Vodacom's non confidential response

Draft Mobile Broadband Services Regulations and Findings on Mobile Broadband Services Inquiry

This submission is structured as follows: Page

Annex A - Independent expert report by Mr. Richard Feasey

Annex B - Practical issues with monitoring margins at a granular level

Executive summary

Vodacom is pleased that the Independent Communications Authority of South Africa's ("**ICASA**") inquiry into the provision of mobile broadband services ("**Market Inquiry**") is now drawing to a close. Since ICASA commenced its Priority Markets process in 2017, the sector has been under the threat of intervention, not only from ICASA but also with the Competition Commission's ("**CC**") own investigation into data service markets. As a capital intensive sector, on the cusp of another wave of innovation, it is vital that market participants such as Vodacom have certainty over the regulatory environment they will face. Drawing this inquiry to a close will help to create this certainty.

Vodacom also supports wholeheartedly ICASA's and Government's vision for the sector: it wants to see all South Africans benefitting from access to high quality, affordable, mobile data services. Indeed, it is to this end that Vodacom has, over recent years, significantly transformed its pricing, while throughout the COVID-19 pandemic it has prioritised connectivity for the most disadvantaged members of South African society. [redacted].

However, Vodacom has a number of concerns with ICASA's Findings

While Vodacom is pleased to see ICASA finalise the Market Inquiry, it is concerned that certain of the proposed regulations may not be within the ambit and purpose of the empowering legislation and, in making its findings, ICASA may not have taken account of all relevant considerations. In many respects, ICASA's Findings do not accurately reflect the sector as it stands today, let alone give a proper forward looking view of the sector of the sort that should be the centre piece of any market review. The mobile sector has changed significantly since ICASA began its Priority Markets process in 2017, but the Findings Document on Mobile Broadband Services Inquiry ("**Findings**") and Draft Mobile Broadband Services Regulations ("**Draft Regulations**") fail to recognise this. The result is that certain of the remedies and interventions proposed in the Draft Regulations appear unreasonable and/or are not apparently relevant or connected to the current or future reality in the relevant markets.

In particular, the Findings fail to:

- Recognise Telkom's sustained growth and success in the both the retail and various wholesale markets. For example, over the past two years, Telkom has more than doubled its mobile service revenues and mobile data revenues, while it is also the market leader in terms of mobile data traffic. Importantly, data from Facebook suggest that Telkom is mainly gaining subscribers from Vodacom and MTN, rather than Cell-C[1].

- Recognise the many advantages that Telkom has in the market, amongst others: its greater access to capacity spectrum and fibre backhaul, its control of ducts and poles, as well as the multiple options it has for extending its network across South Africa.

- Reflect the very considerable degree of competition in the mobile markets – as evidenced by the strong competition between operators on both price and non-price factors. For example, operators have recently implemented a number of important price reductions, whilst operators have made significant attempts (underpinned by large investments) to improve their network quality, despite the larger operators, especially Vodacom, facing acute spectrum constraints. Operators have different unique selling points, which allows users to find an operator that best matches their specific needs.

[1] Source: Facebook Actionable Insights Trends

- Recognise the broad raft of wholesale services offered in the market, including site access, deep passive sharing ("**DPS**") and national roaming ("**NR**"). While it may be the case that only MTN and Vodacom can offer roaming services in remote areas, this does not mean that competition between Vodacom and MTN is not intense. Indeed, even Telkom, who, as a major customer of NR might be expected to argue for intervention in that market, has argued that no intervention is necessary[2].

- Apply a proper forward looking analysis of the sector and so omit many factors which will further drive competition going forward. Most crucially, the Findings underplay the role of spectrum in the sector – both failing to recognise how ICASA's parallel spectrum release process will ease capacity constraints, enhance competition in wholesale markets and improve outcomes in retail markets, and how the failure to release spectrum up to now has contaminated current market outcomes. This comes despite the fact that ICASA recognises that the spectrum auction will have a "formidable impact" (but not until after the upcoming market review period).

Vodacom has particular concerns over some of the pro-competitive measures ICASA has proposed

Vodacom has significant concerns about a number of the measures proposed in the Draft Regulations. As set out in more detail, below, Vodacom rejects ICASA's conclusions that competition is not effective in the retail mobile market, the site access market and the national roaming for coverage ("**NR for coverage**") market. Vodacom also rejects ICASA's view that it has Significant Market Power ("**SMP**") in a number of these markets. Given this, Vodacom does not believe that ICASA has met the necessary threshold to impose pro-competitive conditions in these markets. As such, the proposed remedies should be withdrawn. But, even if ICASA did demonstrate properly that pro-competitive remedies were required, it does not appear to have considered how the measures it is proposing could cause significant, unintended harm to the future health of the sector.

Generally, Vodacom agrees with ICASA that direct retail market regulation is unnecessary and that any pro-competitive measures – if required – should focus on upstream wholesale markets. Vodacom also agrees that direct price controls in wholesale markets are likely to be significantly damaging to future investment in the sector. To that extent, were any pro-competitive measures required, ICASA would be correct to focus on monitoring remedies, as it proposes in the Draft Regulations. However, there is no economic rationale for ICASA to monitor tariffs at the level of detail it has proposed in Sections 7.1.5 to 7.1.7 and 7.2 of the Draft Regulations. Vodacom assumes that ICASA is, through this monitoring regime, attempting to identify retail pricing which might create margin squeeze concerns and so which should be investigated further by the CC. If that is indeed the case then ICASA must align its approach more closely with how an actual margin squeeze test would be conducted by the CC. Without doing this, ICASA risks raising false alarms and creating an entirely unnecessary regulatory burden on the sector, while also potentially indirectly either:

- Forcing NR prices down to levels which are not compatible with the investment necessary in the sector or leading to the withdrawal of some NR services; or

- [redacted]

Should ICASA persist with this obligation to monitor tariffs it should, therefore, only require SMP operators (in markets which are not effectively competitive) to submit aggregated average price data, covering all regions, and for the portfolio of voice and rated data services that the SMP operator offers and which access seekers use NR to compete against. Furthermore, with regards to NR specifically, ICASA needs to consider more carefully whether it is appropriate to compare retail prices with a wholesale price that an access seeker such as Telkom uses for only a very small proportion of its traffic. In particular, ICASA must take into account the ability for access seekers to cherry pick where they rely on roaming as opposed to own network build or other wholesale services, and hence the likelihood that prices for NR do not provide a good proxy for network costs across South Africa as a whole.

[2] Telkom submission to ICASA - Discussion document on the Market Inquiry into Mobile Broadband Services in South Africa

Finally, Vodacom notes that ICASA proposes to apply the same monitoring remedies also to MVNO and APN services. This is contrary to the legal framework in South Africa, which requires ICASA to both find that a market is ineffectively competitive, and identify one or more operators with SMP, before imposing pro-competitive conditions. ICASA has, correctly, not defined any operators to have SMP in the MVNO access or APN markets. It has also found the MVNO access market to be effectively competitive. It cannot, therefore, impose any pro-competitive conditions on providers in these markets.

In the remainder of this summary, Vodacom sets out briefly its views on the individual markets defined by ICASA.

The retail market

Vodacom welcomes ICASA's decision to not impose remedies in the retail market. In line with best practice, any necessary interventions should be focused on the most upstream input/market possible and remedies only imposed in more downstream markets if the upstream interventions, including the upcoming spectrum auction and Wholesale Open Access Network ("**WOAN**") interventions are insufficient to ensure effective competition downstream.

Vodacom notes ICASA's product market definition. Vodacom would highlight that recently, dedicated mobile broadband services, used in the home or in business premises, often in place of a fixed broadband connection, have grown rapidly. Vodacom expects this growth will continue. Given the forward looking nature of this inquiry, ICASA should, therefore, consider carefully how this might impact its market definition. Vodacom agrees with ICASA's decision to define sub-national markets. In line with ICASA's position, Vodacom also considers that 5G technology is unlikely to have a significant impact on competition over the period covered by the market review.

However, Vodacom does not accept ICASA's conclusion that there is ineffective competition in some retail markets. This is because ICASA has failed to take into consideration several important factors, including:

- Evidence of limited barriers to expansion in the retail market, as demonstrated by the growth of Telkom and Rain;
- Evidence on recent competitive dynamics relating to both price reductions and improvements in network quality (despite the spectrum constraints that larger operators, especially Vodacom, are facing); and
- The impact the release of spectrum through the Invitation to Apply ("**ITA**") process will have on the market in the period covered by the market review; and the impact of the existing spectrum constraints on current market outcomes.

