

**Vodacom's response – Not confidential**

**Discussion Document on the Market Inquiry into Mobile Broadband Services**

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## Executive summary

Vodacom thanks the Independent Communications Authority of South Africa ("**ICASA**") for its review of the mobile broadband value chain. Vodacom supports the view that mobile data services in South Africa should be affordable, of a high quality and available to as many people as possible. Vodacom is, therefore, committed to ensuring that recent improvements in all aspects of the provision of mobile data services should continue. Given this, Vodacom welcomes the opportunity to respond to ICASA's Discussion Document ("**Discussion Document**") on the Market Inquiry into Mobile Broadband Services ("**Market Inquiry**").

In preparing its response, Vodacom has focused its comments on ICASA's preliminary views as set out in the Discussion Document. Therefore, if ICASA, following stakeholders' responses to this Discussion Document, were to make any substantial changes to these preliminary views (e.g. if it were to change its views on the market definitions or make material changes to the proposed remedies), it should provide all stakeholders with an opportunity to respond to these changes before producing its Findings Document.

Furthermore, following the publication of the Discussion Document, Vodacom requested ICASA grant it access to most of ICASA's underlying analysis. Despite Vodacom's request, ICASA declined, on the basis of confidentiality, to provide the requested analysis. Given this, there are certain areas of the Discussion Document, where it is difficult for Vodacom to ensure that its data has been interpreted and applied correctly, to comment meaningfully and to adopt a definitive position. Vodacom recommends that allowance be made for making the confidential data or assessments available to external advisers on a restricted basis, and/or for redaction of truly confidential data, to facilitate a fair and meaningful analysis.

## Overview

ICASA paints a detailed picture of the mobile sector and provision of mobile data services, showing that South Africa's performance is in line with that in many other markets. However, ICASA then proposes to intervene in the provision of mobile services, despite not setting out any clear market failures<sup>1</sup> with adverse consumer impacts and hence any rationale for such intervention.

In Vodacom's view, ICASA's proposed interventions are even more concerning when considering that ICASA's analysis had no regard to the potential impact on the defined markets of its imminent assignment of High Demand Spectrum ("**HDS**") and licensing of the Wireless Open Access Network ("**WOAN**"). That is, ICASA did not consider the overlap between these processes, which is unreasonable given that effectiveness of competition needs to be assessed on a forward-looking basis in the Market Inquiry and that any remedies that may be imposed must be proportionate. Furthermore, whilst the Discussion Document does, correctly, recognise the severe spectrum shortages in South Africa, ICASA does not proceed to assess the impact of such spectrum shortages on the markets that it has defined, thereby compromising<sup>2</sup> its analysis.

Going forward, the assignment of a large amount of HDS should significantly improve outcomes in mobile markets. Further, one of the key objectives of the WOAN is to increase competition in retail and wholesale services markets, which clearly overlaps with the objectives of the Market Inquiry process. Any assessment of competitive conditions and proposed conditions to address market failures cannot reasonably ignore the intended effects on competition envisaged from licensing the WOAN/assigning HDS. Understanding these likely impacts is, therefore, crucial if ICASA is to be able to decide if further, pro-competitive remedies are required.

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<sup>1</sup> The ECA requires the Authority to "*(d) impose appropriate pro-competitive licence conditions on those licensees having significant market power to remedy the **market failure***"

<sup>2</sup> We use the word "*compromised*" because, effectively, ICASA is not able to distinguish in its analysis, between market outcomes arising from a lack of effective competition and market outcomes arising from the spectrum shortage.

Vodacom does, however, recognise that it is challenging to accurately foresee how the mobile sector will develop in the coming years, in the light of these processes. Therefore, given that ICASA will assign spectrum and license the WOAN in the near future, Vodacom believes that ICASA should consider postponing the Market Inquiry, or at least any proposed interventions, until there is greater clarity on what impact these significant parallel measures will have. The imposition of market review remedies without awaiting such an outcome may well end up undermining ICASA's other processes, e.g. the viability of the WOAN and/or being disproportionate and having unintended consequences e.g. stifling investment.

Nonetheless, if ICASA does decide to go ahead with the Market Inquiry now, at the very least it needs to undertake a thorough forward-looking assessment of the effectiveness of competition and ensure that any intervention is focused where there is a clear market failure with detrimental consumer impacts, err on the side caution to avoid unintended consequences, and be strictly proportionate to the issue identified, given the expected changes in the market. With this in mind, Vodacom has also identified the following main concerns relating to the Discussion Document, i.e. it:

- Appears to consider, in many places, all types of mobile services, rather than restricting its analysis to data services, which would be in line with ICASA's clear statement that its Inquiry is focused on data services. This is critically important because, for example, Vodacom has a lower share of mobile data subscribers/mobile data traffic/downlink spectrum than overall mobile subscribers;
- Should place more weight on the rapid growth of Telkom in mobile markets, which demonstrates that there are limited barriers to expansion in retail and wholesale markets;
- Significantly overstates Vodacom's market share of sites, which means that both the assessments of effectiveness of competition and SMP are inaccurate for the site access market;
- Fails to recognise widespread site-sharing in South Africa, which demonstrates that stronger regulation of site access is not required;
- Should place more weight on the recent commercial agreements, which demonstrate that there is already effective competition for roaming services between Vodacom and MTN, with other players being well-positioned to offer roaming services in future;
- Seems to unreasonably propose roaming regulation in areas where infrastructure-based competition is clearly viable;
- Linked to the above, does not properly consider the extent to which the regulation of national roaming services, could deter investment incentives, especially for the latest technologies; and
- Fails to consider the lack of effective access to ducts and poles, which is important for rolling-out fibre mobile backhaul.

### **The assessment of effectiveness of competition should be a thorough forward-looking analysis**

When assessing the effectiveness of competition, the Electronic Communications Act ("ECA") S67(4A) requires that ICASA should conduct a *"forward-looking assessment of the market power of each of the market participants over a reasonable period"* [emphasis added]. In effect, this means that ICASA needs to conduct a thorough forward-looking analysis to obtain a clear view on the appropriate counterfactual (i.e. how the market would develop absent any additional regulation arising from the market review) before deciding whether any intervention is warranted. Conducting a forward-looking assessment is also consistent with international best practice.

When assessing the effectiveness of competition in the Discussion Document, ICASA appears to focus mainly on market shares. However, a full assessment must consider a range of relevant factors in addition to market shares.

ICASA also needs to make sure that it does not conflate the SMP analysis with the assessment of the effectiveness of competition, as these are clearly two distinct processes in terms of the ECA. Even if ICASA finds an operator (or operators) with relatively high market shares, this does not automatically mean that there is ineffective competition.

### **Impacts of the imminent HDS assignment and the WOAN need to be considered**

It would be erroneous for ICASA not to take into account the impact of the imminent assignment of HDS and the establishment of the WOAN on its Market Inquiry, especially given that both of these processes are under ICASA's control. The release of HDS and the entry of the WOAN will have a fundamental impact on the mobile market, and will likely support the achievement of ICASA's and the Government objectives in relation to further improving the provision of mobile data services in South Africa. This by itself would already render the regulatory interventions proposed in the Discussion Document unreasonable and unjustified.

#### **Spectrum shortages compromise ICASA's analysis of market outcomes**

In its Discussion Document, ICASA clearly recognises that operators in South Africa have access to less spectrum than mobile operators elsewhere. For example, it stated that:

*"South Africa has assigned relatively little spectrum for mobile use compared to international benchmarks. Figure 17 shows the spectrum assigned to mobile operators in EU countries and South Africa by frequency band, as well as the average spectrum assigned per operator. This illustrates that South Africa is well behind the leading countries when it comes to assigning spectrum for mobile broadband, having assigned about half the spectrum compared to the UK for example, and with **an extremely low assignment per operator**."*[Emphasis added]

Vodacom agrees with the above statement. However, when assessing both the effectiveness of competition and SMP within the different markets that it has defined, ICASA fails to take into account the implications of the spectrum shortages that it has identified, amongst others:

- How the unusual distribution of spectrum in South Africa (smaller operators having a similar or greater share of spectrum than larger operators) impacts upon competitive dynamics and market outcomes at the retail and wholesale levels;
- How capacity constraints arising from a lack of spectrum have affected Mobile Network Operators' ("MNO") incentives and ability to provide MVNO, APN and national roaming services; and
- How spectrum shortages impacted on operators' ability to deploy their networks in an inefficient way, and how this has impacted wholesale and retail market outcomes.

As a result of the above, ICASA's analysis of the effectiveness of competition in different markets is compromised. Whilst ICASA does seem to appreciate that spectrum assignments can be one factor which influences mobile market outcomes (for example by undertaking a statistical analysis that shows a negative relationship between the amount of spectrum deployed and prices), it overlooks the fact that any perceived "market failure"<sup>3</sup> identified from its benchmarking and/or consideration of market outcomes is likely to be driven by spectrum shortages.

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<sup>3</sup> Vodacom contends that this isn't really a "market failure", but rather a "regulatory failure"

ICASA is proposing now to assign a large amount (a total of 446MHz) of HDS in the 700MHz, 800MHz, 2.3GHz, 2.6GHz and 3.5GHz bands. Making this available to the mobile licensees could have a significant positive impact on the effectiveness of competition in different markets and retail market outcomes. For

What is more, Vodacom notes that ICASA is proposing to impose strict coverage obligations (100% population coverage) on three licensees (those who acquire lots B, C and D) in the upcoming auction.<sup>4</sup> This is likely to have an impact on the market for roaming services and affect non-price outcomes in South Africa.

#### A key objective of the WOAN is to increase competition in mobile markets

The policy on HDS and policy direction on the licensing of a WOAN sets out that one of the key objectives of the WOAN is to:

*"promote competition within the ICT sector with the emphasis on service -based competition...."*<sup>5</sup>

Martin Cave, a renowned expert on telecommunications sector policy, has also recognised that the WOAN has the potential to increase competition at both the network-level and the retail-level:

*"I believe that a non-dominant WOAN can usefully be introduced in South Africa. It should maintain and in (in some geographies) enhance existing levels of network competition, and deliver better, cheaper services to end users. It will also promote service competition."*<sup>6</sup>

The objective of the Market Inquiry is also to increase the effectiveness of competition and enhance consumer outcomes. Given this, there is a clear overlap in the objectives of both processes. This is important because any regulation that ICASA imposes must be proportionate. This means ICASA must consider the impact of the WOAN on its Market Inquiry process.

In its Information Memorandum ("IM"), ICASA set out clear plans for establishing the WOAN and ensuring that it receives, to Vodacom's knowledge, an unprecedented combination of entry assistance:

- Assignment of a significant amount of HDS (the exact assignment still needs to be determined) with reduced fees;
- Existing MNOs will be obliged to provide the WOAN with access to their passive and active infrastructure on cost-orientated terms; and
- A requirement for existing operators, jointly, to purchase 30% of the WOAN's capacity.

