services was conducted in terms of section 67 of the ECA, which contemplates the making of regulations with four related aspects. These aspects must frame ICASA's decision.

3.2 MTN has submitted these aspects to ICASA as part of its submission to the Discussion Document on 27 February but repeats these aspects below for ease of reference:

3.2.1 *First:* the relevant wholesale and retail markets or market segments are to be defined (s 67(4)(a)).

3.2.2 *Second:* ICASA must determine whether there is effective competition in those markets (or market segments) (s 67(4)(b)). In making this determination, ICASA must consider all relevant factors,[1] including (i) non-transitory entry barriers and (ii) "*the dynamic character and functioning*" of the markets (or market segments), including an assessment of relative market shares of the various licensees and "*a forward-looking assessment of the relevant market power*" of the licensees in the markets (or market segments) (s 67(4A)).

3.2.3 *Third:* ICASA must determine which, if any, licensees have significant market power (as defined) "*in those markets and market segments where there is ineffective competition*" (s 67(4)(c)). It bears emphasis that the question as to whether or not licensees have significant market power (i.e. are dominant) in a market is distinct from the antecedent question as to whether or not there is ineffective competition in that market. Without a finding of ineffective competition – based on a consideration of all

1 See the phrase "must consider, *amongst other things*" in s 67(4A) of the ECA.

relevant factors – the question as to which licensees exercise significant maker power in that market does not arise.

3.2.4 *Fourth:* the regulations must impose appropriate procompetitive licence conditions "*on those licensees having significant market power*" to remedy the market failure (s 67(4)(d)). It is apparent that the licence conditions envisaged in section 67 apply only to those licensees with significant market power in the particular market[2] and that the conditions must be "*appropriate*" (i.e. fair and reasonable) and proportionate (s 67(4)(d) and s 67(8)(c)).

3.3 ICASA's decision-making must comply with the requirements of administrative law. MTN submits that ICASA's decision making has not complied with these requirements in that -

3.3.1 ICASA did not take into account all relevant factors in coming to its decisions in the Findings Document. For example, as noted above, MTN's various submissions on a number of topics (including how the markets were defined and whether MTN has SMP) were not taken into account by ICASA. Furthermore, ICASA ignored all other relevant factors (such as the vigorous competition between Vodacom and MTN) and took into account only market shares in determining that MTN has SMP in many markets.

3.3.2 ICASA's decisions in the Findings document are irrational, and it took into account irrelevant considerations. For example, despite clear evidence that MTN and Vodacom compete vigorously with one another, ICASA still chose to look at MTN and Vodacom in combination. Additionally, despite clear contrary indications, ICASA regarded MTN and Vodacom as comparable when MTN is far smaller than Vodacom and is more similar to Telkom. This resulted in ICASA incorrectly finding that MTN has SMP in several markets.

3.3.3 ICASA's proposed penalties for failure to provide quarterly reports are disproportionate when considering that the fine does not relate to unlawful conduct that would affect any market or consumers.

3.3.4 ICASA's decisions in the Findings Document are decisions no reasonable decision-maker would have made under the circumstances. More particularly, no reasonable decision-maker would have defined the markets as ICASA has in the findings document. Additionally, no reasonable decision-maker would have come to the decision that MTN has SMP in any market.

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[2] See also s 67(8)(b) of the ECA, which provides that, if the Authority, pursuant to a subsequent review, determines that a licensee to whom pro-competitive conditions apply no longer possess "*market power in that market or market segment, the Authority must revoke the applicable pro-competitive conditions applied to that licensee*".

4. **FINDINGS DOCUMENT – RETAIL MARKET**

4.1 **Geographic market definition at the retail level**

4.1.1 ICASA alleges that the geographic market for mobile retail services should be defined at the provincial level, with further delineations into urban and rural areas. Consequently, ICASA defines 16 geographic markets at the retail level.

4.1.2 ICASA purports to reach this definition by aggregating geographies that have similar competitive conditions. It alleges that the prevailing conditions of competition in areas served by two networks are appreciably different from those in areas served by more than two networks. In addition, ICASA claims that the differences in costs between rural and urban areas and the regional differences in mobile operator management, pricing, and investment decisions mean that geographic markets can be aggregated into regional markets at the provincial level.[3]

4.1.3 MTN respectfully submits that the reasons provided by ICASA are not sufficient to conclude that the geographic market is provincial – as opposed to national – in scope. Geographic (and product) market definition should be based on the hypothetical monopolist test (or SSNIP test). Although ICASA claims to have applied this test in its market definition exercise, MTN respectfully submits that ICASA has not done so in a robust or logically consistent manner.

4.1.4 The SSNIP test is commonly used to define the geographic and product dimensions of a relevant market. The SSNIP test takes a candidate market and asks whether, if a hypothetical monopolist controlled all supplies in that candidate market (i.e. all supplies of a particular product in a specific geographic area) but did not control the supplies in other areas, it would be able to profitably impose a small but significant non-transitory increase in price above competitive levels (a "SSNIP"), typically in the order of 5–10%.[4]

4.1.5 If the constraints from firms outside of the candidate market are not strong enough to render this price increase unprofitable (i.e. the price increase would be profitable), this would indicate that the candidate market is, in fact, a relevant market for antitrust purposes. In contrast, if a 5–10% price increase would be unprofitable for the monopolist, then the candidate market should be widened to include additional geographies/products previously excluded. The test is then repeated iteratively until a price increase would be profitable. At this point, the geographic/product dimension of the candidate market over which the price increase has been evaluated would be a relevant market for antitrust purposes.