The site access market

Vodacom supports the changes that ICASA has made to its analysis of this market. In particular, Vodacom agrees with ICASA's decision to recognise that only sites controlled by an operator should contribute towards its market share. Notwithstanding its concerns over whether pro-competitive measures are required, Vodacom understands the reasons for ICASA's proposed monitoring remedy for sites, but emphasises that this approach also requires ICASA to take into account the impact of this remedy when assessing the effectiveness of competition in downstream markets.

However, Vodacom would not support the imposition of any more stringent remedies. The market is already subject to considerable regulation in the form of the Facilities Leasing Regulations ("**FLR**") and, following the spectrum auction, Tier 1 operators (as defined in the ITA) will be required to produce reference offers for site access. Further, Vodacom disagrees with ICASA that competition in the market is ineffective. It also has concerns with ICASA's market definition and its analysis of market shares (which determines its assessment of SMP). Specifically:

- In line with its response to ICASA's Discussion Document ("**Discussion Document**") on the Market Inquiry into Mobile Broadband Services, Vodacom still considers that the product market definition should be expanded to include micro solutions, lampposts, billboards and unused rooftops (due to demand side substitutability).

- Vodacom considers that there is effective competition in the sites market. Vodacom has made a number of arguments in support of this view in its response to the Discussion Document (e.g., on the importance and role of tower companies, and the impact of existing FLR and relevant local policies on communication infrastructure). However, ICASA's Findings did not reply in earnest to Vodacom's points, and Vodacom is concerned that ICASA has not properly taken these into account in its Findings.

- Vodacom still has concerns that there are methodological and/or data integrity issues with ICASA's market share analysis for sites which underpins its SMP Findings. However, Vodacom is unable to respond appropriately to ICASA's Findings due to the lack of transparency around its approach to the analysis.

The market for NR for coverage

Vodacom maintains its position that any NR market for coverage purposes should be limited to remote areas.

ICASA has not shown there to be ineffective competition in the NR market for coverage purposes. In fact, a full assessment of this market would reveal strong competition. In particular:

- There is already strong competition between MTN and Vodacom to provide coverage roaming services, as Telkom has already recognized in its response to the Discussion Document;

- ICASA has underplayed the changes occurring in the market and which can be expected to increase the level of competition even more in the next 2-5 years, namely:

  - Roaming customers will have even stronger bargaining power because own network roll-out will become more viable as a result of:

    - The allocation of additional low frequency spectrum;

    - Strong competition in the site access market, including the impressive growth in the number of sites made available by Telkom's Gyro unit and its process of converting the rest of its sites to accommodate mobile services; and

    - The obligations in the site access market (from the existing FLR, the ITA and potentially from this market review process).

  - The coverage obligations attached to the spectrum auction.

  - The launch of the WOAN.

- ICASA's conclusion that Vodacom and MTN have SMP in this market is not based on any robust evidence.

The MVNO and APN access markets

Vodacom supports a number of ICASA's conclusions, in relation to the markets for MVNO access and APN services. In particular, Vodacom supports ICASA's conclusion that there is effective competition in the MVNO access market. On a forward-looking basis, the spectrum auction will also further improve conditions for MVNO access, given the obligation to provide MVNO access and the boost to capacity. In contrast, however, Vodacom does not believe that ICASA's conclusion that there is ineffective competition in the market for wholesale APN services is robust.

Furthermore, Vodacom is especially concerned that despite ICASA not clearing the "hurdle" for imposing remedies in these markets (i.e., despite ICASA not finding that competition is ineffective and that one or more operators have SMP) it is, in fact, proposing monitoring remedies in these markets. This is clearly inappropriate and these remedies should be removed from the Regulations. Notwithstanding this, if ICASA does monitor margins for APN services, it should be comparing wholesale APN prices with retail APN services, rather than with all retail mobile services. This would more accurately reflect how APN access seekers use wholesale APN services.

A. Introduction

Vodacom welcomes the publication of the Draft Regulations and Findings published by ICASA on 26th March 2021 in respect of its Mobile Broadband Services Inquiry ("**MBSI**").

Vodacom shares ICASA's ambition for all South Africans to benefit from being able to access high quality, affordable, mobile data services. Key to meeting this ambition is ensuring regulatory certainty for sector investors. However, for a number of years now the sector has been under the threat of regulatory intervention, with the numerous and overlapping regulatory and policy initiatives having been undertaken by ICASA, the CC and the Government of South Africa creating a significant element of uncertainty. So, while Vodacom has a number of concerns with ICASA's Draft Regulations and with the Findings that form the basis of these, it does welcome the conclusion of this process.

Going forward it is imperative, if South African consumers are to benefit from ICASA's ambition, that other processes, most particularly, the award of High Demand Spectrum (HDS), are completed in a timely and efficient manner. Of all the measures that will enable the sector to deliver ICASA's ambition, it is this award which will have by far the greatest impact.

This document constitutes Vodacom's written response to the Draft Regulations and Findings. In this response, Vodacom firstly sets out the scope of its response. It then turns to consider a number of overarching themes in the Draft Regulations and Findings, and which seem to drive its conclusions. Before turning to its position on individual markets, Vodacom then responds to the key element of the Draft Regulations, namely the margin monitoring remedy ICASA intends to impose on those operators it considers to have SMP in a relevant market. In Annex A of its response, Vodacom also includes an independent expert report from Mr. Richard Feasey, a regulatory and sector expert in the mobile sector and panel member of the UK's Competition and Markets Authority, in which Richard also responds to this element of ICASA's proposals. In Annex B, Vodacom sets out a number of practical issues with collecting the data that ICASA would require to monitor margins at a very granular level.

The scope of Vodacom's submission

Throughout this document Vodacom comments on ICASA's Draft Regulations and its Findings. Whilst Vodacom recognizes that the Findings are supposed to be final, the remedies set out in the Draft Regulations are inherently tied to the content of the Findings (market definition, assessment of the effectiveness of competition, identification of operators with SMP) and thus need to be evaluated jointly. As the Draft Regulations are informed by the Findings and the final Regulations will need to be consistent with ICASA's accurate and relevant findings, it is necessary to address the content of the Findings as well.

Further, as per Section 67(4) of the ECA, Vodacom notes that the market definitions, the assessment of the effectiveness of competition and the identification of operators with SMP have been included in the Draft Regulations, which ICASA is required to publish for consultation in terms of section 4(4):

> *"67 Competition matters*
>
> *(4) The Authority must, following an inquiry, prescribe regulations defining the relevant markets and market segments and impose appropriate and sufficient pro-competitive licence conditions on licensees where there is ineffective competition, and if any licensee has significant market power in such markets or market segments. The regulations must, among other things-*
> *(a) define relevant wholesale and retail markets or market segments;*
> *(b) determine whether there is effective competition in those relevant markets and market segments;*
> *(c) determine which, if any, licensees have significant market power in those markets and market segments where there is ineffective competition;*
> *(d) impose appropriate pro-competitive licence conditions on those licensees having significant market power to remedy the market failure;*
> *(e) set out a schedule in terms of which the Authority will undertake periodic review of the markets and market segments, taking into account subsection (9) and the determination in respect of the effectiveness of competition and application of pro-competitive measures in those markets; and*
> *(f) provide for monitoring and investigation of anti-competitive behaviour in the relevant market and market segments."*

As such, in Vodacom's view, the determinations relating to market definition, the effectiveness of competition and the identification of operators with SMP are, in fact, subject to consultation and ICASA must remain open to revise its Findings based on the consultation process that follows from publishing the Draft Regulations.

Consequently, some of Vodacom's comments in this response relate to issues discussed in the Findings and not just to ICASA's Draft Regulations. As Vodacom has already provided a detailed response to the Discussion Document, Vodacom has focussed this submission on the most recent evidence available to it and on topics not raised in the Discussion Document, rather than seeking to repeat all of the arguments that it has previously made. However, for the avoidance of doubt, the points made in Vodacom's response to the Discussion Document are correct, remain valid and should have been considered more fully, and taken on board, by ICASA in its Findings.