Vodacom does not, as set out in its response to the IM, agree with all of the above proposals. Notwithstanding this, Vodacom considers that even if the degree of entry assistance is reduced to a more reasonable level (e.g. the removal of the proposed wholesale obligations<sup>7</sup> and a reduction in the amount of HDS assigned to the WOAN), the WOAN has the potential to increase competition at both the network-level and the retail-level. As such, it is thus required that the WOAN should be considered by ICASA in its Market Inquiry.

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<sup>4</sup> As set out its response to the IM, Vodacom considers that the coverage obligations will need to be modified to make them more realistic.

<sup>5</sup> Government Gazette - "Policy on high demand spectrum and policy direction on the licensing of a wireless open access network" (26 July 2019)

<sup>6</sup> Cave - "The South African Government's ECA amendments Bill: an assessment"

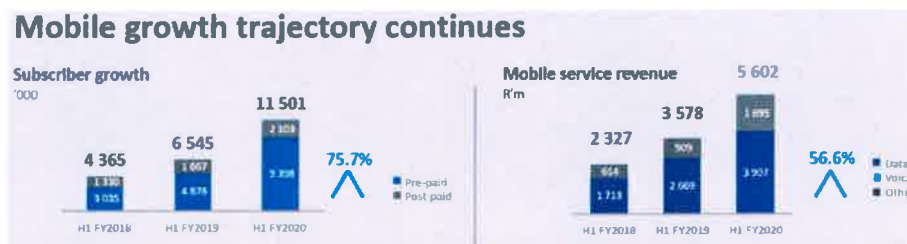
<sup>7</sup> Vodacom considers that the Facilities Leasing Regulations should be sufficient for ensuring that the WOAN gets effective access to mobile sites. It also considers that the market for roaming services is already competitive.

## **Other important market developments should also be taken into account**

### **Telkom's impressive growth**

ICASA has afforded limited attention to Telkom's impressive growth, despite the fact that this can be expected to continue, in part because Telkom has a number of advantages relative to other players e.g. a higher share of current spectrum holdings and an extensive fibre network. Telkom's mobile subscriber share has grown from zero at the start of 2010 to just under 10% by the end of 2018. Further, according to Telkom's latest financial results, Telkom's mobile subscriber base almost doubled in size between September 2018 and September 2019, from 6.5 million to 11.5 million (see Figure 1).<sup>a</sup>

**Figure 1: Telkom's mobile subscriber growth – FY 2019 vs FY 2020**



Source: Telkom, Interim Results Presentation, H1 FY2019/20

Telkom has also been rapidly rolling-out sites. On a national basis, Telkom, through its Gyro unit, has become one of the largest operators in terms of tower ownership. According to Telkom's latest financial results, Gyro's mast & tower portfolio consists of 6,500 towers spread across South Africa. Telkom also forecasts that Gyro will deploy 2,000 additional sites for the next three years.

### **Recent wholesale agreements**

There have also been a number of important wholesale agreements concluded in recent months in South Africa, which ICASA has not taken into account in its Discussion Document.

- Cell C has concluded a network agreement with MTN, which will strengthen both players' positions in the market;
- Vodacom has concluded agreements relating to network sharing with RAIN and Liquid Telecom ("Liquid"); and
- Vodacom has reached a Deep Passive Sharing ("DPS") agreement with Telkom covering 2,500 sites.

The above wholesale agreements are likely to strengthen competition at both the wholesale and retail-levels. For example, the agreement between MTN and Cell C should put Cell C in a position to offer a widespread roaming service. Smaller operators' ability to reach such agreements with Vodacom and MTN also demonstrates that there is effective competition at the wholesale-level.

<sup>a</sup> Telkom, Interim Results Presentation, H1 FY2019/20, slide 7

## Retail market

Having discussed ICASA's oversight to assess the effectiveness of competition in an appropriate way across all of its defined markets, Vodacom now sets out its views on ICASA's analysis of individual markets, starting with the retail market.

### Market definition

Vodacom acknowledges that data, voice and SMS services are likely to form part of the same product market definition, whilst agreeing with ICASA that the Market Inquiry should focus on data services. ICASA's assessment and proposals should accordingly be consistent in this regard and not expand beyond data services.

Vodacom also notes the proposed geographic market definition. In this response, Vodacom is unable to comment fully on this because certain aspects of the analysis are incomplete, whilst ICASA has also not provided Vodacom with the information underlying its analysis. Given this, Vodacom does not, in this response, adopt a definitive position on the appropriate boundaries of the geographic market and reserves its position and its rights in this regard. Nevertheless, Vodacom notes that there are certain features in South

In any case, Vodacom considers that conclusions on the scope of the geographic market should not influence the final outcome of this review. This is because:

- To the extent that there are concerns around competition at the retail level (which Vodacom disagrees with), ICASA correctly finds that these are best addressed at the wholesale level rather than through any remedies in the retail market; and
- Even if the retail market was defined as national, this would not preclude ICASA from defining sub-national wholesale markets – a topic Vodacom returns to later in this submission.

### Effectiveness of competition and identification of operators with SMP

Vodacom does not agree with ICASA's conclusions on the effectiveness of competition and SMP in the mobile retail market. In particular:

- As already discussed, there is little consideration afforded to how the effectiveness of competition will change going forward due to:
  - The assignment of a large amount of HDS;
  - The licensing of the WOAN;
  - Telkom's rapid growth; and
  - Recent wholesale agreements.
- Furthermore, ICASA's assessments of the current level of competition and market outcomes and SMP are compromised by the spectrum constraints that the market faces. This is exacerbated by the fact that larger MNOs have a disproportionately small share of the total HDS currently available.



- Given ICASA's focus on data services, it should be estimating market shares based on data subscribers and data traffic rather than on overall subscribers – on average, this will reduce Vodacom's market share across different municipalities.
- ICASA's assessment of the effectiveness of competition is largely carried out at the national-level despite it having defined sub-national markets – ICASA has not presented any evidence on the durability of market shares over time within sub-national markets.
- ICASA's own international benchmarking shows that South Africa's performance is middle of the range with some examples of strong performance on non-price factors, despite the spectrum constraints the market is facing.

Most fundamentally, and when combining the above points, it is clear that ICASA has not identified any market failures linked to competition problems.

#### Proposed remedies

Vodacom agrees with ICASA's decision not to impose any remedies at the retail-level. This is in line with the ECA requiring any remedies to be proportionate and also in line with international best practice. For example, the European Commission (EC) has stated:

*"It is essential that ex ante regulatory obligations should only be imposed on a wholesale market i.e. in markets where there are one or more undertakings with significant market power, with a view to ensure sustainable competition on a related retail market"*<sup>9</sup> [Emphasis added]

## **Spectrum**

#### Market definition

Vodacom notes that, based on international precedent, it is unusual to define spectrum as being in a separate wholesale market.

#### Effectiveness of competition and identification of operators with SMP

Vodacom agrees that no operator has SMP for spectrum. In fact, Vodacom would highlight that its share of spectrum (14%) is far below the threshold for deemed dominance (45%) and also far below the spectrum cap imposed by Ofcom in the UK (37%). In fact, when considering downlink spectrum (which is more relevant in the context of data services), Vodacom's share is even lower at 11%.

Spectrum is, however, the key bottleneck for providing mobile services. Therefore, ICASA should have considered the implications of the lack of spectrum on the level of competition in the other downstream markets that it has defined, i.e. sites, roaming, MVNO/APN access and Retail.

#### Proposed remedies

Vodacom notes that ICASA is already planning to intervene in the upstream market for spectrum, by assigning HDS and licensing the WOAN. Both of these processes can be expected to strengthen competition and improve consumer outcomes. Therefore, according to the modified greenfield approach followed by the EC, ICASA should first consider the impact of the assignment of HDS and the licensing of the WOAN on the retail market before considering whether there is a need for any intervention in more downstream wholesale markets.

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<sup>9</sup> Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL establishing the European Electronic Communications Code (Recast) (Text with EEA relevance), page 72

Vodacom agrees with the need to urgently assign HDS. It also agrees with ICASA's decision not to impose any remedies on spectrum as part of the Market Inquiry. It does, however, note that ICASA is proposing to attach a wide range of obligations on the HDS that it is due to assign. Vodacom has commented on these proposals in its response to ICASA's IM on the assignment of HDS.

## **Site access**

### Market definition

Vodacom notes ICASA's decision to define a separate product market for site access. Vodacom considers that the product market definition for site access should include all types of sites and available infrastructures due to there being a chain of substitution between different types of sites. This means that macro sites, lampposts, billboards, micro and indoor cells, rooftops (both used and unused) and other available infrastructure should all be included within the same product market.

Vodacom is not in a position to comment fully on ICASA's decision to define sub-national markets, as it has not seen all of ICASA's analysis. However, based on Vodacom's understanding of the site access market, it considers that there are likely to be grounds for defining sub-national markets, although more work needs to be done by ICASA to determine the most appropriate geographic unit. Based on international precedent, Vodacom would also highlight that even if the relevant wholesale markets were not defined on a sub-national basis, ICASA could still restrict any remedies to portions of the market, and accordingly to particular geographic regions.

### Effectiveness of competition and identification of operators with SMP

Vodacom does not agree with how ICASA has assessed the effectiveness of competition for site access and identified operators with SMP and does not agree with ICASA's conclusions in this regard. ICASA's analysis of market shares for site access appears questionable because:

1. Vodacom considers that ICASA should be measuring the number of sites controlled by each party. Whilst Vodacom has not had access to ICASA's market share calculations for site access, Vodacom is concerned that ICASA has not measured the number of sites controlled by each party on a consistent basis. Given this, ICASA should confirm that it has excluded sites not controlled by Vodacom, such as rooftops, billboards, lampposts, micro and indoor sites within the estimate of Vodacom's market share for sites. Such sites should instead be assigned to those entities that control the sites, rather than Vodacom. Making this adjustment will significantly reduce the number of sites attributed to Vodacom.
2. Vodacom is surprised that Vodacom is said to have SMP in so many more municipalities than MTN (106 for Vodacom municipalities relative to 20 municipalities for MTN), despite both operators controlling a similar number of sites. Vodacom has conducted its own analysis of market shares for sites and has found that Vodacom's market share for sites controlled is only above 45% in 17 out of 234 municipalities<sup>10</sup>. At a national-level, Vodacom would also highlight that its market share of sites controlled is far below the 45% threshold for deemed dominance.
3. Ideally, ICASA should also take into account unused rooftops and other available infrastructure when estimating market shares. However, Vodacom accepts that accurate information on this may not be available. Nonetheless, when assessing the effectiveness of competition, ICASA should assess qualitatively the role played by unused rooftops and other available infrastructure. Vodacom would be very surprised if ICASA considers there to be ineffective competition for sites in urban areas, where

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<sup>10</sup> This takes into account all sites controlled by Vodacom, MTN, Gyro, tower-sharing companies, used rooftops. It excludes unused rooftops due to a lack of data

there are likely to be ample rooftops and other available infrastructures that MNOs are required to consider by Municipalities when deploying mobile equipment.