4.1.6 The competitive forces that may prevent a price increase from being profitable for a

3 Findings Document, Pages 19-20, Paras 66-67.

4 See Bishop, S. & Walker, M. (2010) The Economics of EC Competition Law, pp 111–115, and 505.

hypothetical monopolist come in two forms: demand and supply-side substitution. Demand-side substitutes are alternative products to which customers may turn in the face of a relative increase in the price of the product(s) included within the candidate market. In terms of the geographic scope of a market, these may take the form of products in the same geographic area that have similar functionality and sufficiently similar prices. They may also take the form of products in other geographies to which enough customers would be willing to switch, such that a SSNIP would be rendered unprofitable.

4.1.7 Supply-side substitutes are products for which the conditions of supply are sufficiently similar to those of the activity in question such that, were a hypothetical monopolist to attempt to implement a SSNIP over the candidate market in question, producers of these alternatives would deploy their existing production and supply and begin producing a substitute product, or begin operating in that area, thereby rendering the 5-10% increase in relative prices unprofitable. Typically, for a firm to constitute a supply-side substitute, it must rapidly redeploy its supply and capacity without incurring significant additional costs and risks. While supply-side substitutes may take the form of other firms/products in the same area as the candidate product(s) in question, they may also take the form of products/firms currently offered in other areas, but which can rapidly begin offering sufficiently substitutable products or services in the candidate market in question.

4.1.8 Notably, the SSNIP test <u>does not require the conditions of supply and competition to be perfectly homogeneous in different areas for those areas to be considered part of the same relevant geographic market</u>. Instead, the fundamental economic question for the SSNIP test is whether competitors from other geographic areas impose sufficiently strong competitive constraints on the candidate market in question to prevent the hypothetical monopolist in that candidate market from profitably raising prices.

4.1.9 Applying this framework to the current context, the SSNIP test would need to consider whether a given geographic area (such as a province, or indeed some subset of a province, such as the rural areas within a province) is sufficiently insulated from competitive pressures from other areas, such that a hypothetical monopolist MNO would be able profitably to raise prices (by 5%-10%) in that area. If this is the case, then the area in question would be considered a separate market for antitrust purposes. However, if MNOs offering services in other areas can enter and offer services within the area and undercut the hypothetical monopolist MNO once it has raised its prices (without incurring substantial additional costs and risks), then the price increase would be rendered unprofitable. In this case, the area in question would not constitute a separate geographic market, and the scope of the market would need to be widened until competitive responses from other operators are no longer strong enough to render a 5%-10% price increase unprofitable.

4.1.10 In this regard, MTN and Vodacom have almost 100% national coverage, as do Cell C, Telkom, and other operators (under their roaming and other network sharing arrangements). This means that it is very likely that any one of these operators would be able to respond to a retail price change by any other operator in any province or sub-provincial area. Notably, such supply-side substitution would not require MNOs to expand their operations from adjacent geographic areas since multiple MNOs (particularly MTN and Vodacom) already have national coverage and a national presence. The ease with which operators can respond to each other's retail pricing behaviour across the country means no single province or sub-provincial area is insulated from exterior competitive forces.

4.1.11 When properly accounting for the role of supply-side substitution, and indeed the fundamental nature of the supply of mobile services throughout South Africa, the only logical conclusion is that there is a national market for retail mobile services.

4.1.12 ICASA states that it has specifically chosen not to consider supply-side substitution at the market definition stage of its market inquiry. However, the reasons provided for doing so are not robust. In any event, such an omission (at this stage) is inconsistent with ICASA's approach to other aspects of its analysis.

4.1.13 ICASA has relied on guidance from the European Commission ("EC") to support its view that geographic markets can be aggregated into regional markets. However, ICASA is selective, and therefore misleading, in its citation of this regulatory framework. In particular, the excerpt quoted by ICASA in the Findings Document continues to expressly state that the *"definition of geographic markets should be checked against an analysis of demand and supply side substitutability"*.[5]

4.1.14 ICASA also explains that it has not considered supply-side substitution in its market definition exercise to *"avoid the risk of defining overly broad markets"*.[6] However, in doing so, ICASA has not evaluated the risks or unintended adverse consequences arising from defining overly narrow markets (and, fatally, ICASA has failed to consider these risks at any later stage in its analysis). For instance, if markets are defined too narrowly, this significantly increases the risks of erroneously finding that operators have high market shares in those narrow markets. If operators are then found to be dominant on this basis, such a finding may incorrectly be used to justify a regulation that may disincentivise investments or otherwise stifle procompetitive actions or unnecessarily increase regulatory burden. This would be detrimental to consumers.

4.1.15 Although ICASA claims to account for supply-side substitution in its assessment of effective competition (as should be done in cases where supply-side substitution is not considered at the market definition stage), it does not do so correctly. We discuss this in more detail below.

4.1.16 MTN has provided these sound economic arguments in support of its submission that

[5] Findings Document, Pages 18-19, Para 64.