B. Vodacom continues to have a number of concerns with ICASA's analysis

Vodacom supports a number of the conclusions ICASA has reached in its Findings and Draft Regulations. For example, it does believe that ICASA is correct, and applying principles consistent with best practice, to focus any remedies (should they be considered necessary, which Vodacom disputes) in upstream wholesale markets. It also considers that ICASA is right to recognise the significant risks with imposing price controls in wholesale markets, and therefore supports ICASA's decision to reject the calls of some stakeholders for direct price controls on some wholesale facilities or services. Given that any remedies should be focussed on upstream markets, Vodacom understands the reasons for ICASA's proposed monitoring remedy for sites, even though this will place some additional burden on Vodacom. It is important that ICASA assesses the impact of this site access remedy market when assessing the effectiveness of competition on a forward-looking basis in the markets that are downstream of site access (i.e. NR for coverage, MVNO access, APN services and retail services).

However, despite Vodacom agreeing with a number of areas of ICASA's approach, Vodacom has identified some key areas in the Draft Regulations and Findings where ICASA has erred. Therefore, in this section of its response, and before turning to comment in detail on each of the markets defined by ICASA, Vodacom sets out a series of concerns that it has with a number of overarching themes of ICASA's analysis. These are as follows:

- First, Section 67(4)(d) remedies cannot be imposed without finding ineffective competition and identifying operators with SMP, given the limited scope for regulations authorised by section 67;
- Second, ICASA's analysis understates and therefore fails properly to interrogate the impact that the spectrum auction and WOAN will have, over the course of the next three years, on market outcomes and the effectiveness of competition;
- Third, ICASA's analysis of the defined markets cannot be relied upon due to its failure to take into account the full impact of spectrum constraints on those market outcomes;
- Fourth, and even notwithstanding the above points, ICASA's analysis fails to recognise that competition between operators has intensified substantially;
- Fifth, ICASA's analysis has failed to demonstrate that there are vertical relationships that could harm competition; and
- Sixth, ICASA's analysis lacks transparency.

Vodacom now sets out its concerns in detail on each of these points. In all cases, it begins by summarising ICASA's position and then sets out why, in its view, ICASA has erred in reaching this position.

1. Section 67(4)(d) remedies cannot be imposed without finding ineffective competition and identifying operators with SMP

Vodacom notes that as per sections 67(4)(b), 67(4)(c) and 67(4)(d) of the ECA, pro-competitive licence conditions such as those laid out in the Draft Regulations may only be applied to markets when both of the following conditions apply:

- There is ineffective competition on a forward-looking basis; and
- Licensees have Significant Market Power (SMP).

However, the Draft Regulations propose to impose remedies in markets where this is not the case:

- For MVNO services, despite there being no finding of ineffective competition and no operators with SMP; and
- For APN services, despite there being no operators with SMP.

The Draft Regulations are not in line with the ECA in this regard.

Further, ICASA should also clarify that the remedies it has set out in relation to site access (i.e., section 7, Paragraph 1.1 of the Draft Regulations) only apply in those municipalities where operators have SMP and where there is ineffective competition. In addition, any remedies for roaming should only apply to those agreements that focus on "roaming for coverage", given that ICASA has excluded "roaming for capacity" from the relevant market.

2. ICASA's analysis understates the impact of the spectrum auction and WOAN over the upcoming market review period

In the Findings, ICASA argues that the spectrum auction and the WOAN will have a "formidable impact". Vodacom agrees with this statement. However, with the exception of the MVNO, APN and site access[3] markets, ICASA considers that such an impact will only materialise in the longer-term i.e. after the upcoming market review period. ICASA also appears to be solely focussed on the impact of the obligations attached to the spectrum licenses, whilst ignoring the significant impact that the spectrum auction could have on both capacity and coverage[4], and the knock-on impact that improvements in network capacity (in particular) could then have on wholesale and retail market outcomes. ICASA also ignores the significant support that smaller operators will receive in the auction.

These omissions are particularly surprising given that ICASA has, in the Findings, acknowledged concerns over the alignment of the different regulatory processes.[5] And yet, despite this, ICASA's analysis of the potential impact of the spectrum award that it set out in the ITA and in the various court proceedings that have followed, places far greater importance on the short-term impact of the spectrum auction than does the MBSI Findings.

2.1 ICASA's position

In its Findings, ICASA's position appears to be that:

- The main impact of the spectrum auction will be driven by the obligations attached to the spectrum licences;
- The spectrum auction will ultimately have a formidable impact, but not over the upcoming market review period; and
- The spectrum auction will only have an impact on the MVNO/APN and site access markets over the upcoming market review period, but not the other mobile markets.

<u>ICASA seems to just focus on the obligations attached to the spectrum licenses</u>

ICASA has correctly recognised that the obligations attached to the spectrum auction and the establishment of a WOAN will have an impact on competition in mobile markets going forward:

> *"Spectrum ITA and WOAN: Since the publication of the Discussion Document, a major change in the market has been the publication by the Authority of the spectrum ITA, for the licensing of high demand spectrum, and the WOAN invitation to apply. The conditions attached to the spectrum ITA process as well as the invitation to apply for the WOAN introduce various factors that are likely to change the conditions within wholesale and retail markets. As such,* ***as part of the forward-looking assessment of competition in the market, these changes need to be accounted for in the analysis of competition****. Some aspects of the spectrum ITA that may impact on a forward-looking assessment of competitiveness in the market are the following:*
> *37.1. Coverage obligations;*
> *37.2. Spectrum caps and spectrum floors;*
> *37.3. References offers for site access for any licensee requesting site access and guidelines including pricing, timeframes and policies for reserving space on masts;*

[3] ICASA recognises the impact of ITA reference offer on sites when assessing the site access market
[4] The coverage obligation and associated speed requirement simply set out the minimum that operators have to achieve within 5 years. However, operators may choose to exceed the coverage obligation. Importantly, operators will likely start to make significant use of the additional spectrum long before the deadline for the coverage obligation
[5] Paragraph 34 of Findings

37.4. Open access to MVNOs (which must have 51% ownership from persons from historically disadvantaged groups with business plans to be submitted within 3-6 months); and
37.5. Requirements for successful applicants that are to be assigned the radio frequency spectrum to procure 30% of national capacity from the WOAN".[6] [Emphasis added]

ICASA states that the spectrum auction and the WOAN will ultimately have a formidable impact, but not over the upcoming market review period

Whilst ICASA recognises that the spectrum auction and the WOAN will have a "formidable impact" on the mobile sector, in its Findings it states that such impacts are unlikely to be substantial in the short-term to medium-term:

"Finally, submissions to the effect that the WOAN and forthcoming spectrum assignments will improve competitive conditions are likely correct in the longer term. However, within the short to medium term (the next 3 years), these changes in the market are unlikely to have a substantial impact. In addition, it is likely that the WOAN will need a significant period to build out its network"[7]

*"...while ICASA believes that the WOAN and new spectrum assignments will have a **formidable impact** on the market in the longer term, in the next three years this is unlikely, given the delays with the digital dividend process and the time the WOAN will likely need to establish itself".*[8] [Emphasis added]

ICASA seems to consider that the spectrum auction will only have an impact on the MVNO/APN and site access markets over the upcoming market review period, but not the other mobile markets

Whilst ICASA has, throughout most of its Findings, underplayed the role of the spectrum auction during the upcoming market review period, it appears to place more emphasis on the spectrum auction when discussing MVNO and APN access:

*"However, the Authority's view is that competition concerns in the retail market will likely be remedied through wholesale interventions including with respect to APN and MVNO price monitoring, set out in the draft Mobile Broadband Services Regulations. As noted, **there are several changes in the market at present including obligations related to spectrum licensing and additional capacity.**"*[9] [Emphasis added]

In the market for site access, ICASA has also taken into account the impact of the requirement for Tier 1 operators to produce reference offers for site access following the auction:

"...while the Authority had proposed developing regulations for site access dealing with timeframes and conditions in the Discussion Document, the Authority's spectrum ITA has requirements for Tier 1 operators to: Produce a reference offer for site access to be offered to any licensee requesting site access and guidelines, including pricing, timeframes and policies for reserving space on masts.

As such, it is no longer necessary to develop detailed guidelines, as on a forward-looking basis it would be more reasonable to monitor the impact of the very similar requirements of the proposed spectrum licence conditions."[10]

[6] Paragraph 37 of Findings
[7] Paragraph 50 of Findings
[8] Paragraph 92 of Findings
[9] Paragraph 227 of Findings
[10] Paragraph 165 and 166 of Findings

We now turn to why Vodacom believes, in each of these instances, ICASA has underplayed the short term impact of the spectrum auction and the entry of the WOAN.