Vodacom would also highlight that the overall level of space<sup>11</sup> is not the same for all sites. For example, the available space, determined by the wind-load capacity, on Vodacom's sites is more limited than for tower-sharing companies, Telkom (Gyro) and rooftops<sup>12</sup>. As a result, Vodacom's market share based only on the number of sites, and without taking into account the available capacity on a site, is likely to overstate any market power that it has.

ICASA should also have acknowledged the widespread site-sharing in South Africa<sup>13</sup>, as this strongly suggests a lack of market failure. As already discussed, a number of important site-sharing agreements have recently been reached. This is largely driven by operators having countervailing buyer power as they have a number of alternative options for getting site access, whilst also being underpinned by the Facilities Leasing Regulations. If Vodacom does not provide an operator with site access, then it knows that another

Further, ICASA's analysis of barriers to entry is undermined by its acknowledgement of the rapid growth in sites that Telkom has managed to achieve.<sup>14</sup> A subset of tower-sharing companies also have a relatively small portfolio of sites (whilst other tower-sharing companies have a larger portfolio of sites), which provides further evidence that barriers to entry, such as economies of scale, are minimal for sites.

#### Proposed remedies

Before considering whether any additional remedies for site access are required, ICASA should first:

1. Assess the effectiveness of the existing Facilities Leasing Regulations.
2. Consider whether it can simplify, improve and expedite any regulatory processes and approvals, such as processing of municipal leases, environmental impact assessments ("EIA") and wayleaves. As ICASA itself recognises, these processes can lead to substantial costs and delays in mobile network roll out.

Vodacom agrees with ICASA's decision not to impose any price regulation in respect of sites. Vodacom already provides information on its site locations and supports this proposed remedy provided that the information does not have to be made publicly available, as this could create unacceptable security risks.

Vodacom notes that ICASA also intends to restrict operators' ability to reserve capacity on sites. This could be problematic in circumstances where operators want to reserve space on sites for new technologies e.g. 5G, but the required spectrum is not assigned in a timely fashion. In cases where the assignment of spectrum has been delayed, operators should be allowed to reserve capacity on sites for a longer period of time. If ICASA did not permit this, then this could deter investment in new sites, as the benefit from rolling-out new sites would be more limited if operators were not able to reserve capacity for new technologies.

Lastly, Vodacom considers that imposing accounting separation for sites may be impractical given the sub-national market definition for site access, whilst also imposing a disproportionate burden on operators.

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<sup>11</sup> I.e. the available square meters on a site taking into account wind load capability of a tower

<sup>12</sup> Rooftops have no wind load limitations

<sup>13</sup> Although ICASA does mention two of the more recent agreements, it has not analysed these in any detail - *"However, there are also signs that the market may be becoming more competitive and two major extensive site sharing agreements have been recently negotiated."*

<sup>14</sup> In terms of the ability to roll out new sites by sharing or establishing owned sites, Telkom has grown its site footprint rapidly in recent years

## Roaming

Vodacom is of the view that the roaming service market is competitive. Although there may be a limited number of very remote areas that could be a natural monopoly on a forward-looking basis, this does not justify regulation because it is not necessary for all operators to have exactly the same level of geographic coverage (as recognised by the ACCC in Australia<sup>15</sup>). Some differentiation on coverage may be in consumers' interest, since some consumers will value coverage more than others. Further, roaming regulation could deter investment, which could prevent any operator from rolling-out its network to very remote areas in the first place.

### Market definition

Vodacom considers that the product market for roaming should be defined as "roaming services in remote areas". Such a product market definition would be in line with the Discussion Document stating that the main benefit of roaming services is to provide coverage in areas where own-network roll-out is not viable:

*"The benefits of national roaming are primarily facilitating market competitiveness and providing coverage in areas in which infrastructure investment is too costly or is not feasible."*

However, in its Discussion Document, ICASA has concluded that some operators have SMP in areas where there is competition and deployment is viable, which suggests that ICASA is planning to impose remedies in such areas. This is inconsistent with ICASA's statement that the main benefit of roaming services is in remote areas.

Vodacom is not in a position fully to comment on ICASA's decision to define sub-national markets, as it has not seen all of ICASA's analysis. However, it concurs with ICASA that there may be scope to define sub-national markets.

### Effectiveness of competition and identification of operators with SMP

Vodacom and MTN both have over 99% 3G population coverage, which suggests that very few areas in South Africa could be considered as a natural monopoly<sup>16</sup>. Furthermore, ICASA has only carried out a partial, forward-looking, assessment of the effectiveness of competition for roaming services. For example, on the one hand, ICASA has considered the new roaming agreements between Telkom and Vodacom, and Cell C and MTN. These agreements clearly demonstrate that there is already effective competition for roaming services. However, competition for roaming services is likely to intensify even more in future and ICASA has not considered that the number of roaming hosts is likely to increase in many areas in future due to:

- The agreement between MTN and Cell C, and MTN and Liquid; and
- The agreements relating to network sharing between Vodacom and RAIN, and Vodacom and Liquid.

ICASA needs to update its market share calculation for roaming services to reflect the above agreements, as under all agreements operators are able to transmit on their own equipment. Vodacom considers that the MTN and Cell C agreement in particular could have a significant impact on ICASA's market share calculation for roaming services. This is because Vodacom understands that the number of sites on which Cell C transmits will significantly increase under this agreement, given that Cell C will likely be able to use most or all of MTN's sites.

Vodacom also wishes to draw ICASA's attention to three other key changes, which will increase competition for roaming services in future:

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<sup>15</sup> [https://www.accc.gov.au/system/files/Mobile%20roaming%20declaration%20inquiry%20final%20report\\_0.pdf](https://www.accc.gov.au/system/files/Mobile%20roaming%20declaration%20inquiry%20final%20report_0.pdf)

<sup>16</sup> In its response to the IM, Vodacom is proposing that acquirers of sub-1GHz spectrum should face a coverage obligation to cover 99.78% of the population with a basic data service within 5 years.

- The assignment of additional sub-1GHz spectrum in accordance with ICASA's IM, which will make it less costly for MNOs to expand their network footprint and so further increase the areas in which network competition is possible;
- The launch of the WOAN, which according to ICASA's IM on spectrum, will offer roaming services; and
- The coverage obligations that ICASA plans to impose on licensees as part of the upcoming spectrum auction, which are likely to encourage further own-network rollout in some areas.

#### Proposed remedies

Both Cell C and Telkom have been in the mobile market for a decade or more<sup>17</sup>, so cannot be considered as new entrants, as they have had ample time to roll-out their own networks. Therefore, whilst it is true that some countries do impose roaming regulation on a temporary basis to help assist new entry, these circumstances do not apply to Cell C and Telkom.

Vodacom is of the view that there is no need for any form of roaming regulation in South Africa. Cell C already has a long-term network arrangement with MTN, which means that it would not need a regulated roaming service (and even if it did need a roaming service it would benefit from strong competition for such services, especially on a forward-looking basis). Meanwhile, Telkom has itself highlighted that there is no need for price regulation of roaming services, whilst any historic issues with seamless handover have been resolved:

*"In order to compete with established operators, it is essential for new entrants to offer nationwide coverage. Given the cost and time required to build a national network this means national roaming is unavoidable for new entrants.*

*However, in Telkom's view, **the price of national roaming does not lend itself to regulation** for the following reasons. First, **Telkom's recent experience negotiating with Vodacom, compared to its previous experience with MTN, suggests to Telkom that there is significantly more competition in the wholesale market for national roaming than before.** For example, **Telkom's roaming agreement with Vodacom includes seamless handover**, the lack of which was a major shortcoming of the MTN agreement. Simply put, the market has become more mature and the nature of roaming agreements is now better understood.*

*Second, the nature of the service means that the roaming customer requires flexibility to renegotiate when needed, which may be hindered by a predefined regulatory timetable for the review of regulated prices. In general, it is important to bear in mind that market dynamics, technology and consumer demand evolve, sometimes rapidly. Telkom considers that such changes are more easily addressed in a commercial rather than in a regulated setting.*

*In the light of these considerations, **Telkom's view is that commercially negotiated roaming agreements remain preferable at this stage.** There may, however, be some scope for a set of guidelines setting out minimum service levels in roaming agreements."*<sup>18</sup> [Emphasis added]

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<sup>17</sup> Cell C entered in 2001, whilst Telkom entered in 2010

<sup>18</sup> Telkom's submission in response to the DSMI's Provisional Findings and Recommendations Report (14 June 2019).

If, despite all of the evidence that there will be effective competition for roaming services, ICASA did ultimately decide to impose remedies in this market, then it should bear in mind that it should only apply to:

- The remote areas which could be considered natural monopolies on a forward-looking basis; and
- Data services, given that ICASA's Market Inquiry is focused on data services.

Further, for the latest technologies e.g. 5G, there should be some delay before imposing roaming regulation, to avoid deterring investment incentives and innovation.

## **MVNO and APN access**

### Market definition

It is important to note that ICASA cannot impose remedies in any market that it has not defined. However, given that ICASA is not proposing to impose any remedies on MVNO and APN access, Vodacom agrees that ICASA can leave open the question of market definition. Vodacom notes that historically Cell C has used roaming services acquired from Vodacom as an additional input into providing MVNO access. This suggests that ICASA is correct to consider that MVNO access may be downstream from roaming services.

### Effectiveness of competition and identification of operators with SMP

Historically, Vodacom has not seen significant interest from MVNOs. However, in more recent years, Vodacom has held negotiations with several MVNOs, although these have broken down for a number of reasons, including MVNOs turning down Vodacom's offer. Vodacom considers that the lack of MVNOs in South Africa can be explained by operators having a lack of spectrum and therefore having to manage capacity constraints. Given this, on a forward-looking basis the assignment of spectrum should improve MVNOs' ability and incentive to offer MVNO and APN access. Further, the envisaged increase in the number of networks available i.e. RAIN, Liquid and the WOAN, will enhance competition for MVNO and APN services.

### Proposed remedies

Vodacom agrees with ICASA's decision not to impose any remedies on MVNO and APN access, as any remedies should be focused on more upstream markets. Furthermore, regulated access to MVNOs could actually undermine ICASA's own parallel process, i.e. the financial viability of the WOAN.

Vodacom would also highlight that ICASA is proposing to attach an obligation on acquirers of HDS to each offer access to at least three MVNOs. Notwithstanding Vodacom's disagreement with this proposal, as set out in its response to ICASA's IM, this again provides an example of ICASA not having taken into account the overlap between its IM on spectrum and its Market Inquiry process.

## **Duct and pole access**

ICASA has omitted a key market for mobile services, namely duct and pole access. Both fixed and mobile markets would benefit if there were more effective access to the duct and pole network controlled by Telkom. At present, the lack of effective access is limiting the roll-out of fibre for mobile backhaul. The failure of Telkom to provide access to its duct, pole and dark fibre network has led to industry having to rely on inefficient legacy technologies, such as microwave. Where mobile operators decide to self-provide fibre backhaul it typically takes longer and is also more expensive. As a result, ICASA needs to identify ducts and poles access as a market under the current Market Inquiry.