[6] Findings Document, Page 20, Para 70.

the geographic market for the provision of retail mobile services is national in its submission to ICASA on 27 February 2020, during its one-on-one meeting with ICASA on 1 October 2020, and during the public hearings in respect of the MBSI on 27 October 2020. MTN views ICASA's continued insistence to disregard this highly relevant and pertinent economic assessment as irrational and irregular.

4.2 **Effectiveness of Competition at the retail level**

4.2.1 ICASA assesses the effectiveness of competition by considering whether there are substantial barriers to entry. It considers whether supply-side substitution, from a geographic perspective, would be timely, likely, and sufficient to mitigate market power in those geographic areas identified by ICASA as being standalone markets. Following this assessment, ICASA alleges that there is ineffective competition at the retail level, on the basis that:

4.2.1.1 barriers to entry in the retail market are high, and therefore supply-side substitution is unlikely;[7]

4.2.1.2 there is a persistent duopoly consisting of Vodacom and MTN, particularly in rural areas, with these two operators displaying high combined market shares in the geographic markets identified by ICASA;[8] and

4.2.1.3 the market shares of incumbent operators have not changed appreciably over time.[9]

4.2.2 Each of these contentions is fundamentally flawed as a matter of economics, and we address them in turn below.

4.2.3 First, ICASA acknowledges MTN's submission that supply-side substitution would likely occur if an operator were to raise retail prices in a given sub-national geographic area.[10] However, ICASA claims that MTN has provided no evidence of supply-side substitution. This claim is misguided for the following reasons:

4.2.3.1 ICASA is not clear on the type of evidence of supply-side substitution it considers to be sufficient. This is important when considering that up until recently, retail prices have been set at a national level, so there has not been any instance of one operator raising prices in a given geographic area that another operator could then respond to (to then provide evidence of supply-side substitution).

4.2.3.2 Notwithstanding the above, more recently, MTN has responded to Vodacom's region-specific pricing by introducing 'MyTown' Offers, which allow MTN customers

7 Findings Document, Page 21, Paras 71 and 73.

8 Findings Document, Pages 21-22, Paras 74 to 77.

9 Findings Document, Page 22, Para 76.

10 Findings Document, Pages 21-22, Para 74.

to purchase specific data bundles offered in specific towns. This is concrete evidence of operators swiftly responding to changes in prices in different areas. In turn, this supports the definition of a national market at the retail level. Within this context, MTN faces low barriers to entry (or expansion) in moving from offering mobile services in one area to providing similar mobile services in another area (or offering a greater volume of services in either area). MTN provides similar services nationally, often utilising at least some common assets and capabilities (in particular its core and backhaul network) to do so.

4.2.3.3 Other operators have the same ability to respond to price changes in different areas. Whether these operators choose to do so or not is not a reflection on the effectiveness of competition[11], as ICASA recognises in its Findings Document, but rather merely indicates the day-to-day commercial decisions of operators in the retail market.

4.2.3.4 As discussed above, the available evidence regarding supply-side substitution at the retail level strongly suggests that the geographic market for retail mobile services is national in scope. If this evidence is not accounted for in the market definition stage of the analysis, it should be considered when assessing the effectiveness of competition. In this regard, although ICASA claims that barriers to entry are high at the retail level, ICASA has provided no robust evidence to support a link between these alleged barriers to entry and ineffective competition. That is, even if high barriers to entry existed, this would not be sufficient to conclude that competition at the retail level is ineffective. As discussed in more detail below, there is ample evidence that competition between existing players at the retail level has effectively delivered substantial procompetitive outcomes to consumers.

4.2.3.5 Moreover, the recent entry of Rain and Liquid at the retail level indicates that entry barriers are by no means insurmountable. Similarly, Rain and Liquid have started to offer retail mobile services in multiple geographic areas, indicating that the barriers to entry (or expansion) from one area to another are not substantial.

4.2.4 Second, ICASA asserts that there is a persistent duopoly comprised of MTN and Vodacom, and seemingly on this basis claims that competition is ineffective at the retail level.[12] Once again, these claims are fundamentally flawed.

4.2.4.1 To demonstrate a duopoly, ICASA would have to show that other operators either do not exist, or fail to exert any significant competitive constraint on MTN and Vodacom. To demonstrate that there is a duopoly that results in ineffective competition at the retail level, ICASA would then need to show that competition between Vodacom and MTN is ineffective and insufficient. At the most basic level, ICASA has failed to demonstrate that there is any evidence of a lack of competition

11 Findings Document, Page 57, Para 218

12 Findings Document, Page 23, Para 82.

between MTN and Vodacom. There is no evidence of any concerted practices between MTN and Vodacom. ICASA has failed to demonstrate that competition between MTN and Vodacom is not, in and of itself, effective, or, at the very least, that these two operators are not a substantial driver of effective competition at the retail level.