2.2 ICASA needs to place more emphasis on the impact of the spectrum auction and the WOAN over the upcoming market review period

In the Findings, ICASA needs to place more emphasis on the impact of the spectrum auction and the WOAN over the upcoming market review period. This is because:

- As part of other processes, ICASA has itself – correctly – highlighted the short-term impact of the spectrum auction and, as such, its Findings must be consistent with this;
- The spectrum auction will result in a large boost to network capacity, which will further enhance outcomes in both wholesale and retail markets;
- The spectrum auction will allow operators to improve coverage (including both outdoor and indoor coverage), which will lead to increased competition in wholesale and retail markets;
- ICASA designed the spectrum auction in a way which gives significant support to smaller operators;
- The WOAN should be able to have an impact over the upcoming market review period; and
- The spectrum auction will impact all of the mobile markets defined by ICASA.

<u>As part of other processes, ICASA has itself highlighted the short-term impact of the spectrum auction</u>

In both the ITA and the ongoing court processes that have followed, ICASA has placed more weight on the short-term impact of the spectrum auction, which contradicts the position that ICASA has taken in its Findings.

For instance, as part of its Reasons Document on the ITA, ICASA has emphasised the importance of the spectrum auction, given both the amount of spectrum on offer and also the nature of the spectrum:

> *"**Access to spectrum is a key input to the provision of mobile services given that spectrum**, particularly low frequency sub-1GHz frequencies most suited to the efficient provision of wider coverage mobile broadband services, is a finite resource. As such, access to such spectrum can have a significant impact on the nature of wholesale competition in the market, and the services that can be offered.*
>
> ***This spectrum award will make available a large amount of spectrum suitable for the provision of mobile broadband services (both low frequency spectrum for coverage and higher frequency spectrum for capacity)**. Some 406 MHz of spectrum would be awarded by the close of this process to operators including to the proposed new WOAN. Given the scarcity of sub-1GHz spectrum in South Africa (no 700MHz and 800MHz spectrum has been assigned to date), it is likely to be particularly important in shaping future competition in mobile markets, and the extent to which individual national wholesalers are able to compete credibly with each other."*[11] [Emphasis added]

Importantly, in contrast to the position that ICASA has taken in its Findings, ICASA has argued, as part of the ITA process, that the spectrum auction will have an impact on competition in the short- to medium-term:

[11] ICASA ITA Reasons Document – paragraphs 35 and 36

> *"**A spectrum award process would in the short to medium term influence competition at the wholesale level more significantly.** Spectrum would typically (but not exclusively) be won by the wholesale national players. However, downstream retail competition will still be affected."*[12] [Emphasis added]

In its Findings, ICASA dismisses the impact of the spectrum auction over the upcoming market review period because of the delays in the digital migration process. This is inappropriate for a number of reasons.

- First, it completely ignores the fact that the large amount of high frequency spectrum on offer is immediately available. This comes despite the fact that ICASA has stated that *"capacity and average data rates"* are an essential capability for operators to be able to compete[13].

- Second, ICASA is wrong to consider that the low frequency spectrum will have no use until the digital migration process is complete. As part of the dispute on the spectrum auction, ICASA has argued that operators are already able to get the full commercial value from the low frequency spectrum (700MHz and 800MHz):

> *"Telkom's complaint that it will incur the relevant costs "without certainty about when Telkom can expect to enjoy the full commercial benefits of this sub 1GHZ spectrum" is without any merit. **The correct position is that as soon as the auction process is completed and the relevant licences are awarded, the successful bidders will then become entitled to enjoy the full commercial benefits of the spectrum that would have been awarded to them.**"*[14] [Emphasis added]

> *"I persist that successful bidders will not have to wait the conclusion of the digital migration process before enjoying the full commercial benefits of such IMT700 and IMT800 spectrum that would be awarded to them"*[15]

ICASA's position in the Findings that the spectrum auction will have limited impact over the upcoming market review period also contradicts its own position that a delay (an "interdict") in the spectrum auction will cause significant harm to the sector:

> *"there is an urgent demand to release the high demand spectrum which Telkom seeks to interdict"*[16]

> *"the delay in releasing high demand spectrum is prejudicial to other mobile operators, the economy, the public interest and the country's ability to generate more job opportunities"*[17]

> *"the country has already been prejudiced by the delays which have been occasioned in releasing high demand spectrum"*[18]

It is unreasonable for ICASA to argue that the spectrum auction will have limited impact over the upcoming market review period, whilst at the same time arguing that *"there is an urgent demand to*

[12] Paragraph 34 of ICASA's competition assessment to inform the licensing of the international mobile telecommunication spectrum on the ICT sector
[13] ICASA - Reasons document relating to the invitation to apply on the licensing process for international mobile telecommunications in respect of the provision of mobile broadband wireless access services for urban and rural areas using the complimentary bands, IMT700, IMT800, IMT2600 and IMT3500 - Table 3
[14] ICASA's heads of argument paragraph 5.5.4
[15] ICASA answering affidavit to Telkom paragraph 7.21
[16] ICASA's heads of argument paragraph 6.6.1
[17] ICASA's heads of argument paragraph 6.6.3
[18] ICASA's heads of argument paragraph 6.6.4

release the high demand spectrum" and *"... a spectrum award process would in the short to medium term influence competition at the wholesale level more significantly"*.

For the avoidance of doubt and for the reasons set out below, Vodacom agrees with the positions ICASA has articulated as part of the ITA process, namely that the spectrum award and the creation of the WOAN will have significant, and immediate, impacts on the markets considered in the MBSI. ICASA must, therefore, ensure the final Regulations are consistent with the position it has articulated elsewhere.[19]

The spectrum auction will result in a large boost to capacity, which will improve market outcomes and competition

As Vodacom has set out previously to ICASA, the mobile market in South Africa is one of the most spectrum constrained in the world. This spectrum constraint has impacted negatively on the mobile market (as set out in more detail in the following section), as it has limited the ability of network operators, particularly the larger network operators, to add capacity to their networks. This is important because of the direct link between network capacity and quality.

Specifically, as network congestion increases, so network quality can fall. Such a reduction in quality primarily manifests itself as slower speeds and degraded service quality. This is because the bandwidth of a cell is split between the number of customers using their mobile service at a given point in time. Therefore, if the number of customers in a cell doubles, then the average speed provided to a given customer roughly halves, all else equal.

As a result of the trade-off between the number of customers on Vodacom's network (as well as the amount of data used by customers at a given point in time) and its network quality, Vodacom has to carefully manage the pricing of its retail and wholesale services in a way that preserves its network quality given the capacity available. That is, Vodacom has to manage its data prices to mitigate the negative impact that increased usage could have on its service quality. This trade-off is particularly acute as a result of Vodacom's capacity constraints and because of the increase in data traffic seen following the start of the pandemic. Vodacom's capacity constraints do not mean that it cannot reduce its prices at all – indeed Vodacom has been on an important pricing transformation journey (see Section D.3). Instead, it just means that there are limits on how quickly Vodacom can reduce its prices. And Vodacom's significant investments and roaming agreement with Rain have helped to partially reduce its capacity constraints, which have helped to enable some price reductions.

The release of HDS in the auction has the potential to very significantly, and quickly, ease Vodacom's capacity constraints in a way that is not fully possible when solely relying on Vodacom's investments and the Rain roaming agreement (e.g. because Vodacom does not control Rain's spectrum and Rain also uses its capacity to serve its own retail subscribers and other wholesale customers). This is because the high frequency spectrum bands (2.6GHz and 3.5GHz) which are used to provide additional capacity on networks and which will be made available in the auction are already available for the mobile operators to make full use of. Indeed, this is illustrated by Vodacom's own planned site roll-out for the high frequency spectrum to be licensed through the ITA, whereby Vodacom will begin by rolling this out on the most capacity constrained sites.

[19] Vodacom notes that the interdict requested by Telkom in respect of the ITA was granted by the Court. This meant that the spectrum auction did not take place in March 2021 as planned. However, ICASA is confident that it will win the review process and that the spectrum auction will be able to take place soon

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[21] A leading expert in the field of analogue and digital transmission

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<u>ICASA has included significant support for smaller operators as part of the auction</u>

The Findings makes brief mention of the spectrum floors and caps that will form part of the auction rules. However, this understates the significant support smaller operators will receive as part of the spectrum auction. To help ensure that smaller operators are credible competitors after the auction, the ITA will ensure that two smaller operators (the so called "Tier-2" operators) will have the opportunity to bid for spectrum that has been set-aside for them during an opt-in round. That is, these operators will be able to purchase important blocks of spectrum without having to face competition from Tier 1 operators during the opt-in round. The following figure shows the significant amount of spectrum that smaller eligible operators can bid up to, taking into account all their existing broadband spectrum held, during the opt-in round.