## A. Legal framework and international precedent

In this section, Vodacom describes the process that ICASA has to follow in market reviews. It does this based on the legal framework in South Africa, whilst also referring to best practice in other countries. Vodacom refers back to this section throughout the rest of this submission to highlight areas where ICASA has not adhered to its legal obligations or where ICASA has deviated from best practice.

### 1. Legal framework for conducting market reviews in South Africa

Section 67(4) of the ECA provides ICASA with the legislative powers to address market failure, where it exists, by way of an inquiry in terms of section 4B of the ICASA Act 13 of 2000. To do so, however, ICASA must, among other things:

- *"define relevant wholesale and retail markets or market segments;*
- *determine whether there is effective competition in those relevant markets and market segments;*
- *determine which, if any, licensees have significant market power in those markets and market segments where there is ineffective competition;*
- *impose appropriate pro-competitive licence conditions on those licensees having significant market power to remedy the market failure;*
- *set out a schedule in terms of which the Authority will undertake periodic review of the markets and market segments ...; and*
- *provide for monitoring and investigation of anti-competitive behaviour in the relevant market and market segments."*

The following sub-sections highlight a number of important points about the process that ICASA has to follow when conducting a market review. These also reflect the market review guidelines ("**The Guidelines**") which ICASA published in 2010. Although The Guidelines are not legally binding on ICASA, they do set out a clear approach, largely in line with internationally established practice, which Vodacom would expect ICASA to follow in its market reviews<sup>19</sup>. In the sub-sections below, we highlight that:

- The assessment of the effectiveness of competition and the identification of licensees with SMP are two distinct steps;
- The assessment of the effectiveness of competition has to be forward-looking;
- The assessment of the effectiveness of competition needs to take into account a range of factors other than merely market shares;
- Any remedies need to be proportionate and focused on market failures; and
- Investment incentives have to be taken into account when designing remedies.

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<sup>19</sup> With the exception of one area of the market review guidelines (see Section 1.2 below)

## 1.1 Defining relevant wholesale and retail markets or market segments

The Guidelines stipulate that:

*"The exercise of defining a market involves identifying a particular product or service supplied by one or more suppliers and evaluating whether the same or similar consumer-desired outcome may be achieved through the consumption of other products/services, if available. This exercise implies that the original hypothesis is that the desired consumer outcome may only be achieved from the consumption of a particular product or service. If it may be shown that the same/similar desired outcome may be achieved through the consumption of additional products/services, then the definition of the market has to be expanded to include these additional products/services. The Authority may use the Hypothetical Monopolist Test, including the Small (but) Significant Non-transitory Increase in Price (SSNIP) test, as well as other alternatives, including the examination of 'practical indicia', during the process of defining a market."*<sup>20</sup>

The Guidelines then go on to explain that both demand-side and supply-side substitution may be relevant when defining markets:

*"In defining a market, therefore, the Authority must consider both barriers to entry (structural, legal and regulatory) as well as the dynamic characteristics of the market in question."*<sup>21</sup>

The latter involves assessing both demand-side and supply-side substitution:

*"Demand-side substitution: demand-side substitution occurs when consumers choose to switch products based on the products' characteristics, price and/or intended use. The objective of evaluating demand-side substitution is to establish whether the consumer has choice of the use of different products to achieve the same desired outcome. If a choice of product exists, under demand-side analysis the scope of the market will have to be expanded."*<sup>22</sup>

*"Supply-side substitution: supply-side substitution occurs when a change in the market (e.g. an increase in the sales price of a product) leads to an increase in the number of licensees who provide the same product to the consumer. The objective of evaluating supply-side substitution is to establish whether a change in the price of a product would entice a greater number of suppliers to enter the market in question, thereby enhancing consumer choice and reducing the market power of a firm."*<sup>23</sup>

## 1.2 Effectiveness of competition and identification of operators with SMP

The assessment of the effectiveness of competition and the identification of licensees with SMP are two distinct steps

The ECA S67 (5) states that:

*"a licensee has significant market power in a market or market segment if that licensee –*

- is dominant;*
- has control of an essential facility; or*

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<sup>20</sup> Page 7

<sup>21</sup> Page 7

<sup>22</sup> Page 8

<sup>23</sup> Page 9



- *has a vertical relationship that the Authority determines could harm competition."*

However, it is clear from the whole of Section 67 that the ECA does not equate "SMP" and "ineffective competition".

- Section 67(4) of the ECA requires ICASA to impose procompetitive conditions on licensees "where there is ineffective competition **and** if any licensee has significant market power..." [Emphasis added]
- Section 67(4A) states the factors that ICASA must consider when determining whether there is effective competition, making it clear that a finding of SMP is not sufficient.

Therefore, in circumstances where ICASA finds that a license has SMP, it is a statutory jurisdictional prerequisite for ICASA to **also** assess whether there is ineffective competition, **before** deciding to impose any remedies<sup>24</sup>. Hence, regarding the existence of SMP by itself as determinative, without an independent assessment of whether there is ineffective competition, would entail a failure by ICASA to comply with a jurisdictional prerequisite under section 67(4).

Indeed, ICASA has acknowledged this in previous market reviews it has conducted. For example, in its 2010 and 2014 market reviews of the wholesale call termination markets, ICASA did not regard a finding that an operator had SMP as sufficient to establish whether there was also ineffective competition in the relevant market(s) and hence whether regulation was warranted. Despite a finding that each licensee possessed not only SMP, but absolute SMP (i.e. 100% market share) over its own network (the defined markets), ICASA nevertheless considered other factors that might result in a conclusion that there was effective competition, or that regulation was not warranted.

#### The assessment of the effectiveness of competition has to be forward-looking

The ECA S67(4A) requires that, as part of any market review, ICASA's assessment of the effectiveness of competition must be forward-looking. This is clear from the following text:

*"When determining whether there is effective competition in markets and market segments, the Authority must consider, among other things-*

- a. the non-transitory (structural, legal, and regulatory) entry barriers to the applicable markets or market segments; and*
- b. the **dynamic** character and functioning of the markets or market segments, including an assessment of relative market share of the various licensees or providers of exempt services in the markets or market segments, and a **forward-looking assessment** of the relative market power of the licensees in the markets or market segments"* [Emphasis added]

The Guidelines also make it a very clear that "a forward-looking assessment of the effectiveness of competition within a market is required":<sup>25</sup>

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<sup>24</sup> Given this, the following statement in ICASA's market review guidelines (2010) is inconsistent with the ECA, as it incorrectly equates effective competition with SMP: "Effective competition is a state of being within a particular market where, at a point in time, no one (or group thereof) licensee has significant market power."

<sup>25</sup> Page 11

The assessment of the effectiveness of competition needs to take into account a range of factors other than merely market shares

The Guidelines set out the methodology ICASA expects to use to evaluate the effectiveness of competition. According to this, effective competition exists when:

- *"consumers have sufficient choice regarding who provides the services they seek, at reasonable prices;*
- *sellers have access to buyers without justified restrictions imposed by external parties, including competitors and legislation;*
- *The price charged for a product or service is a result of the interplay between consumers and licensees, i.e. no one firm has price-setting power;*
- *Any variation in price in products or services is a result of differences in the cost of provision or characteristics inherent to the product, such as quality."*<sup>26</sup>

The Guidelines then further set out the factors that ICASA would typically expect to consider when evaluating the effectiveness of competition, namely:

- Assessment of relative market shares;
- Actual and potential existence of competitors;
- The level, trends in concentration and history of collusion in the market;
- Economies of scope and scale;
- Control of essential facilities;
- Technological advantages or superiority;
- The degree of countervailing bargaining power;
- Easy or privileged access to capital markets and financial resources;
- Dynamic characteristics of the market;
- The nature and extent of vertical integration; and
- Ease of entry into the market.

For example, in its 2010 review of wholesale call termination markets, ICASA considered a range of different factors when assessing the effectiveness of competition: market shares, actual and potential competitors; levels and trends in concentration and whether there was a history of collusion; the overall size of each market participant; whether any market participant had control over essential facilities; the impact of any technology advantages or superiority enjoyed by a given market participant; access to capital markets and financial resources; and whether the market in question displayed dynamic characteristic (including growth, innovation, and product and service differentiation).

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<sup>26</sup> The Guidelines, page 10

### 1.3 Imposing appropriate pro-competitive licence conditions on those licensees having significant market power in markets with ineffective competition, to remedy the market failure

#### Any remedies need to be proportionate and focused on identified market failures

The ECA S67 (4d) makes it clear that any remedies have to be targeted at market failures. This means a finding of a market failure (independent of a finding of SMP) is a jurisdictional prerequisite for imposing remedies. This is because, under this section, ICASA has to:

*"impose appropriate pro-competitive licence conditions on those licensees having significant market power to remedy the **market failure**"*

The ECA S67(8c) (in the context of reviewing remedies) also states that any remedies have to be proportionate:

*"Where, on the basis of such review, the Authority determines that the licensee to whom pro-competitive conditions apply continues to possess significant market power in that market or market segment, but due to changes in the competitive nature of such market or market segment the pro-competitive conditions are no longer proportional in accordance with subsection (7), the Authority must modify the applicable pro-competitive conditions applied to that licensee **to ensure proportionality**."*[Emphasis added]

The Guidelines also make it clear that any remedies should be focused on market failures and need to be proportionate:

*"The imposition of such obligations is intended to correct the **specific identified market failure**. Therefore, not all possible pro-competitive conditions will be applied if a market review reveals a lack of effective competition."*<sup>27</sup> [Emphasis added]

As part of its 2010, 2014 and 2018 market reviews of wholesale call termination markets, ICASA explicitly set out the market failures that it was attempting to address (i.e. a lack of access, the potential for discrimination between licensees offering services, a lack of transparency and inefficient pricing)<sup>28</sup>. It also recognised that *"specific obligations imposed must be based on the nature of the problem identified and must be proportionate and justified"*<sup>29</sup>.

#### Investment incentives have to be taken into account when designing remedies

With reference to the objectives of the ECA, The Guidelines highlight the importance of encouraging investment incentives and dynamic efficiency in the ICT sector:

*"The motive behind enhancing competition is to stimulate both allocative and **dynamic efficiency** up and down as well as across value chains in the supply of goods and services to the South African consumer. The objective is to ensure that the supply of goods and services to the South African consumer is achieved at a fair quality as well as a fair price. Achieving this objective requires a balance to be made between returns on investment in the production and supply of goods and services to the South African consumer and the price (including quality and consumer protection measures) ultimately paid by the South African consumer for such goods and services."*

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<sup>27</sup> Page 13

<sup>28</sup> Page 6 of Gazette 33698, page 4 of "CALL TERMINATION REGULATIONS, 2014"; page 6 of Gazette 41943

<sup>29</sup> Page 73 of Gazette 33121

*The ECA explicitly acknowledges the importance of this trade-off by including, in the objects of the Act:*

- *2(d) **encourage investment**, including strategic infrastructure investment, and innovation in the communications sector;*
- *2(f) promote competition within the ICT sector;*
- *2(z) promote stability in the ICT sector'<sup>30</sup> [Emphasis added]*

## 2. International precedent

A number of national telecommunications regulators have been conducting market reviews for almost two decades now. As such, international precedent provides useful insight into best practice when conducting market reviews in the sector. Indeed, ICASA has itself referred to a number of examples of international precedent in its Discussion Document.