4.2.4.2 Moreover, Vodacom and MTN also face significant competitive pressures from other MNOs. Over the years, Telkom has consistently won market share from MTN and exerted substantial competitive constraints on MTN. In fact, Telkom outperformed MTN on mobile customer revenue increasing their performance by 31.4% in comparison to MTN who only grew by 6.3% year on year as at March 2021. Additionally, Telkom's data network continues to carry nearly twice the volume of MTN's data network as it carries 942PB in comparison to MTN's 524 PB year to date. Further, evidence of Telkom's significant growth has been submitted by MTN to ICASA in its letter of 24 February 2021, attached hereto as "**Annexure MTN1**". Newer entrants Rain and Liquid have also been imposing appreciable competitive constraints on MTN. These smaller MNOs are well-resourced in terms of their spectrum allocations and have access to sizeable funding.[13] Accordingly, there is simply no support for ICASA's continued allegation of a duopoly, far less a duopoly that results in "ineffective competition at the retail level".

4.2.4.3 The above notwithstanding, ICASA's assessment focuses only on market structure, i.e. the number of players in a market and the market shares of those players. However, it is widely recognised in economics that a simplistic assessment of a market's structure is insufficient to draw robust conclusions about whether competition is ineffective in that market. An assessment of effective competition must go beyond a simple assessment of market shares and must extend to a consideration of whether the firms in question can act appreciably independently of their rivals, suppliers, and customers, to raise prices above competitive levels. This is particularly the case in markets characterised by recurrent, large capital investments, and limited resources, which only a handful of firms may more efficiently serve.

4.2.4.4 ICASA, therefore, places unreasonable emphasis on market share evidence to conclude that competition is ineffective at the retail level, and in turn, does not provide a proper competitive analysis. The assessment entirely ignores the substantial evidence of outcomes that could only have been achieved if competition was indeed highly effective. As discussed above, this includes massive investments in network infrastructure on a national basis to achieve nearly 100% national mobile coverage, exponential increases in data volumes, drastic decreases in effective data prices, and the rapid roll-out of new technologies. In other words, the fact that a market is duopolistic (which is in any case not correct in the current

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13 ICASA, 2016. Radio frequency use for bands above 1GHz. Available at: https://www.icasa.org.za/uploads/files/Spectrum-Usage-Availabilty-Q1-2016.xlsx [Accessed 28 April 2021].

context) is insufficient to conclude that competition is not effective, in particular when there is substantial evidence of procompetitive outcomes.

4.2.4.5 ICASA has calculated a combined MTN and Vodacom market share in each of the 16 geographic markets identified for 2018 and 2019.[14] Based on these (high) combined market shares, ICASA appears to conclude that competition is ineffective at the retail level. However, as discussed above, referring to MTN and Vodacom on a collective basis ignores the fierce competition between MTN and Vodacom as different and independent operators. ICASA's approach also obscures the individual shares of MTN and Vodacom in each of the geographic markets that ICASA has identified and therefore gives a misleading impression that MTN somehow has "dominant" market shares. Notably, since MTN's national subscriber share is lower than 30%, MTN likely has a market share below the legal threshold for dominance in each geographic market that ICASA has identified. However, how ICASA has presented its findings does not make this transparent.

4.2.5 Third, to further support its allegation that competition is ineffective at the retail level, ICASA asserts that the market shares of MTN and Vodacom are "persistent" and have not changed appreciably over time.[15] There are once again several flaws with this claim.

4.2.5.1 In the first instance, persistent market shares are not necessarily a sign of any lack of competition. Competition might well be vigorous and effective, and yet if competitors are well-matched, there might be little net movement in market shares over time. In such a case, other more reliable indicators of competition might be considered. Accordingly, the very test that ICASA has proposed is flawed. ICASA has ignored many other, more reliable indicators that show that competition is vigorous and effective (as indicated elsewhere in this document). However, even ICASA's assessment of market shares over time is subject to numerous issues (discussed below).

4.2.5.2 To examine changes in the market structure over time, ICASA has used data from 2018 and 2019. However, ICASA obviously cannot hope to capture the dynamic nature of the mobile telephony space using outdated information that spans <u>only one year</u>. As discussed above, MTN's national subscriber market share decreased substantially between 2011 and 2020, while Telkom's share has grown significantly over this period. It is only Vodacom that has enjoyed a stable market share over the past ten years. Notwithstanding this, the data presented in Table 2 of the Findings Document indicates that MTN was "dominant" in 5 markets in 2019, but dropped to 2 markets within one year. This shows that even on the incomplete

[14] Findings Document, Page 24, Table 1.

[15] Findings Document, Page 24, Para 83.

data presented by ICASA, MTN's market shares have been far from persistent when separated from Vodacom.

4.2.5.3 ICASA purports to illustrate that the market shares of MTN and Vodacom, in each geographic market identified by ICASA, did not change significantly between 2018 and 2019. However, as discussed above, ICASA only presents combined market shares for MTN and Vodacom. Therefore, it is not possible to discern whether the individual market shares of MTN and Vodacom changed and to what extent between 2018 and 2019. Although the combined market share of MTN and Vodacom might appear high at face value, an analysis of MTN's individual shares would likely show a decrease over time, given the decline in MTN's national market share.

4.2.5.4 Table 2 of the Findings Document similarly seeks to illustrate the market structure of each of the 16 geographic markets identified by ICASA. In particular, based on whether MTN or Vodacom meet the dominance market share threshold in the Competition Act, ICASA seeks to determine whether MTN or Vodacom is "dominant" in each geographic market. This assessment leads ICASA to conclude that MTN and Vodacom are dominant and have significant market power in several retail markets. However, this claim is once again fatally flawed on several bases.