Figure 8: Minimum Spectrum Portfolios

	Sub-1GHz (minimum, including existing assignments)	1800MHz / 2100MHz and/or 2600MHz (minimum, including existing assignments)
Portfolio 1	2 x 10 MHz	60 MHz
Portfolio 2	2 x 15 MHz	40 MHz

Source: ICASA ITA

The amount of spectrum set aside for the opt-in round has been specifically selected to ensure that those operators who win this spectrum can be credible competitors to the larger operators (i.e., Vodacom and MTN). This is because ICASA has assessed which dimensions of quality[23] are essential in mobile markets and in turn what spectrum is required for operators to be credible competitors for each of these dimensions of quality. Importantly, the opt-in round will allow both Telkom and Cell-C (or any other operator selected to participate in the opt-in round) to acquire low frequency spectrum, whilst Cell-C would also be able to acquire high frequency spectrum.

In addition to being prohibited from bidding during the opt-in round, Tier-1 operators will face a relatively tight overall spectrum cap of 18% (smaller operators will also face the same cap, but it may be less of a constraint on them as they have fewer subscribers). In comparison, Ofcom has used an overall spectrum cap of 37% in previous auctions in the UK. This means that the Tier-2 operators are likely to be placed in an advantageous position, following the spectrum auction, as their network capacity is less likely to act as a binding constraint on their strategy than will be the case for the Tier-1 operators. Given the speed with which mobile operators can deploy networks (as shown below in respect of Rain's roll out plans) this should be taken into account when assessing, during this market review period, the ability of the Tier-2 operators to place an increasingly strong competitive constraint on the other operators.

<u>The WOAN should have an impact over the upcoming market review period</u>

The spectrum auction also includes a number of measures to help ensure that the WOAN becomes a credible national wholesale provider. Indeed, based on these measures, Vodacom believes that ICASA is wrong to assume that the WOAN will not become a credible competitor in wholesale markets within the timeframe of this review, given that:

[23] ICASA considers the following dimensions of quality - capacity and average data rates, quality of coverage, minimum coverage and minimum average data rates, highest peak data rates, and Other IMT advantages (e.g. better latency, M2M, enhanced mobile broadband).

- ICASA has assessed the mix of low frequency and high frequency spectrum that the WOAN requires to be credible and set this aside for the WOAN. This means the WOAN is guaranteed to have sufficient spectrum to be a credible player. As set out above, the high frequency spectrum is available immediately, as, in large part, is the low frequency spectrum, with the digital migration process expected to be completed within 2 years.

- The WOAN will also be guaranteed a certain level of demand, as the MNOs who win spectrum will need to jointly purchase 30% of the WOAN's capacity. This will enable the WOAN to establish its position in the market and ensure it is able to benefit from some economies of scale.

- The WOAN will benefit from a competitive market for NR and access to facilities. Vodacom anticipates that there will be aggressive competition for providing the WOAN with various forms of wholesale access, thus helping to ensure that the WOAN can quickly roll-out its network.

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<u>The spectrum auction will impact, during the next three years, all of the mobile markets defined by ICASA</u>

Spectrum is an input into the markets for NR for coverage, MVNO access, APN services and ultimately retail services.[25] Given this, and in line with international best practice, ICASA should consider the impact of the spectrum auction on these downstream markets before considering whether any further intervention is required in these markets. To do otherwise would not be appropriate. For example, in the EU, regulators have to focus interventions on the most upstream input/market possible and only impose remedies in more downstream markets if the upstream interventions are insufficient. Although ICASA has not defined access to spectrum as a market, the same principle should apply in this case i.e. it should consider the impact of the spectrum auction on wholesale and retail markets, before considering whether any further intervention is required in wholesale markets.

[24] Based on Stats SA Mid-Year population estimates
[25] Spectrum is also an important input when providing roaming for capacity purposes, although ICASA has not defined this as a relevant market.

However, ICASA has taken into account the impact of the spectrum auction in only some parts of its analysis, but not others. For example, whilst ICASA considers the impact of the spectrum auction on the APN access market, MVNO access market and sites market, ICASA has not discussed the impact of the spectrum auction on the retail and NR markets at all. This is a significant omission because it is clear that the spectrum auction is likely to impact on the defined markets over the upcoming market review period.

This is because:

- For the market for sites, larger operators ("Tier-1 operators") will have to provide a reference offer, as ICASA has already acknowledged. This will have to be offered immediately upon completion of the spectrum auction. As described in more detail in Section E, this will have an impact on the provision of site access.

- For the coverage roaming market, operators will be able to roll-out their own network more widely and efficiently as a result of i) getting access to low frequency spectrum and ii) benefitting from the greater transparency for access to sites that will be driven by the reference offer obligation included in the ITA. In addition, operators will also face coverage obligations, which means that smaller operators will have to cover at least 80% of the population within 5 years. More extensive own network roll-out will reduce operators' reliance on NR services, which will increase their bargaining power when negotiating roaming agreements as they will have a more credible alternative. This is discussed in more detail in Section F.

- For the markets for MVNO services and APN access, ICASA has correctly recognised that *"there are several changes in the market at present including obligations related to spectrum licensing and additional capacity"*. The *"additional capacity"* that ICASA is referring appears to relate to the capacity roaming arrangements that a number of operators have entered into. However, for similar reasons, the additional capacity from the spectrum auction will also improve MNOs' ability to offer MVNO and APN access. This is especially the case given that the spectrum auction will provide operators with control of spectrum whereas Vodacom has no control over Rain's spectrum, which provides it with much less certainty relative to owning spectrum itself. This is discussed in more detail in Section G.

- Finally, and as a result of the positive impacts in the upstream markets as well as the direct benefit to the retail market of increased capacity, outcomes in the retail market should improve further. In particular, the reduction in capacity constraints that should arise from the auction will allow operators, particularly the larger operators who have been most capacity constrained, to price more aggressively, without this impacting negatively network quality. Indeed, arguably this is already starting to happen, as can be seen from MTN's recent aggressive price reductions in the retail market. This is discussed in more detail in Section D.3. Critically, as Vodacom turns to next, spectrum constraints have been overlooked by ICASA in its analysis of market performance today. As a result, ICASA has also not properly considered how those outcomes may further improve as capacity constraints are relieved.

3. ICASA's analysis of the defined markets cannot be relied upon due to its failure to fully take into account the impact of spectrum constraints on those market outcomes

ICASA is correct to highlight, in the Findings, the "formidable impact" that assigning additional spectrum will have[26]. Logically, if assigning more spectrum will have a "formidable impact", it must also be the case that the current shortage of spectrum must be having a formidably adverse impact on mobile market outcomes. But ICASA has failed to fully recognise the magnitude of this adverse impact when it assesses the effectiveness of competition across the different mobile markets that it has defined. This makes ICASA's findings unreasonable and means that ICASA cannot be confident that its

[26] Paragraph 92 of Findings

Findings are correct as those Findings will no longer be viable once the auctioned spectrum is deployed. This is because most of the indicators and evidence ICASA relies on to support its Findings regarding the effectiveness of competition in the defined markets are materially compromised by the spectrum constraints that exist in South Africa.[27]

It is clear that ICASA must not dismiss the concerns raised by operators on this subject. The spectrum constraints faced by mobile operators in South Africa are far more severe, and more longstanding than those in other markets. For example, some EU countries assigned 800MHz and 2.6GHz spectrum more than a decade ago, while this spectrum has still not been assigned in South Africa. Faced with this degree of constraint, it should be clear that not only will the award of this spectrum have a formidable impact on competition and market outcomes in the defined markets, but also that the failure to award this spectrum to date has also had a significantly detrimental impact on the market. This must be recognised.