The European Union ("EU") is often considered to be at the forefront of best practice in the design of regulatory frameworks for telecommunications, including the conduct of market reviews. The EU first published its list of relevant markets (i.e., those economic markets it considered may be susceptible to ex ante regulation across Member States) in 2003 following the development of its regulatory framework for electronic communications in 2002. More recently, the European Commission ("EC") has produced a new electronic communications code and SMP guidelines to reflect its latest thinking and key developments in the telecoms sector. Many non-EU countries take into account the EU's approach when designing their own regulatory framework and conducting market reviews.<sup>31</sup>

Therefore, in this section we focus on summarising relevant precedent from the EU. However, for completeness, we also draw relevant lessons from the approaches adopted to telecommunications regulation in Australia and New Zealand.

### 2.1 Market definition

Supply-side substitutability is only considered at the market definition stage when it does not involve significant costs

In its Discussion Document, ICASA argues that it should not assess supply-side substitutability at the market definition stage:

*"the Authority considered demand-side substitution in terms of defining the relevant markets, but supply-side issues ... have been considered where relevant in assessing the effectiveness of competition"*

In contrast, the EC considers that supply-side substitutability can be considered at the market definition stage of a market review process, assuming it occurs with the same immediacy as demand-side substitutability:

*"Supply-side substitutability may also be taken into account when defining markets in those situations in which its effects are equivalent to those of demand substitution in terms of effectiveness and immediacy. This means that suppliers are able to switch production to the relevant products and market them in the short term without incurring significant additional*

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<sup>30</sup> Page 3

<sup>31</sup> The US tends to adopt a more light-touch approach towards telecoms regulation than in the EU, so the FCC does not carry out regular market reviews in the US

*costs or risks in response to small and permanent changes in relative prices. When these conditions are met, the additional production that is put on the market will have a disciplinary effect on the competitive behaviour of the companies involved. Such an impact in terms of effectiveness and immediacy is equivalent to the demand substitution effect.”<sup>32</sup>*

## 2.2 Assessment of competition

### The assessment of markets has to be forward-looking

As in South Africa, the EC also makes it clear that, in a market review, the assessment of competition has to be forward-looking:

*“In carrying out a market analysis in accordance with Article 16 of Directive 2002/21/EC, NRAs will conduct a **forward-looking**, structural evaluation of the relevant market over the relevant period.”<sup>33</sup> [Emphasis added]*

Further, the EC also highlights that any other sector-specific regulation (or other policy decision) that may impact the market has to be taken into account when conducting the forward-looking assessment of markets:

*“NRAs should take into account existing market conditions as well as expected or foreseeable market developments over the course of the next review period in the absence of regulation based on significant market power; this is known as a Modified Greenfield Approach. On the other hand, **the analysis should take into account the effects of other types of (sector-specific) regulation, decisions or legislation applicable to the relevant retail and related wholesale market(s) during the next review period.**”<sup>34</sup> [Emphasis added]*

In the context of South Africa, this means that ICASA needs to consider the impact of the establishment of the WOAN and the assignment of HDS when assessing the effectiveness of competition in its market review process. It also means that ICASA should take into account any other existing regulations including the Facilities Leasing Regulations when assessing the effectiveness of competition in the identified markets.<sup>35</sup>

A similar approach is also followed by authorities in other jurisdictions when conducting market reviews. For example, when assessing the merits of ex ante regulation of national roaming services in Australia, the ACCC carried out a forward-looking assessment of the impact of the regulation:

*“In considering the effect that declaration would have on competition in relevant markets, the ACCC will consider the likely future state of competition in the relevant market, with and without declaration of the service. Among other things, this will require consideration of whether declaration would establish conditions under which competition will be improved and whether these conditions are likely to develop in the future without declaration.”<sup>36</sup>*

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<sup>32</sup> EC (1997) - COMMISSION NOTICE on the definition of relevant market for the purposes of Community competition law

<sup>33</sup> EC – “Guidelines on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and services (2018/C 159/01)”

<sup>34</sup> EC – “Guidelines on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and services (2018/C 159/01)” Staff Working Document

<sup>35</sup> In ECA/ECFL Regulation, the transparency and non-discrimination obligations only apply when firms have SMP. In contrast, the obligation to lease facilities applies irrespective of whether a firm has SMP. However, no section 67 inquiry has been held for purposes of the ECFL and therefore, no licensee has been found to have SMP. Regulations 9(3) and 10(3) on non-discrimination and transparency will therefore apply to all licensees at present.

<sup>36</sup> ACCC (2017) – “Domestic mobile roaming declaration inquiry – Final report”

A range of factors have to be considered when assessing competition

As in South Africa, regulatory authorities in the EU are expected to consider a range of factors when assessing the level of competition:

*"The following non-exhaustive criteria are relevant to measure the market power of an undertaking to behave to an appreciable extent independently of its competitors, customers and consumers:*

- *barriers to entry,*
- *barriers to expansion,*
- *absolute and relative size of the undertaking,*
- *control of infrastructure not easily duplicated,*
- *technological and commercial advantages or superiority,*
- *absence of or low countervailing buying power,*
- *easy or privileged access to capital markets/financial resources,*
- *product/services diversification (for example, bundled products or services),*
- *economies of scale,*
- *economies of scope,*
- *direct and indirect network effects*
- *vertical integration,*
- *a highly developed distribution and sales network,*
- *conclusion of long-term and sustainable access agreements;*
- *engagement in contractual relations with other market players that could lead to market foreclosure*
- *absence of potential competition.*<sup>37</sup>

The EC also specifically emphasises the role of bargaining power in negating the impact of high market shares:

*"However, even an undertaking with a high market share may not be able to act to an appreciable extent independently of customers with sufficient bargaining strength."*<sup>38</sup>

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<sup>37</sup> EUROPEAN COMMISSION – "Guidelines on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and services (2018/C 159/01)"

<sup>38</sup> EUROPEAN COMMISSION – "Guidelines on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and services (2018/C 159/01)" Staff Working Document

Further, the EC has highlighted that commercial wholesale offers may remove the need for ex-ante regulation:

*"During the gradual transition to deregulated markets, commercial agreements, including for co-investment and access between operators will gradually become more common, and if they are sustainable and improve competitive dynamics, they can contribute to the conclusion that a particular wholesale market does not warrant ex ante regulation."<sup>39</sup>*

## 2.3 Remedies

Remedies are focused on the most upstream market

The EC has stated that any remedies should be focused on wholesale markets:

*"Ex ante regulation imposed at the wholesale level, which is in principle less intrusive than retail regulation, is considered to be sufficient to tackle potential competition problems on the related downstream retail market or markets. The advances in the functioning of competition since the regulatory framework for electronic communications has been in place are demonstrated by the progressive deregulation of retail markets across the Union. Furthermore, the rules relating to the imposition of ex ante remedies on undertakings designated as having significant market power should, where possible, be simplified and be made more predictable. Therefore, the imposition of ex-ante regulatory controls based on an undertaking's designation as having significant market power in wholesale markets should prevail."<sup>40</sup>*

The EC further states that, to the extent possible, any remedies should be focused on the most upstream market in the supply chain:

*"When defining the relevant wholesale markets which may be susceptible to ex ante regulation, NRAs should start by identifying and analysing the market which is most upstream of the retail market, in which problems have been found, noting that this may be a market which consists of or includes more generic cross-market wholesale products such as passive infrastructure access (e.g. duct access) or passive access remedies. **Only thereafter, if remedies in the most upstream market are not sufficient in themselves to address the competitive problem in the retail market, NRAs may proceed to define and analyse wholesale markets further downstream in the supply chain, again following a Modified Greenfield approach in case regulation is in place at the moment of assessment.**"<sup>41</sup>*

Vodacom notes that ICASA is already planning to assign HDS, which according to ICASA is an upstream market in the mobile broadband supply chain. As part of this process, ICASA is licensing a WOAN, which constitutes a form of regulatory intervention. Further, by relieving capacity constraints, the assignment of HDS should increase competition and improve consumer outcomes. Therefore, according to the modified greenfield approach, ICASA should first consider the impact of the assignment of HDS and the licensing of the WOAN on the retail market before considering whether there is a need for any intervention in more downstream wholesale markets.

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<sup>39</sup> DIRECTIVE (EU) 2018/1972 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 11 December 2018 establishing the European Electronic Communications Code

<sup>40</sup> DIRECTIVE (EU) 2018/1972 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 11 December 2018 establishing the European Electronic Communications Code

<sup>41</sup> EC – "Guidelines on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and services (2018/C 159/01)" Staff Working Document

### Remedies have to be focused on market failures

As in South Africa, in the EU any remedies have to be focused on market failures. Further, in the EU, for regulators to justify remedies at the wholesale-level, they have to demonstrate the existence of corresponding market failures at the retail-level:

*"It follows from the above that both static and dynamic considerations should be reflected by the NRAs in the market analysis, with a view to **addressing market failure(s) identified at retail level** by imposing appropriate wholesale regulatory obligations, which should, inter alia, promote competition and contribute to the development of the internal market. These obligations should be based on regulatory principles set out in Article 8 of Directive 2002/21/EC, such as promoting regulatory predictability, efficient investment and innovation and infrastructure-based competition."<sup>42</sup> [Emphasis added]*

Indeed, as is clear from this quote, the EC also recognises the importance, when regulatory authorities are designing remedies, of regulatory predictability, efficient investment and innovation, and infrastructure-based competition.

### Remedies can be geographically differentiated even with national market definitions

The EC highlights that even with national market definitions, it is possible to impose geographically differentiated remedies:

*"In a situation where NRAs could not identify substantially and objectively different conditions stable over time, which are sufficiently clear in order to define sub-national markets, the existence of geographically differentiated constraints on a SMP operator who operates nationally, such as different levels of infrastructure competition in different parts of the territory, are unlikely to be strong enough to justify the finding of distinct markets. If, however, an operator is found to have SMP in a relevant market, such geographically differing constraints are more appropriately taken into account at the remedies stage by imposing a geographically differentiated set of obligations."<sup>43</sup>*

Indeed, Vodacom notes that this approach is actually applied in a number of markets. This is clear from a survey conducted by the Body for European Regulators of Electronic Communications ("BEREC"), which examines all of the ex-ante regulation imposed on electronic communications markets across European countries. Based on this survey, BEREC has stated that:

*"Some NRAs apply a geographical approach to regulation in terms of market segmentation, others in terms of remedies.*

*Forms of geographical regulation relate primarily to markets 3b and 4. Comparing 2019-2018 data, it appears that the geographical approach to the ex-ante regulation is getting more important in all markets with a specific role taken by legacy products in market 3b."<sup>44</sup>*

Indeed, BEREC has produced information showing specific European countries where regulatory authorities have imposed geographically differentiated remedies despite having defined national markets. As can be seen from the table below, it is quite common for regulators to impose geographically differentiated remedies despite defining national markets.