4.2.5.4.1 As discussed above, it is incorrect to define sub-national geographic markets at the retail level. Moreover, as a matter of economics, simplistic market share analysis is not sufficient to determine whether a firm is "dominant" or has substantial market power. Therefore, ICASA's analysis has no probative value from the outset.

4.2.5.4.2 ICASA simply labels MTN or Vodacom as being "dominant" in each of the geographic markets that it has identified. However, ICASA does not provide actual market share figures for MTN and Vodacom. Furthermore, ICASA does not explain why it has not assessed "dominance" in 4 of the regions in 2019. This is presumably because neither Vodacom nor MTN could be found to be "dominant" in these regions in 2019. However, this would be an important finding in and of itself because (i) it indicates that other operators are stealing market share from MTN and Vodacom, and (ii) it illustrates a change in the market structure over time, which is inconsistent with ICASA's claim that there is a lack of dynamism in market shares. ICASA has not been transparent in communicating these findings and therefore provides an incomplete and misleading assessment of the state of competition at the retail level. MTN submits that this lack of transparency and provision of misleading data is irregular as a matter of administrative law.

4.2.5.5 ICASA explains that, although Telkom's market share has grown in recent years, Cell C's market share has declined.[16] ICASA uses this as evidence to further support its allegation that competition is ineffective at the retail level. However, ICASA's conclusion does not flow logically from its observation. Competition cannot be ineffective if Telkom (a relatively new entrant into the mobile space) has grown while Cell C (a comparatively established operator) has declined. Instead, the change in their relative market shares is indicative of active and effective competition. It is improbable that an established firm would decline and lose market share in the absence of strong competition (instead, if competition were not effective, one would naturally expect an established firm to flourish, even if it were inefficient). Similarly, a newer entrant could only grow if competing vigorously with its larger rivals to win market share. The presence of both these dynamics indicates effective competition in the retail mobile services market.

5. FINDINGS DOCUMENT – SITE INFRASTRUCTURE ACCESS MARKET

5.1 Market definition at the site infrastructure access level

5.1.1 Regarding product market definition at the site infrastructure access level, ICASA excludes micro solutions, lampposts, and billboards from the relevant product market. ICASA states that this is because these types of infrastructure do not provide the equivalent coverage and capacity offered by macro sites. ICASA defines the relevant product market as consisting of rooftops, indoor sites, and macro sites.[17]

5.1.2 Regarding the geographic scope of the relevant market, ICASA maintains that the geographic market for site infrastructure access is at least as narrow as local municipalities. ICASA reasons that sites required are decided on a local geographic basis and that current sharing agreements specify individual sites. ICASA further explains that a site in one municipality is unlikely, in most instances, to be a demand-side substitute for a site in another municipality, as it would likely not provide coverage for the same area.[18]

5.1.3 MTN respectfully submits that ICASA's conclusions regarding the scope of the relevant product and geographic markets are incorrect for several reasons.

5.1.4 First, ICASA has provided no robust evidence to exclude micro-sites from the relevant product market. According to the hypothetical monopolist test, the question is not whether two products are equivalent, but whether a sufficient number of customers

16 Findings Document, Page 26, Para 92.

17 Findings Document, Pages 35-36, Paras 131-133 and 135.

18 Findings Document, Page 37, Para 138.

would switch from one product to another in response to a change in the price of the first product, such that the price increase would be rendered unprofitable. Whether a customer switches will depend on the relative prices and qualities of the products that are available. The implication of this is that products do not have to be equivalent in their observable characteristics to be included in the same relevant product market – all that is required is that a sufficient number of customers would switch away in response to a price rise.[19] [20] ICASA has not adequately considered or applied the SSNIP test framework to its definition of the product market at the site infrastructure access level.

5.1.5 Given the high level of demand-side switching between all different forms of sites, it would not be appropriate to exclude micro solutions simply because they are not equivalent to macro sites. Moreover, different forms of sites are linked by chains of demand and supply substitution, and there are typically several options for any particular network requirement.

5.1.6 Second, ICASA has not adequately considered MTN's previous submissions regarding the geographic scope of the site infrastructure access market, once again omitting relevant information from its market assessment. MTN submits that failing to consider these relevant factors would be irregular both as a matter of administrative law and in terms of section 67(4A).

5.1.6.1 MTN and Vodacom use the same underlying and contiguous site infrastructure networks to serve customers throughout the country. Therefore, if either MTN or Vodacom sought to raise the prices of site infrastructure access in a given municipality, the other would likely respond and enter that municipality to render that price increase unprofitable (if not already active in the municipality in question). Accordingly, a proper application of the SSNIP test indicates that the geographic market is broader than municipal. Indeed, the fierce competition between MTN and Vodacom, as the two primary infrastructure players in South Africa, has driven these two operators to roll out their networks on a national basis and continually upgrade and expand these networks.

5.1.6.2 In addition, from a demand-side perspective, there are likely to be many options for an operator within a given area. For example, there will be some degree of demand-side substitution between sites on different high points in the target area in many areas.[21] In this way, areas that an individual site can cover are likely to overlap substantially with the areas that can be covered by other sites, indicating that there is expected to be a chain of substitution on the demand side. Moreover,

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19 See Bishop, S. & Walker, M. (2010) The Economics of EC Competition Law, Page 762.