Figure 10: Spectrum award dates across EU for 800 MHz and 2600 MHz

EU Member State			EU Member State		
Date	**800 MHz**	**2600 MHz**	**Date**	**800 MHz**	**2600 MHz**
2008		Sweden	2012		Netherlands
2009		Finland	2012	Romania	Romania
2010		Austria	2013	Austria	
2010		Denmark	2013	Belgium	Finland
2010		Estonia	2013	Cyprus	Cyprus
2010	Germany	Germany	2013	Czech Rep.	Czech Rep.
2010	Netherlands	Netherlands	2013	Estonia	
2011		Belgium	2013	Finland	
2011	France	France	2013	Greece	
2011	Italy	Italy	2013	Lithuania	
2011	Portugal	Portugal	2013	Latvia	
2011	Spain	Spain	2013		Luxembourg
2011	Sweden		2013	Poland	Poland
2012	Czech Rep.	Czech Rep.	2013	Slovakia	Slovakia
2012	Denmark		2013		Slovenia
2012	Ireland		2013	UK	UK
2012		Lithuania	2014	Estonia	
2012		Latvia	2014	Hungary	
2012	Luxembourg	Luxembourg	2014	Slovenia	Slovenia

Source: Study on Spectrum Assignment in EU" – SMART 2016/0019 (LS telcom AG, Valdani Vicari & Associati, PolicyTracker)

We now turn to a number of the specific areas where ICASA has failed to reflect the impact of the spectrum constraints facing the sector.

Spectrum shortages have a number of crucial impacts on the markets defined by ICASA

Throughout its Findings, ICASA makes a number of passing references to spectrum constraints. However, given that it considers that the spectrum auction will have a "formidable impact", it should have done more to assess how spectrum constraints are adversely affecting the different markets that it has defined. This is because the spectrum shortages will impact the different markets defined by ICASA in a number of important ways:

[27] Although it is the case that some spectrum has been assigned on a temporary basis during the pandemic, this is not a replacement for long term spectrum assignments, as operators cannot make significant investments on the basis of temporary assignments. Indeed, Vodacom notes that ICASA is now intending to withdraw these temporary assignments

- **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. 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. 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. However, ICASA appears to have placed some weight on the relatively unfavourable position of South Africa in some international price comparisons as an indicator of a lack of effective competition, without analysing the relevant context. This is despite the fact that, in its own Discussion Document, ICASA presented econometric evidence to show the link between spectrum availability and mobile data prices.[28] It is clearly irrational for ICASA to recognise this link in its Discussion Document and to acknowledge that the ITA will have a formidable impact but then, when this is pointed out by MNOs, to not contextualise and amend its international benchmarking and conclusions accordingly.[29] In particular, when carrying out international benchmarking, it is important that there is a like-for-like comparison, which means that ICASA should have either:

    - Restricted its sample of countries to those with similar spectrum constraints;

    - Adjusted prices to take into account the differences in spectrum allocations across countries; or

    - Placed limited weight or disregarded its international price benchmarking entirely.

- **International non-price benchmarking**. Spectrum constraints are likely to lead to lower quality and coverage and slower service innovation (deployment of latest technologies) in South Africa than would otherwise be the case. While South Africa performs relatively well on these measures even with the spectrum constraints it is facing, it is also the case that assigning additional spectrum will enable MNOs to further enhance mobile network performance. It is, therefore, again imperative that ICASA takes this spectrum constraint properly into account when assessing the current state of the defined markets. Releasing additional spectrum in a timely manner is the single most important and necessary factor to enhance market outcomes.

- **Site densification**. Operators will in some cases have rolled-out additional sites to compensate for the lack of spectrum. This will impact ICASA's calculation of market shares for sites, whilst it also helps explain why there is a lot of site-sharing between Vodacom and MTN. That is, this degree of site sharing, and the number of sites deployed by the larger operators is not a sign of market failure, or ineffective competition. Rather, it is a sign that spectrum constraints have again impacted the functioning of the market.

- **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 wholesale access (in terms of reduced quality and hence customer churn) would exceed the wholesale profits for the host MNO. This would again be consistent with outcomes that would be observed in effectively competitive markets, under spectrum constraints. ICASA has observed that competition for MVNO and APN services has improved as capacity has increased (as a result of the capacity roaming

[28] Paragraph 66 and Table 2 of the MBSI Discussion Document

[29] For example, when discussing its international benchmarking (paragraph 89 of the Findings), ICASA simply acknowledges that there are spectrum constraints, but does not analyse this any further: "In addition to non-price factors such as data speeds and LTE coverage, ICASA acknowledged the potential impact of inadequate spectrum assignment on the quality of services and data prices and also that spectrum should be assigned to operators as soon as possible."

arrangements some operators have entered into). Given this conclusion, it would only be logical that if spectrum had already been assigned, which would have resulted in higher capacity, then competition for MVNO and APN services would be even stronger.

As a general principle, having identified the formidable impact of spectrum, ICASA should have first assessed to what extent assigning a large amount of additional spectrum will have on any perceived market failures that it has identified. Only after carrying out this exercise should ICASA consider whether any further intervention in the form of Chapter 10 remedies is warranted. This would also be in line with ensuring that any intervention is focussed on the most upstream inputs (i.e. spectrum) to the extent possible.

4. ICASA's analysis fails to recognise that competition between operators has intensified substantially

As already discussed, to impose Section 67(4)(d) remedies, ICASA has to demonstrate that there is both ineffective competition and operators with SMP in the relevant market. When determining whether there is ineffective competition, ICASA has to consider whether any operators have real market power rather than purely relying on a more mechanical assessment of market shares. In particular, the ECA states that:

> *"(4A) 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."*[30] *[Emphasis added]*

When assessing whether there is ineffective competition, authorities typically consider:

- Whether any operator has sufficient market power to unilaterally behave to an appreciable extent independently of its competitors, of its customers and ultimately of consumers (meaning that the operator does not have to react to its competitors' strategies); or

- Whether any operators co-ordinate their behaviour to such an extent that they can jointly behave to an appreciable extent independently of their competitors, customers and ultimately, consumers.

As discussed in the following sections, ICASA has not provided evidence that either of these factors hold in South African mobile markets. This means that it does not have a legal or economic basis for imposing remedies.

4.1 Vodacom faces strong competition from a range of operators

As demonstrated by recent developments, Vodacom cannot act independently of its competitors and customers, given that[31]:

- Telkom continues to grow at an impressive rate and is not constrained in its growth;

[30] Act No. 1 of 2014: Electronic Communications Amendment Act, 2013 (4A)
[31] This list is not exhaustive. Vodacom's response to Discussion Document on the Market Inquiry into Mobile Broadband Services (27 February 2020) also contained a detailed discussion of why there is effective competition for mobile services in South Africa

- MTN has a significant lead on network quality;
- Cell-C is in the process of completing a business turnaround strategy and is expected to become an increasing competitive threat once again; and
- Vodacom's commercial arrangements with Rain and Liquid have increased the level of competition.

Taken together (and combined with the points that Vodacom has made to ICASA in its submission to its Discussion Document[32]) this demonstrates that there is effective competition across the range of mobile markets that ICASA is assessing. For example:

- Telkom's network, including its site network (though Gyro) is rapidly expanding, so giving access seekers more choice, both for site access and, over time, for NR. Telkom has benefitted from its NR agreement (which Telkom has not complained about) and DPS agreements with Vodacom, which is not something that one would expect if there was a lack of effective competition.
- MTN's lead on network quality shows that it is trying hard to capture subscribers from Vodacom and other operators.
- Cell-C has completed a business turnaround strategy.
- The network sharing agreements are enabling recent entrants, such as Liquid and Rain, to scale up quickly, so adding further layers of competition in the retail market but also in wholesale markets.

The rest of this section sets out more information on these key trends. Vodacom then comments in more detail on the impact that these key trends are having on the individual markets defined by ICASA throughout the rest of the report. For example, in the Retail Section D.3, Vodacom describes the significant price competition between operators.