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<sup>42</sup> EC – "Guidelines on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and services (2018/C 159/01)"

<sup>43</sup> EC – "Guidelines on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and services (2018/C 159/01)" Staff Working Document

<sup>44</sup> BEREC – "Regulatory accounting in practice 2019"



**Figure 2: Examples of European countries with geographically differentiated remedies despite defining a national market**

	Market 3a – fibre LLU	Market 3a – VULA (FTTC)	Market 3a – VULA (FTTH)	Market 3b – legacy access products	Market 4 – active NGA products
Countries with geographically differentiated remedies despite defining a national market	Belgium Denmark	Belgium Italy	Belgium Spain Italy Macedonia	Belgium France Italy Macedonia Slovenia	Belgium Switzerland France

Source: BEREC – "Regulatory accounting in practice 2019"

Incentives to invest and innovate have to be taken into account when deciding on whether remedies would be appropriate

The EC emphasises that regulatory authorities should make sure that mandated access does not deter incentives to invest and more sustainable competition in the long-run even when there is a short-term benefit for competition:

*"The imposition by national regulatory authorities of mandated access that increases competition in the short term should not reduce incentives for competitors to invest in alternative facilities that will secure more sustainable competition or higher performance and end-user benefits in the long term."<sup>45</sup>*

The EC has made it clear that even when the market leader has a substantial market share, inappropriate ex-ante regulation should be avoided in emerging markets:

*"In line with point 23 of the 2014 Recommendation on relevant markets, **newly emerging markets should not be subject to inappropriate ex ante regulatory obligations**, even if there is a first-mover advantage. Newly emerging markets are considered to comprise products or services where, due to their novelty, it is very difficult to predict demand conditions or market entry and supply conditions, and consequently it is difficult to reliably analyse them in view of the imposition of ex ante regulation. Newly emerging markets should be carefully assessed to avoid that inappropriate ex ante regulatory obligations hinder innovation. However, at the same time, foreclosure of such markets by the leading undertaking should be prevented."<sup>46</sup> [Emphasis added]*

The EC likely made the above statement with fibre services in mind. However, it could also be relevant for ICASA when considering whether to impose mandated national roaming obligations for 5G services.

<sup>45</sup> DIRECTIVE (EU) 2018/1972 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 11 December 2018 establishing the European Electronic Communications Code

<sup>46</sup> EC – "Guidelines on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and services (2018/C 159/01)" Staff Working Document.

Similarly, the ACCC takes into account the following three objectives to determine whether any potential regulation of telecommunications services would be in the long-term interest of end-users ("LTIE"):

- *"whether declaration would promote competition in the relevant markets;*
- *whether declaration would achieve any-to-any connectivity; and*
- *whether declaration would encourage the economically efficient use of, and investment in infrastructure."*<sup>47</sup>

As reflected by the above quote, one of the key objectives that the ACCC takes into account is how the regulation would impact investment in infrastructure. The ACCC has further explained that regulation (declaration) has the potential to distort investment incentives:

*"In other situations, however, declaration could deter efficient investment, stifle the development of a more diverse and differentiated range of goods and services, delay the deployment of new technology and prolong inefficient production processes. In a dynamic environment such as telecommunications, this is likely to cause significant harm to end-users."*<sup>48</sup>

The ACCC has also said that:

*"When considering incentives for investment in infrastructure, the ACCC also has regard to the risks involved in making the investment. Facility owners will not commit to major new capital outlays without expectation of profits commensurate with the commercial risks involved."*<sup>49</sup>

Similarly, in New Zealand, the Telecommunications Act (2001) requires that regulation be imposed only where it leads to the long-term benefit of users. The Act makes it clear that as part of this assessment, incentives to innovate have to be considered:

*"To avoid doubt, in determining whether or not, or the extent to which, competition in telecommunications markets for the long-term benefit of end-users of telecommunications services within New Zealand is promoted, consideration must be given to the **incentives to innovate** that exist for, and the risks faced by, investors in new telecommunications services that involve significant capital investment and that offer capabilities not available from established services."*<sup>50</sup>

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<sup>47</sup> ACCC (2017) – "Domestic mobile roaming declaration inquiry – Final report"

<sup>48</sup> ACCC (2016) – "A guideline to the declaration provisions for telecommunications services under Part XIC of the Competition and Consumer Act 2010"

<sup>49</sup> ACCC (2017) – "Domestic mobile roaming declaration inquiry – Final report"

<sup>50</sup> Ministry of Business, Innovation, and Employment - Telecommunications Act 2001 (Reprint as at 1 January 2020)

## B. Overarching comments on ICASA's approach

Taking into account the requirements of the ECA, the expectations ICASA has set out in The Guidelines and established international precedent, Vodacom has a number of overarching concerns with the approach ICASA has taken to this market review. These are grouped as follows:

- At present, ICASA's assessment is not forward-looking. As such, it does not consider how competition and market outcomes will be impacted and evolve in the counterfactual (without additional regulation) and hence whether imposing remedies is proportionate. In particular, it does not take into account the impact of:
  - **Establishing the WOAN and assigning a significant amount of HDS to MNOs.** These processes are already underway, with similar objectives to the market review – in particular, enhancing competition in the South African mobile market and improving consumer outcomes. Importantly, both of these processes are under ICASA's control. It is therefore important that ICASA considers their impact before contemplating further intervention. ICASA also needs to take into account the compromising effect that the current shortage of spectrum has on its market analysis and consider how this will be alleviated by the upcoming spectrum release.
  - **Other important developments.** ICASA has not considered the implications of the rapid growth of Telkom's mobile business in recent years, along with a range of factors which mean that Telkom should be well positioned to continue to increase its market share going forward. Similarly, ICASA has not considered the impact that recently negotiated wholesale agreements will have on competitive dynamics at both the retail and wholesale-levels.
- ICASA's approach to assessing competition across the markets considered has a number of further shortcomings, i.e.:
  - No market failures, caused by ICASA's provisional finding of ineffective competition in the defined markets, have been identified.
  - The analysis should have been restricted to data services given that this is the focus of the market review; and
  - ICASA should have conducted a more detailed assessment of the appropriate boundaries for sub-national markets.

Vodacom elaborates on each of these points in the sub-sections below and then considers these in more detail, in the following parts of this response, where Vodacom responds to ICASA's analysis of each defined market.

### 1. The assessment of effectiveness of competition should be a thorough forward-looking analysis

When assessing the effectiveness of competition, the ECA S67(4A) makes it clear that ICASA should conduct a ***“forward-looking assessment of the market power of each of the market participants over a reasonable period”***[Emphasis added]. Conducting a forward-looking assessment is also consistent with The Guidelines and international best practice.

In this section we look at key future developments that ICASA should have considered as part of a forward-looking assessment of the evolution of competition and market outcomes in the counterfactual (i.e. in the absence of regulation being imposed through the Market Inquiry).

## 1.1 Impacts of the forthcoming HDS assignment and the WOAN need to be considered

ICASA has not established a cogent case for the proposed regulatory interventions set out in its Discussion Document. The serious spectrum constraints under which the South African mobile market has been operating, undermine ICASA's backward looking assessment of competition. This is because the imminent assignment of HDS, which is under ICASA's control, should lead to a material improvement in consumer outcomes.

In addition, the establishment of the WOAN is intended to strengthen network and retail competition, as set out in the Policy Direction.<sup>51</sup> These objectives clearly overlap significantly with the objectives that ICASA is trying to achieve with its market review process.

Given that ICASA will assign HDS and license the WOAN in the near future, ICASA should consider postponing its mobile broadband market review until there is greater clarity on what impact these measures will have. Imposing market review remedies without such clarity may well end up being disproportionate and having unintended consequences e.g. stifling investment and/or undermining the financial viability of the WOAN. Policymakers and Regulatory Authorities often adopt and introduce more incremental changes to markets to avoid over-shooting and defeating their objectives. For example, in fixed telecoms markets, regulators will often avoid regulating access to new services, until there is clarity about the evolution of the market. Nonetheless, if ICASA does decide to go ahead with its market review now, at the very least it needs to undertake a thorough forward-looking assessment of the effectiveness of competition and ensure that any remedies are proportionate and minimise the risk of any unintended consequences.

### Spectrum shortages compromise ICASA's analysis of market outcomes

In the Discussion Document's section on spectrum, ICASA recognises that spectrum shortages are exercising a significant impact on mobile markets in South Africa. However, ICASA fails to take into account the impact and implications of these spectrum shortages when assessing the effectiveness of competition in the other markets that it has defined (i.e. site access, roaming services, MVNO and APN and retail).<sup>52</sup>

#### ICASA's section on spectrum

In its section on spectrum, ICASA clearly states that operators in South Africa have suffered from a lack of spectrum. For example, it states that:

*"South Africa has assigned relatively little spectrum for mobile use compared to international benchmarks. Figure 17 shows the spectrum assigned to mobile operators in EU countries and South Africa by frequency band, as well as the average spectrum assigned per operator. This illustrates that South Africa is well behind the leading countries when it comes to assigning spectrum for mobile broadband, having assigned about half the spectrum compared to the UK for example, and with **an extremely low assignment per operator**."*[Emphasis added]

Authorities often consider that spectrum is the main bottleneck for mobile services. For example, in the US, the Federal Communications Commission has stated that:

*"Spectrum, in particular, is **the single most important input** that wireless providers need for the provision of service and is a finite and scarce resource."<sup>53</sup>*

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<sup>51</sup> Gazette - "Policy on high demand spectrum and policy direction on the licensing of a wireless open access network" (26 July 2019)

<sup>52</sup> And MVNO and APN access, although ICASA has not formally defined this as a market

<sup>53</sup> FCC (2014) – Seventeenth Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, Including Commercial Mobile Services

The low amount of spectrum that has been assigned to the mobile industry in South Africa is further exacerbated by the larger operators having similar or lower spectrum shares than some of the smaller operators (Telkom has a 24% share compared to Vodacom's 14% share). This means that the little spectrum that is used for mobile services in South Africa is unlikely to be used efficiently. ICASA has stated that:

*"MTN, Vodacom and Cell C in particular have much lower assignments than mobile operators in most developed countries and also than those in countries classified as "Leading" or "Advanced" by the ITU."*

ICASA itself acknowledges that higher spectrum assignments are associated with lower mobile prices and potentially higher speeds:

*"Higher levels of spectrum assignment are also significantly correlated with lower prices, regardless of specification as illustrated in Figure 19. Finally, higher speeds are associated with lower prices which may be a result of higher volumes driving scale economies. There is therefore some support for the contention that spectrum assignment is associated with lower prices."*