20 By way of example, matches and disposable lighters have been considered to be in the same market, despite their physical differences, because customers view them as close substitutes according to their intended use. See Office of Fair Trading (2004), "Market definition: Competition Law Guidelines", Page 7. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284423/oft403.pdf [Accessed 20 April].

21 Findings Document, Page 37, Paras 136 and 137.

the overlapping coverage of different sites creates a single underlying and contiguous network, allowing consumers to remain connected as they move through the country, continuously substituting between sites of different forms and in different locations. Importantly, this does not require customers to travel frequently between municipalities in reality, as ICASA suggests. The key takeaway is that the networks allow consumers to remain connected if they were to travel across different municipalities.

5.1.7 As such, MTN maintains that the relevant geographic market should be defined on a national basis.

5.2 Effectiveness of Competition at the site infrastructure access level

5.2.1 ICASA disagrees with MTN's submission that there would be supply-side substitution between geographic areas regarding providing access to site infrastructure. ICASA asserts that this is because there are high barriers to entry, including the high cost of building sites, the need for minimum efficient scale, and legal and regulatory barriers such as municipal by-laws. In addition, ICASA asserts that MTN and Vodacom are in a "privileged position" of having had a first-mover advantage that enabled them to build out sites in the most advantageous locations first. ICASA links this to the high concentration and alleged ineffective competition in many municipal markets that it has identified.

5.2.2 However, ICASA's assessment ignores the fact that MTN and Vodacom already have national networks, have rolled-out sites on a national basis, and continue to invest heavily in site infrastructure, which allows them to compete on a national level basis. As discussed above, if one operator were to raise the price of site infrastructure access in a given municipality, the other, as a national player, would be well-placed to respond to that price rise. For example, given that Vodacom is a larger operator than MTN and has historically engaged in significant infrastructure investments, it is highly likely that Vodacom would have the ability and incentive to expand its infrastructure into any area in which MTN has established site infrastructure if it were profitable to do so.

5.2.3 In addition, Table 4 of the Findings Document suggests that MTN is "dominant" (based on statutory market share thresholds) in only 8 out of ICASA's listed 47 municipalities.[22] This indicates that it is implausible that MTN would be found to be "dominant" on a national basis, i.e. if the correct approach to geographic market definition were adopted. This once again highlights the unintended consequences of defining a market too narrowly, as ICASA has done, because the approach adopted by ICASA irrationally biases the findings against MTN.

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22 ICASA appears to have excluded district municipalities from its definition of municipalities in the MBSI Discussion Document, defining 234 municipalities in total. However, in the Findings Document, ICASA appears to list only the 47 municipalities in which either MTN (in 8 municipalities), or Vodacom (in 39 municipalities) is dominant. This is biased and inaccurate in itself. Without listing all 234 municipalities, ICASA excludes any and all of those in which, for example, Cell C or Telkom could be dominant from its assessments and from the Findings Document.

5.2.4 ICASA has also not adequately considered the economics of first-mover advantages, and in doing so, ignores the investments, innovations and risks associated with being a first (or second) mover.

5.2.4.1 For instance, MTN and Vodacom have made massive, continuous investments, taking on substantial risks, installed sites, improved their network coverage, and introduced better, more efficient, and faster technologies each year.

5.2.4.2 As the first to bring coverage and new technologies to a given area, an operator bears the cost (and risk) of installing infrastructure and the costs of research, marketing, and education associated with introducing technologies to previously unserved consumers. After that, the first mover also faces several additional risks, including that other operators will free ride on its investments and compete against the first mover in the given area without meeting all the same entry costs.

5.2.4.3 Rural areas, in particular, have benefitted from the competition between MTN and Vodacom through increased national coverage and improved network quality. It is expensive to construct sites and expand coverage to a remote rural area. Indeed, there would be little incentive for an MNO to expand its coverage to these areas if it did not face effective competition, in particular, because these areas are typically less profitable to serve.

5.2.4.4 An adverse finding against an operator, such as finding the operator to be "dominant" because it has made procompetitive investments to expand its network infrastructure to previously unserved rural areas, would disincentivise these necessary procompetitive actions. By way of example, say an operator is considering making investments to install new infrastructure and technology in an area currently unserved by any operator. Suppose this operator expects to be declared "dominant" as a result of these investments that make it the first to enter the given area. In that case, that will significantly reduce the operator's incentives and willingness to make the procompetitive investments in the first place.

5.2.5 In short, therefore, ICASA has provided no robust evidence to conclude that MTN has significant market power at the site infrastructure access level or that there is ineffective competition at this level more generally.

6. FINDINGS DOCUMENT – ROAMING MARKET

6.1 Product market definition at the roaming level

6.1.1 ICASA explains that there are two distinct types of roaming agreements, namely those for the provision of coverage, and those for the provision of capacity. According to ICASA, these types of roaming services are not demand-side substitutes because customers requiring roaming for coverage cannot switch to roaming for capacity, following a price increase in respect of the former (or vice versa). ICASA additionally claims that while providers of coverage roaming (such as MTN and Vodacom) can typically provide additional capacity, providers of capacity (such as Liquid, Rain, and Cell C) cannot offer roaming services to coverage, due to the more limited geographic scope of their networks. Therefore, ICASA defines a product market for national roaming that provides access to coverage only.