Telkom continues to grow at an impressive rate

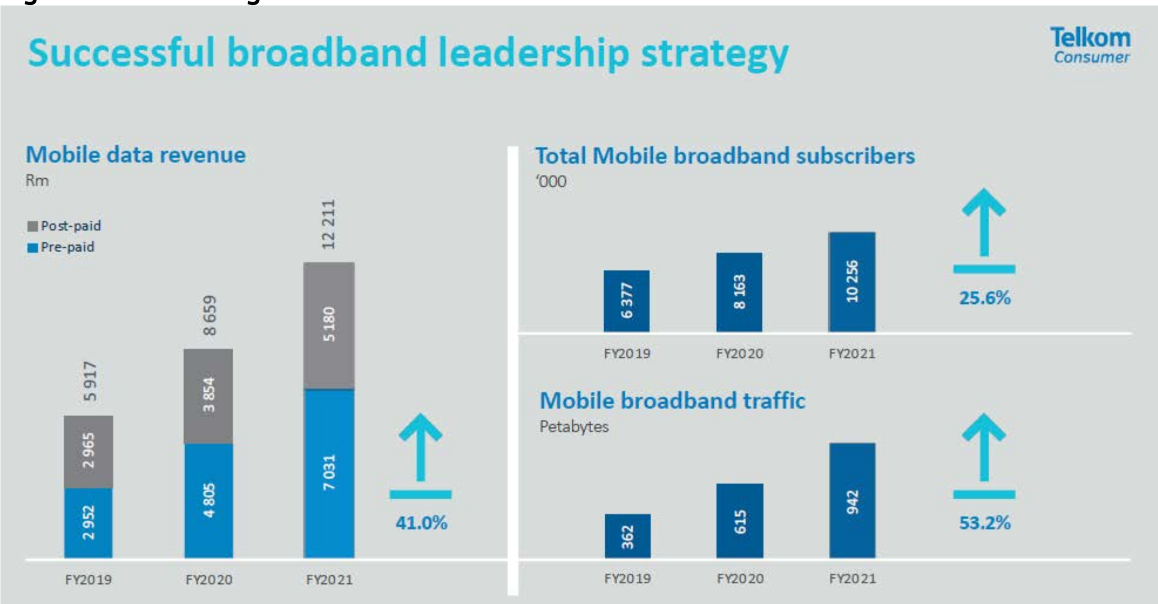
When assessing the effectiveness of competition across the range of markets that it has defined (especially the retail and sites markets), ICASA does not give sufficient consideration to the fact that Telkom/Gyro has managed to grow at an impressive rate in recent years. This shows that:

- MTN and Vodacom's position is anything but entrenched.
- Any barriers to expansion can be overcome.
- Telkom's roaming and facilities agreements with Vodacom have sufficiently attractive terms that Telkom is able to grow rapidly. These agreements have provided Telkom with the flexibility to decide where it chooses to build its own network and where it chooses to rely on wholesale services. Figure 21 shows that Telkom has managed to achieve a high level of 4G availability through a combination of own network roll-out and NR.
- Telkom has been able to grow even without having access to low frequency spectrum. Once it gains access to low frequency (which it can do during the opt-in round), it will likely become an even stronger competitor.

[32] See Vodacom's response to ICASA's Discussion Document on the Market Inquiry into Mobile Broadband Services (27 February 2020)

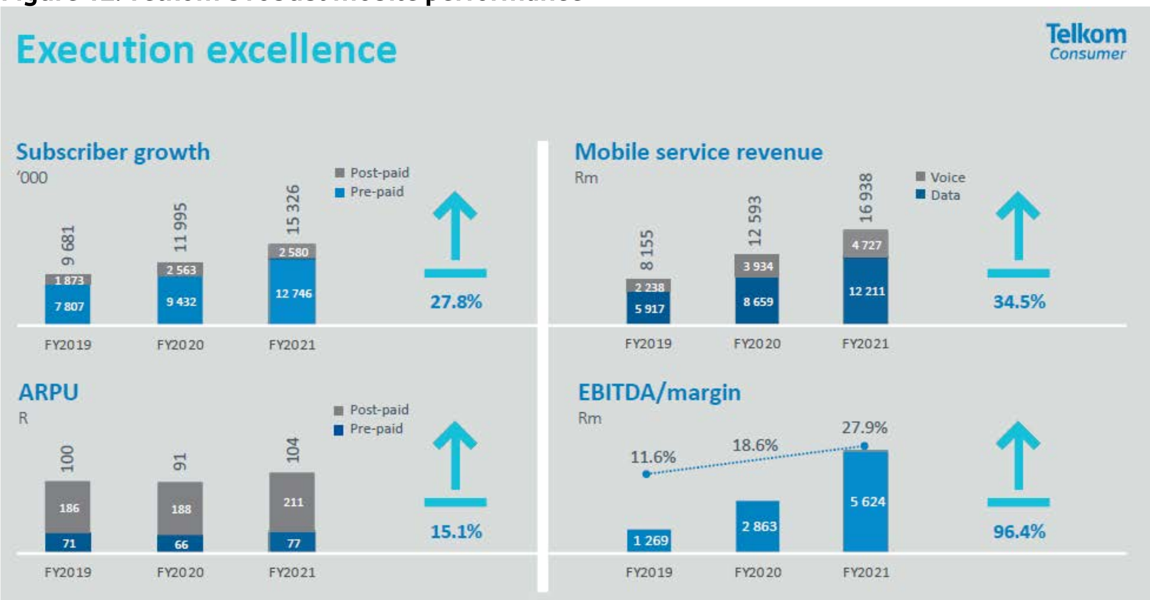
Indeed, even in the period between the publication of the Discussion Document and the Findings, Telkom has continued to perform strongly across a number of indicators (see figures below) - over its FY2021, Telkom's customer portfolio grew by 27.8%, Telkom's mobile revenues have grown by 34.5% and its EBITDA has grown by 96.4%. Looking at a slightly longer time series, Telkom has more than doubled its mobile service revenues and mobile data revenues in just two years. This is clearly not consistent with an operator who is struggling to compete against the larger operators in the market.

Figure 11: Telkom's growth for mobile data services



Source: Telkom SA SOC Ltd Annual Results Presentation For the year ended 31 March 2021

Figure 12: Telkom's robust mobile performance



Source: Telkom SA SOC Ltd Annual Results Presentation For the year ended 31 March 2021

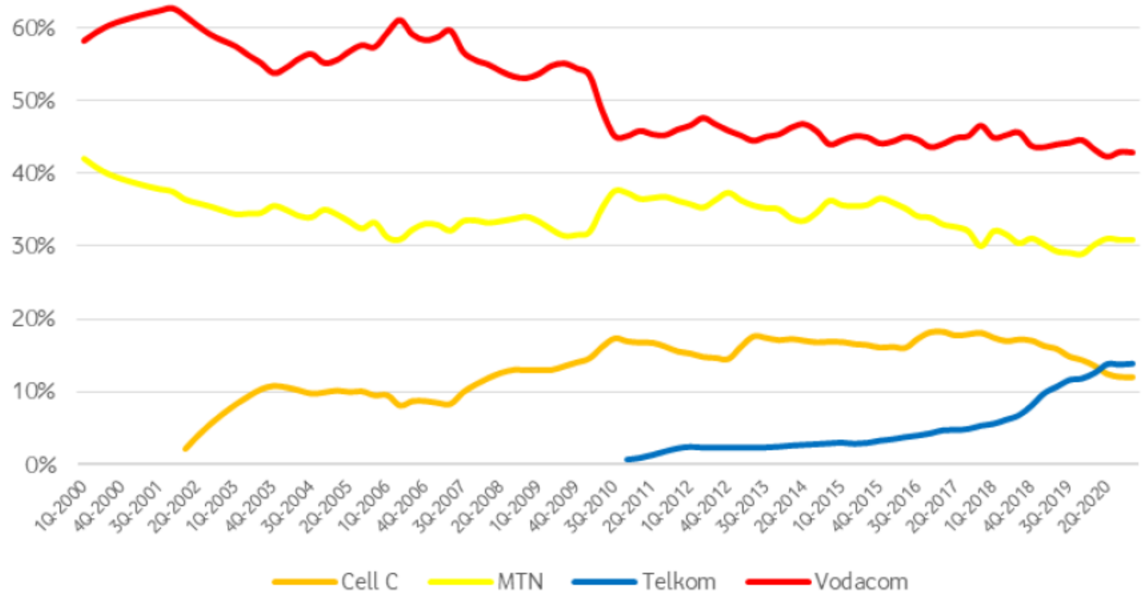
Telkom has also managed to expand its own network at a quick pace. Between FY2019 and FY2021, Telkom managed to increase its number of sites by 26% (from 5,116 sites to 6,430 sites)[33].

[33] Telkom SA SOC Ltd Annual Results Presentation For the year ended 31 March 2021

Market shares

Consistent with Telkom's strong growth, it has managed to increase its retail market share, as shown by the following figure.

Figure 13: Subscriber market shares



Source: GSMA

Further, Telkom is particularly strong in the provision of 4G services. This will put Telkom in a favourable position to compete on a forward-looking basis, as an increasing number of subscribers migrate to 4G services.

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Telkom's growth is driven by a number of advantages it has and which ICASA has failed to recognise

Telkom's growth is unsurprising. Telkom has a number of competitive advantages that put it in a good position to continue growing going forward. Through its Gyro unit, it has a portfolio of over 6,200 towers[39] and intends to build over 2,000 more in the following years[40]. Gyro has also had a strong financial performance, with an EBITDA of 80.4% in H1 FY2021. Furthermore, the majority of its base stations have fibre backhaul, which puts Telkom in a better position than its rivals in terms of expanding capacity and addressing increasing demand[41]. Linked to this, Telkom is in a strong position to self-supply fibre backhaul as it controls most of the duct and pole network in South Africa.