#### Spectrum shortages compromise ICASA's analysis of market outcomes

Whilst ICASA has recognised that the availability and assignment of spectrum in South Africa are limited when compared to the spectrum available and assigned in other countries, and that *"spectrum assignment is critical to achieving cheap, high quality mobile broadband"*<sup>54</sup>, it has failed to appreciate that its assessment of the effectiveness of competition in the various mobile markets are materially compromised by spectrum constraints, as set out below:

- **International price benchmarking.** In the presence of spectrum constraints, MNOs will need to try and meet increasing demand for data using costly solutions – in particular, rolling out more sites.<sup>55</sup> Indeed ICASA notes that *"having access to spectrum lowers the cost to operators of rolling out both improved coverage and capacity, since it requires them to build fewer base stations."*<sup>56</sup> Further, because it will often not be economically or technically feasible to increase the number of sites, MNOs may instead respond to spectrum constraints by lowering their prices more gradually than they otherwise would, in order to manage data traffic volumes and prevent degradation in quality (see Section D on spectrum). This is particularly the case for MNOs who carry larger amounts of traffic. Such outcomes would be consistent with an effectively competitive mobile market under spectrum constraints. By contrast, ICASA appears to have placed some weight on the relatively unfavourable position of South Africa in some international price comparisons as an indicator of lack of effective competition. This tension in approach is unreasonable.
- **International non-price benchmarking.** Spectrum constraints likely lead to lower quality and coverage and slower service innovation (deployment of latest technologies) in South Africa than would be possible in their absence. The quality of service, coverage and service innovation would likely lag behind other countries facing no or only limited spectrum constraints. Indeed, ICASA acknowledges that, in South Africa, *"...more spectrum needs to be assigned in order to enable licensees to deploy new technologies efficiently and increase network capacity."*<sup>57</sup>
- **Increased site densification.** Site densification to alleviate capacity constraints is consistent with outcomes that would be observed in effectively competitive markets, under spectrum constraints.

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<sup>54</sup> Discussion Document, paragraph 62

<sup>55</sup> Site densification will lead to higher variable costs to meet demand than absent spectrum constraints, and hence higher prices than would be the case absent spectrum constraints.

<sup>56</sup> Discussion Document, paragraph 62

<sup>57</sup> Discussion Document, paragraph 61

Yet, ICASA has instead mis-characterised the number of sites as an indication of lack of effective competition/SMP in the Sites and National Roaming markets.

- **Lower ability and incentive to offer wholesale access.** A lack of spectrum will also increase the opportunity cost of offering access to an MNOs' network to third parties. This is because offering such access would likely reduce the quality of service available to a MNOs' own customers, thus reducing customer experience and increasing churn. This would be costly for a MNO, facing severe spectrum constraints, and thus could lead to such an MNO offering access at terms that may be considered by an access seeker to be unattractive, as the cost of offering access in terms reduced quality and lost subscribers would exceed the benefits for the host MNO. This would again be consistent with outcomes that would be observed in effectively competitive markets, under spectrum constraints. Yet, ICASA has mis-characterised the loss of MVNO opportunities to those who have more spectrum available per subscriber<sup>58</sup> (and hence are able to compete more aggressively for wholesale business) and restrictions in national roaming on certain Local Area Codes (LACs) due to severe capacity constraints as a failure to supply<sup>59</sup>, and hence an indication of lack of effective competition/SMP.

The above implies that ICASA cannot be confident of its findings that there is a lack of effective competition in the relevant markets and SMP, as most of the indicators and evidence it relies on to support this finding are materially compromised by the spectrum constraints that exist in South Africa, which ICASA rightly acknowledges. One of the key issues with ICASA's approach is that it appears to conflate issues created by spectrum shortages with market failures linked to competition issues. The evidence is in fact consistent with an effectively competitive South Africa mobile market facing serious spectrum constraints.

### **The WOAN is being established to strengthen competition**

#### **A key objective of the WOAN is to increase competition in mobile markets**

The policy on HDS and policy direction on the licensing of a WOAN sets out that one of the key objectives of the WOAN is to:

*"promote competition within the ICT sector with the emphasis on service –based competition...."*<sup>60</sup>

Martin Cave has also noted that the WOAN has the potential to increase competition at both the network-level and the retail-level:

*"I believe that a non-dominant WOAN can usefully be introduced in South Africa. It should maintain and in (in some geographies) enhance existing levels of network competition, and deliver better, cheaper services to end users. It will also promote service competition."*<sup>61</sup>

Given that the establishment of the WOAN and the market review process are attempting to achieve similar objectives, it is imperative that ICASA considers the impact of the WOAN on its market review process, to determine whether further intervention would be proportionate, bearing in mind the risk of unintended consequences (e.g. the stifling of investment).

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<sup>58</sup> Discussion Document states that "There are concerns that while all MNOs have the capacity to offer wholesale services that would enable stronger retail competition, there seems to be a lack of provision."

<sup>59</sup> Discussion Document states that "This suggests a far more local dynamic. The fact that roaming in South Africa is generally specified at site-level and often excludes particular sites supports this."

<sup>60</sup> Gazette - "Policy on high demand spectrum and policy direction on the licensing of a wireless open access network" (26 July 2019)

<sup>61</sup> Cave - "The South African Government's ECA amendments Bill: an assessment"

As a wholesale-only operator, the WOAN's success hinges on its ability to attract wholesale customers to its network. Regulation imposed as part of a market review could actually undermine the financial viability of the WOAN. For example, if MNOs faced wholesale network access obligations, it would substantially decrease the potential number of access seekers procuring wholesale service from the WOAN.

The WOAN could have an impact within a relatively short space of time

Based on ICASA's IM for spectrum, and the latest Policy Direction, Vodacom considers that it should be entirely feasible for the WOAN, as it is currently envisaged, to enter the South African mobile market during the upcoming market review cycle:

- ICASA has proposed significant entry assistance for the WOAN:
  - First, according to ICASA's own proposals, the WOAN would be assigned a significant amount of LTE spectrum, and more than the spectrum packages that are likely assigned to the industry players; a significant part of that spectrum, 40-50MHz of 2.6GHz, is available for immediate deployment by the WOAN.
  - Second, ICASA has also proposed that licensees awarded HDS in the upcoming auction would be obliged to provide the WOAN with access to their passive and active infrastructure at cost-oriented rates.
  - Third, the WOAN will be offered a 'guarantee' that other MNOs that acquire unassigned HDS will commit to jointly purchase 30% of its capacity. Investors in the WOAN would therefore know that as soon as they are able to launch services, they would be able to obtain revenues for at least 30% of the resulting capacity. This will provide a strong incentive for the WOAN to seek to launch services as quickly as possible after obtaining spectrum and a licence to operate.

Whilst Vodacom has serious concerns about the above proposals, as detailed in our response to the IM, we note that, together, they represent an unprecedented combination of entry assistance measures. Even if the above measures were scaled back, they would still represent significant entry assistance.

- The WOAN will be privately owned, which should strengthen the incentives for the WOAN to launch services once spectrum is awarded to it.
- There is precedent for operators in South Africa obtaining spectrum and being able to launch and



- The WOAN will not need to develop a retail presence and build up a brand, as it will only operate at the wholesale-level.
- The WOAN is not expected to have onerous coverage obligations, at least initially, which should further incentivise the rapid launch of services, as it should have the flexibility to focus its initial roll-out on the most profitable areas.
- There are already several MVNOs in the market and the WOAN should be well positioned to compete for their business, particularly given the advantages noted above that are currently envisaged. These advantages could also mean that MNOs would find it preferable to rent access

from the WOAN rather than to roll out in some areas (especially given their requirement to jointly purchase 30% of the WOAN's capacity). As the WOAN will be a wholesale-only network, it would be in a position to negotiate the provision of services with MVNOs, and other service providers, before the official launch/deployment of its network – this should further accelerate its entry in the SA mobile market.

- There is already interest from credible and experienced infrastructure investors, such as Community Investment Ventures Holdings (CIVH) to bid for the WOAN licence.<sup>62</sup>
- The legal process for the establishment and launch of the WOAN could be completed relatively quickly – indeed, the President remarked in his recent State of the Nation Address (13 February 2020), that *"the licensing of the Wireless Open Access Network (WOAN) is likely to be completed during the course of next year."*<sup>63</sup>

We also note that for the WOAN to exercise competitive pressure it would not need to cover a significant geographic area of SA - if it covers only urban areas, which is only 1.67% of the land area of South Africa, this would equate to around 62.2% of the population<sup>64</sup>. Furthermore, when the WOAN develops its network, as a wholesale-only network operator it will be profit maximising for it to offer services to 'fill' the capacity available – this should provide it with a strong incentive to try and attract, in a timely manner, MVNOs and other service providers. This is especially the case given that it should have a lot of spare capacity to fill as ICASA is currently proposing to assign it a significant amount of HDS to the WOAN.

In summary, Vodacom believes that in view of the latest Policy Direction and IM proposals in relation to the WOAN, it is very likely that the WOAN could exercise additional competitive pressure in the South African mobile market and would be established and operational within the timeframe of the upcoming market review cycle. It is vital that ICASA considers the above before concluding on the need for regulatory intervention.

## 1.2 There are also other important developments that ICASA should take into account

In addition to the assignment of HDS and the establishment of the WOAN, ICASA should also take into account i) Telkom's impressive growth and ii) recent wholesale agreements.