6.1.2 MTN respectfully submits that ICASA has not provided any robust evidence to support its claim that roaming for coverage and roaming for capacity reside in different product markets. In particular, ICASA has once again not considered the role of supply-side responses as between the primary infrastructure players in South Africa, MTN and Vodacom.

6.1.3 If MTN hypothetically provided roaming for capacity only, and Vodacom sought to raise the roaming price for coverage, MTN would be well-positioned to respond to that price increase by offering roaming for coverage (due to its national network). It is important to note that, in this scenario, a competitive response from MTN alone would likely be sufficient to render Vodacom's price increase unprofitable, i.e. it would not be necessary for other operators with more limited networks to respond by offering roaming for coverage. Indeed, ICASA recognises that there have been several procompetitive outcomes at the roaming level, which suggest that MTN and Vodacom apply effective competitive constraints on each other in respect of roaming services.

6.1.4 Therefore, a proper application of the hypothetical monopolist test would likely indicate that the relevant product market comprises both types of roaming services considered by ICASA. There is no evidence that ICASA has attempted a proper application of the hypothetical monopolist test in defining the product market at the roaming level.

6.1.5 Additionally, it should be noted that mobile roaming agreements are not distinguished by coverage or capacity requirements but rather service requirements, specifically voice and/or data service requirements. The latter is based on specific requirements in respect of customer service requirements, period of service, service terms and rates. For this reason, there are no limitations to specific frequency spectrum bands, and no roaming agreements are limited to high level definitions of coverage and/or capacity. This is another reason why ICASA's roaming product market definition is fundamentally flawed.

6.2 Effectiveness of Competition at the roaming level

6.2.1 ICASA asserts that, historically, the market for roaming services has been characterised by ineffective competition. ICASA provides three reasons for this claim:

6.2.1.1 First, ICASA alleges a high concentration with only two operators (MTN and Vodacom) being able to offer roaming services for coverage. ICASA asserts that there is little evidence of potential or actual competitors entering the market for the provision of roaming for coverage purposes, mainly due to the high investment costs associated with building network infrastructure, which in turn limits the options for operators seeking roaming choices.

6.2.1.2 Second, ICASA notes the average effective price paid has previously been higher than the average retail price.

6.2.1.3 Third, ICASA claims that there have historically been network quality issues, such as dropped calls.

6.2.2 As a result, ICASA concludes that Vodacom and MTN possess substantial market power in the (overly narrowly defined) market for national wholesale roaming services for coverage purposes. However, MTN respectfully submits that ICASA's conclusions are misguided, and are not based on sound economics, for several reasons.

6.2.2.1 First, ICASA once again places an unreasonable amount of weight on evidence relating to the market shares and the barriers to expanding network infrastructure to provide national roaming without conducting a proper competitive assessment. Although MTN and Vodacom may be the only operators that can offer roaming services at a national level, ICASA's simplistic approach ignores the competition between MTN and Vodacom in supplying roaming services. MTN submits that the evidence of procompetitive outcomes, such as falling roaming prices, improved quality, and customer switching (as acknowledged in the Findings Document), supports a finding that competition in the provision of roaming services is effective.

6.2.2.2 Second, there are examples in other countries, characterised by consumer bases with far higher disposable incomes and far higher population densities. Healthy and effective retail and wholesale competition has been observed with only two or three national infrastructures. For instance, the UK's Three Mobile and EE combined their networks in the Mobile Broadband Network Limited ("MBNL") joint venture, and O2 and Vodafone combined their networks to create "Beacon". This allowed these operators to share the costs of rolling out their networks while competing at the retail level. Therefore, the UK mobile market is being served by two national networks. Moreover, in 2020 the European General Court annulled the European Commission's decision to block the proposed acquisition of Telefonica UK by Hutchison 3G UK, thereby permitting a merger that would reduce the number of operators in the UK from four to three (but operating over two national networks). South Africa, which is geographically large, at least in relative terms, has a low population density. With low disposable income amongst consumers, it would likely be even more costly for multiple operators to roll out national networks. It is therefore even more likely that two or three national infrastructures would be sufficient and efficient for healthy and effective competition in South Africa.

6.2.2.3 Third, as MTN has set out in previous submissions, it is not meaningful to compare wholesale prices for roaming to average effective retail prices. This is because roaming services are primarily used to provide retail services to rural areas, whereas average effective retail rates are calculated across an operator's entire customer base. Indeed, ICASA acknowledges that such an exercise can be complex because it is unclear what the appropriate retail price metric would be (as this would depend on the time of day and variations in consumer and business rates).

6.2.3 In addition, ICASA's asserts that the roaming market has historically been characterised by high prices and poor quality, but also admits that prices have reduced, and quality issues have been resolved under the new roaming agreements. However, ICASA does not draw any conclusions in respect of effective competition from this. MTN submits that the reduced prices and increased quality indicates an effectively competitive market in that it was unfettered market dynamics, which incentivised investment and stimulated innovation, that have resulted in these new technologies and roaming agreements (and in turn lower prices and increased quality). In other words, pricing and quality in the roaming market improved organically, through competitive forces, and not as result of regulation and intervention.

6.2.4 Separately, MTN supports ICASA's finding that regulation that disincentivises essential investments in infrastructure should be avoided. However, MTN notes that this thinking has not been consistently applied to other areas of ICASA's assessment. Although ICASA recognises the risks of using regulation at the roaming level, it does not appear to appreciate that these same risks exist regarding other levels of the supply chain. Just as unreasonable regulation, informed by unsound economic assessments, would likely disincentivise investments into the roaming space, such regulation would also likely dampen investment incentives at the site infrastructure level, which would have adverse unintended knock-on effects at the retail level.

7. FINDINGS DOCUMENT – VERTICAL RELATIONSHIPS

7.1 ICASA asserts that there could be competition issues related to the fact that MTN and Vodacom are vertically integrated operators. Specifically, ICASA appears to be concerned that vertical relationships between upstream site infrastructure and downstream retail activities could harm competition because operators might have an incentive to provide other operators with inferior access to upstream services. According to ICASA, this means that each of MTN and Vodacom have significant market power in the markets for site infrastructure. In short, therefore, ICASA appears to assert that vertical relationships are, by their very nature, anticompetitive. This claim is fundamentally flawed.

7.2 It is incorrect that vertical relationships are inherently anticompetitive. Just because a firm is vertically integrated does not automatically mean that the firm is dominant and has significant market power, nor that the vertical relationship will give rise to anticompetitive outcomes. It is widely accepted in economics that vertical integration and vertical agreements can have economic efficiency rationales, even when firms have market power. For example, vertically integrated firms can avoid double marginalisation by not pricing above marginal cost at each level of the supply chain, which lowers prices for consumers and increases consumer welfare.

7.3 In South Africa, all mobile network operators are vertically integrated. The intense competition means the contest takes place at different levels of the operator value chain, network infrastructure, service development and innovation, and the relationship with consumers. As pointed out by Copenhagen Economics (2020), ultimately, the success of any vertically integrated firm depends on the ability to satisfy the needs and preferences of the customers located at the end of the value chain covered – and to do so better than its rivals alternatives for its customers[23].

7.4 The central point is that virtually every production process in the sector is vertically integrated, and economics predicts changes to the extent of the vertical integration, which is governed by the boundaries of the operator, in response to changes in relative prices, technologies and institutions. Both vertical integration and changes in the extent of vertical integration are benign characteristics of efficient, dynamic, and competitive markets.

7.5 The business reality of vertical integration is accepted given the economies of scale and scope and other types of efficiencies that can be easily recognised in the communications sector. The benefits of this are well recognised by the European Commission Guidelines, which explain the efficiencies stemming from such types of mergers and therefore represent a good reference for studying integration more broadly in the context of vertical or conglomerate mergers[24].

7.6 Paragraphs 13-14 of the EC Guidelines state that *"vertical and conglomerate mergers provide substantial scope for efficiencies. A characteristic of vertical mergers and certain conglomerate mergers is that the activities and/or the products of the companies involved are complementary to each other. The integration of complementary activities or products within a single firm may produce significant efficiencies and be procompetitive. In vertical relationships for instance, as a result of the complementarity, a decrease in mark-ups downstream will lead to higher demand also upstream. […] Vertical integration may thus provide an increased incentive to seek to decrease prices and increase output because the integrated firm can capture a larger fraction of the benefits. […] Similarly, other efforts to increase sales at one level (e.g. improve service or stepping up innovation) may provide a greater reward for an integrated firm that will take into account the benefits accruing at other levels. […] Integration may also decrease transaction costs and allow for a better co-ordination in terms of product design, the organisation of the production process, and the way in which the products are sold [as well as] customer benefits such as one-stop-shopping."*

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23 Copenhagen Economics (2020), "The economic rationale for vertical integration in the tech sector", Available at: https://www.copenhageneconomics.com/dyn/resources/Publication/publicationPDF/0/550/1606320780/copenhagen-economics-the-economic-rationale-for-vertical-integration-in-tech.pd [Accessed 15 May 2021].

24 OECD (2019) Vertical Mergers in the Technology, Media and Telecom Sector. Page 38.

7.7 ICASA provides little more than a speculative theory that vertical integration may lead to anticompetitive outcomes, provides no actual robust economic assessment to support this theory, and entirely fail to consider vertical integration's procompetitive benefits.

7.8 Therefore, MTN submits that there is no evidential support for ICASA's theory of harm regarding vertical integration in South Africa. There is, thus, no likelihood of any anticompetitive effects flowing from MTNs vertical integration in South Africa. Turning to the required evidence on actual effects in the marketplace, we note no evidence of MTN providing other operators with inferior access to upstream services. If this were the case, we would expect to see shares of new subscriptions disproportionately favouring MTN. Instead, we find market statistics that show MTN's market share dropped from 40% to less than 30% between 2011 and 2020s while later entrants such as Telkom Mobile have, on average, outperformed their past market shares. For example, Telkom's Provisional Annual Results for 2019 state that it achieved 86 per cent growth in active mobile subscribers in that one year alone[25].

7.9 As such, MTN respectfully submits that there is no evidential support for ICASA's assertion that MTNs vertical integration is in and of itself a pre-condition for anticompetitive effects. Moreover, the actual market evidence regarding MTN's market share performance demonstrates that it does not enjoy a position of significant market power in the South African marketplace.

[25] Telkom Provisional Annual Report 2019. Page 16.