### Telkom's impressive growth

#### Telkom's growth in the retail market

As explained in above, ICASA has afforded very little attention to Telkom's impressive growth - Telkom's mobile subscriber share has grown from zero at the start of 2010 to just under 10% by the end of 2018. Further, according to Telkom's latest financial results, Telkom's mobile subscriber base almost doubled in size between September 2018 and September 2019, from 6.5 million to 11.5 million (see Figure 1).<sup>65</sup> Between FY18 and FY20 Telkom has grown its mobile broadband traffic more than threefold.<sup>66</sup>

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<sup>62</sup> <https://techcentral.co.za/remgros-civh-makes-its-case-for-the-woan/95808/>

<sup>63</sup> <https://www.gov.za/speeches/president-cyril-ramaphosa-2020-state-nation-address-13-feb-2020-0000>

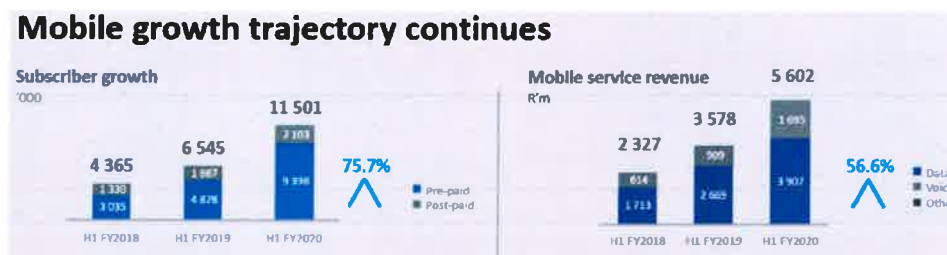
<sup>64</sup> Based on Stats SA Mid-Year population estimates

<sup>65</sup> Telkom, Interim Results Presentation, H1 FY2019/20, slide 7

<sup>66</sup> Telkom Interim Results Presentation H1 2019/2020, slide 8



**Figure 3: Telkom's mobile subscriber growth – FY 2019 vs FY 2020**

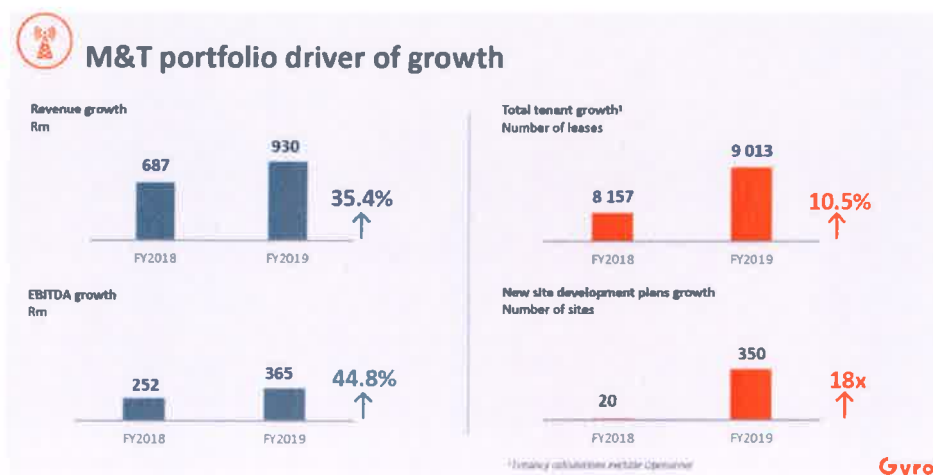


Vodacom's own market share analysis also indicates that Telkom's share of active data subscribers grew by five percentage points over this period, from 9.4% to 14.4%. Over the same period, Vodacom's share declined.

#### Telkom's rapid roll-out of sites

On a national basis, Telkom, through its Gyro unit, has become one of the largest operators in terms of tower ownership. According to Telkom's latest financial results, Gyro's mast & tower portfolio consists of 6,500 towers spread across South Africa of which: 1,300 have multiple tenancy revenue (88% of revenue is from MNOs); and 2,200 towers are well located and capable of supporting further multitenancy. Telkom also forecasts that Gyro will deploy 2,000 additional sites for the next three years.<sup>67</sup> Such a portfolio is providing positive and significant returns for Telkom through tenant use.

**Figure 4: Telkom (Gyro)'s performance in FY2019**



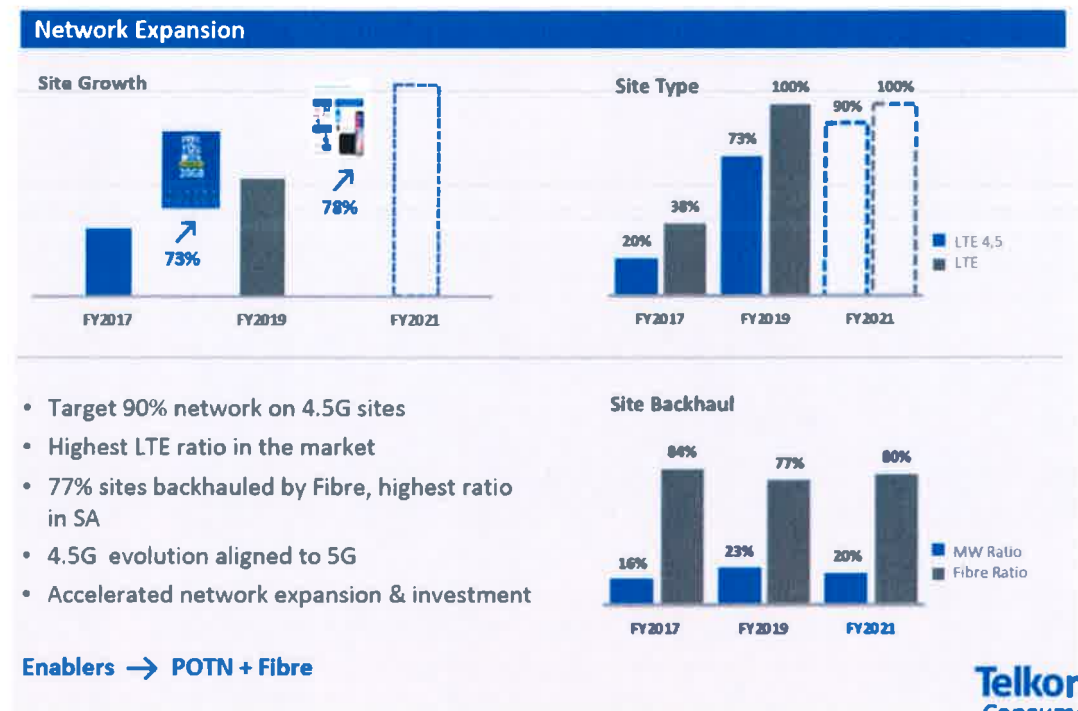
Source:

[http://www.telkom.co.za/ir/apps\\_static/ir/pdf/presentations/investor\\_day/Presentation2019annual.pdf](http://www.telkom.co.za/ir/apps_static/ir/pdf/presentations/investor_day/Presentation2019annual.pdf)

Looking forward, Telkom Capital Markets Day 2019's presentation (Telkom CMDP 2019) forecasts, over the next two years, a further 78% growth in Telkom's site deployment.

<sup>67</sup> [http://www.telkom.co.za/ir/apps\\_static/ir/pdf/presentations/investor\\_day/Presentation2019annual.pdf](http://www.telkom.co.za/ir/apps_static/ir/pdf/presentations/investor_day/Presentation2019annual.pdf)

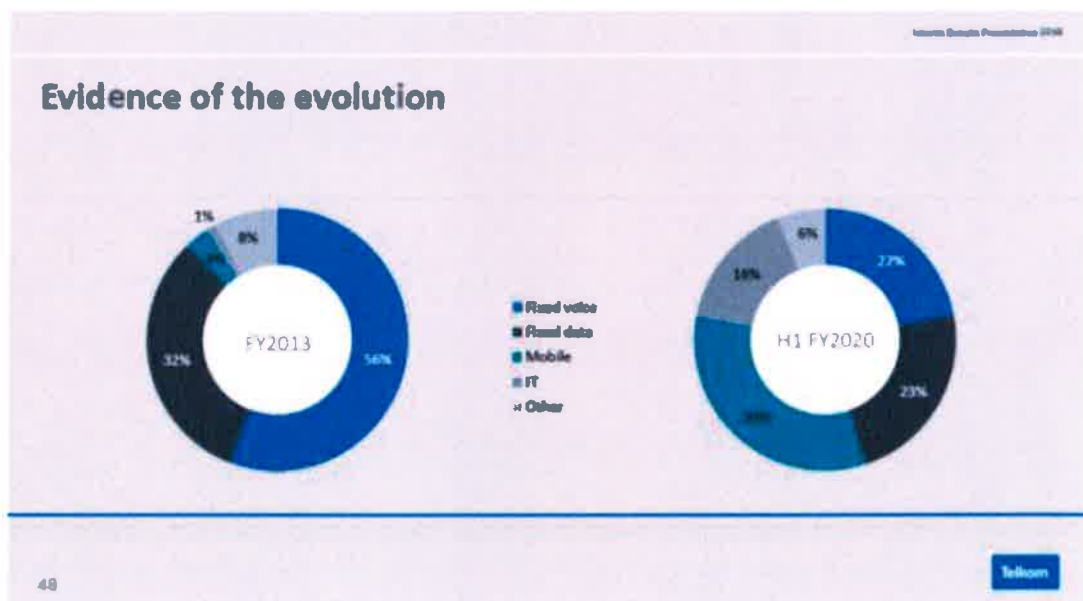
**Figure 5: Telkom's growth of sites**



Telkom is well positioned to continue to grow

Telkom is aggressively competing in both the wholesale and retail markets and has made a strategic shift towards focusing more on mobile services. Telkom's increased focus on the mobile segment is clearly shown from the shift, in recent years, in its revenue away from fixed and towards mobile services. This is shown by the chart below.

**Figure 6: Telkom's revenue split – FY 2013 vs FY 2020**



Source: Telkom Interim Results Presentation H1 2019/2020, slide 48

Telkom has a number of clear advantages relative to other players, which puts it in a strong position to continue to expand:

- It should have plenty of excess capacity given its large block of 2.3GHz TDD spectrum, thus enabling it to offer high volume packages at aggressive price points, without creating significant concerns around network congestion (ICASA itself shows that Telkom has a 24% share of total spectrum relative to Vodacom's 14% share of total spectrum);
- With regards to backhaul:
  - Telkom benefits from a significant fibre footprint, far exceeding that of any other operator - Telkom's fibre footprint reached 163,800km, connecting 77% of Telkom's base stations in 2019. This percentage has since increased to 80%.
  - By comparison, Vodacom has to date only been able to connect 41% of sites, with self-provided fibre. This results in higher incremental costs for Vodacom and other MNOs which do not enjoy the same advantage as Telkom, and also means that Vodacom will not be as well positioned as Telkom to expand capacity to address increasing demand.
- Telkom also benefits from an extensive duct and pole network which should further facilitate the rollout of backhaul for mobile services.
- Telkom is planning to switch off its 2G network in March 2020. This will free up additional capacity for 3G/4G services, as it will be able to re-farm spectrum for these more efficient technologies. Telkom is able to do this as it has a relatively small number of 2G subscribers base on its own network (if any), and secured access to 2G roaming services from Vodacom. Whilst Vodacom's intention is to shut down its 2G network so as to free up more spectrum to re-farm, this is unlikely to be feasible within the period of this review – in particular, due to its sizable existing base of 2G customers combined with ongoing sales of 2G devices by independent third parties.
- Telkom is also well positioned to raise finance and invest on a par with Vodacom and MTN – in FY 2019 Telkom invested more than R3 billion in its mobile network, up from R2 billion. Overall Telkom has invested more than R7 billion in 2019.

As such, Telkom is well positioned to compete aggressively on price and quality and thereby grow its market share and enhance itself as a strong competitive force.

### **Recent wholesale agreements**

There have also been a number of important wholesale agreements reached in recent months in South Africa, which ICASA has not taken into account in its Discussion Document.

- Cell C has concluded an expanded network arrangement with MTN, which will strengthen both players' positions in the market;
- Vodacom has concluded agreements relating to network sharing with RAIN and Liquid;
- MTN has also concluded a network sharing agreement with Liquid; and
- Vodacom has reached a DPS agreement with Telkom covering 2,500 sites.

The above wholesale agreements are likely to strengthen competition at both the wholesale and retail-levels. For example, the agreement between MTN and Cell C should put Cell C in a position to offer a