As ICASA recognised in its Discussion Document, Telkom has the highest share of spectrum in South Africa, and has a particularly large holding of high frequency spectrum. Indeed, this helps explain why Telkom is the number one operator in terms of mobile data volumes. Together, these factors all mean that Telkom is in an enviable position to continue to roll out quickly its own network, without any reliance on other parties. However, in addition to this, Telkom has a number of options when determining its optimal business model for offering mobile services in a given area. For example, it can:

- Roll-out its own network using some combination of:
    - Its own extensive site network;

[38] Telkom will have to roll-out its own network to at least 80% of the population based on the coverage obligation
[39] Telkom SA SOC Ltd Annual Results Presentation For the year ended 31 March 2021
[40] Telkom SA SOC Ltd Annual Results Presentation For the year ended 31 March 2021
[41] Telkom SA SOC Ltd Annual Results Presentation For the year ended 31 March 2021

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ICASA has itself concluded that in the majority of municipalities (185 out of 232 municipalities), no operator has SMP for site access (Vodacom considers that this figure should be even higher – see Section E). The site access market is already underpinned by the FLR. In addition, on a forward-looking basis, the conditions for gaining access to sites is likely to improve even further given that:

- ICASA correctly acknowledges that the ITA requirement for Tier 1 operators to provide a reference offer for sites will impact the site access market; and
- ICASA is proposing a monitoring requirement on sites in its Draft Regulations.

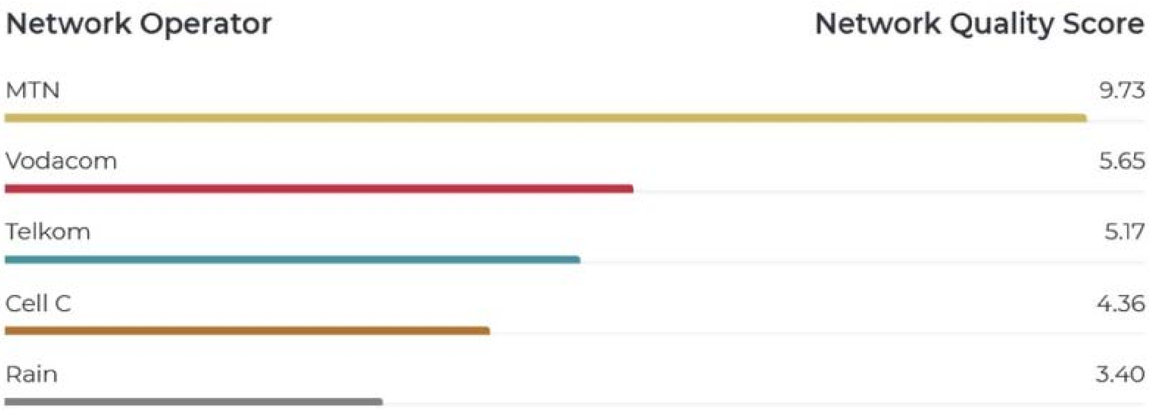
[42] A desire to maintain its current share of high capacity spectrum may, arguably, be one of the potential reasons why Telkom has sought to delay the spectrum auction (which was originally scheduled to have taken place in March 2021). As set out above, ICASA notes that the spectrum auction has the potential to have a "formidable" impact on the South African mobile market. Given this, ICASA needs to avoid rewarding Telkom for delaying the auction by imposing intrusive remedies on Vodacom and MTN, which Telkom would stand to benefit from.

MTN has a significant lead on network quality

ICASA has argued that Vodacom and MTN effectively have a duopoly for the markets for retail services, sites and roaming for coverage (see Section B.4). Vodacom disagrees with this given the important roles played by Telkom, Cell-C and Rain (and also TowerCos in the case of sites). Further, ICASA also disregards the fact that there is intense competition between MTN and Vodacom. MTN is a strong competitor that constrains Vodacom's decision making both in the retail market (in terms of pricing and composition of retail bundles), as well as wholesale markets (competition for tenants/access seekers).

According to a range of network benchmarks, MTN now has a superior network to Vodacom (see figures below). For instance, its download speed is now double Vodacom's. This puts MTN in a very strong position in the retail market. It potentially also puts MTN in a good position to offer wholesale agreements if its high average network speeds reflect a reduction in its capacity constraints than it may have had previously. Vodacom has been doing its best to catch-up with MTN's network quality, whilst having to manage a large increase in traffic on its network. Over the past financial year, Vodacom spent over R10bn on its network, which was higher than the R7.5bn that MTN had spent over the past calendar year[43].

Figure 18: Mobile network quality scores



Source:https://businesstech.co.za/news/telecommunications/482591/these-are-the-best-and-worst-mobile-networks-in-south-africa-5/

Figure 19: Mobile network quality scores

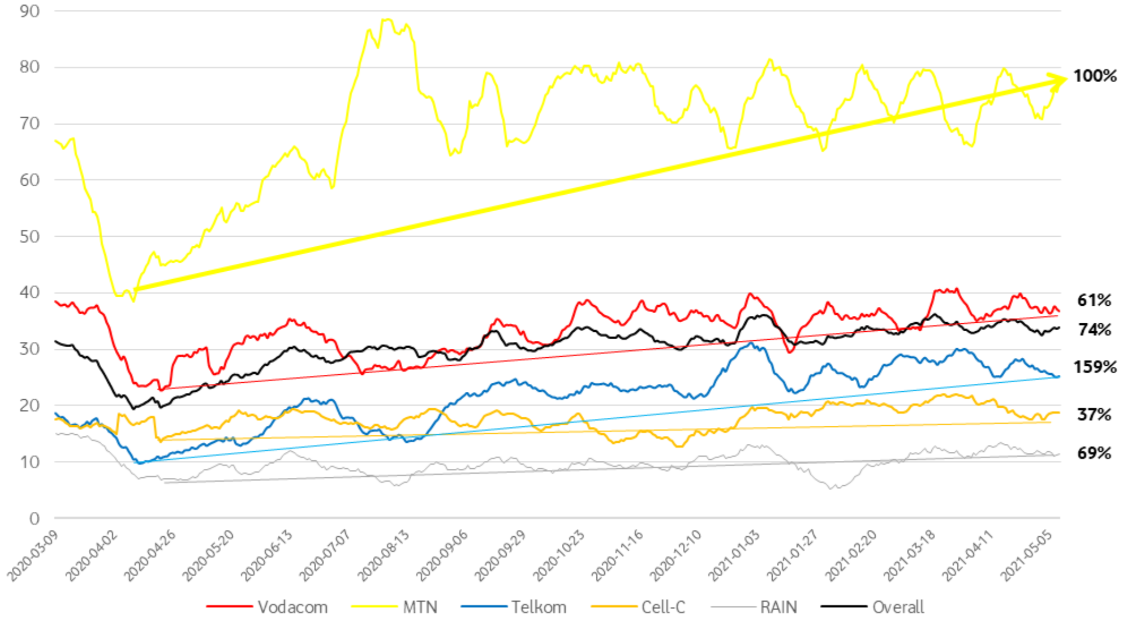
Network Operator	Download (Mbps)	Upload (Mbps)	Latency (ms)	Network Quality Score
MTN	64.29	25.42	32	9.73
Vodacom	32.76	10.94	32	5.65
Telkom	27.83	7.24	30	5.17
Cell C	20.82	10.32	39	4.36
Rain	10.58	9.64	33	3.40

Source:https://businesstech.co.za/news/telecommunications/482591/these-are-the-best-and-worst-mobile-networks-in-south-africa-5/

As shown by the figure below, MTN has managed to significantly extend its lead on download speeds over the past year.

[43] https://techcentral.co.za/vodacom-capex-tops-r10-billion-in-south-africa/107304/

Figure 20: MTN's lead on download speeds (mbps) has increased significantly over the past year



Source: MyBroadband

According to Ookla, MTN also has the highest level of 4G availability. This puts MTN in a favourable position when negotiating NR agreements for coverage.

Figure 21: MTN's lead on 4G availability[44]

	4G availability
MTN	90.5%
Telkom	87.1%
Vodacom	86.1%
Cell C	84.8%

Source: https://www.speedtest.net/global-index/south-africa

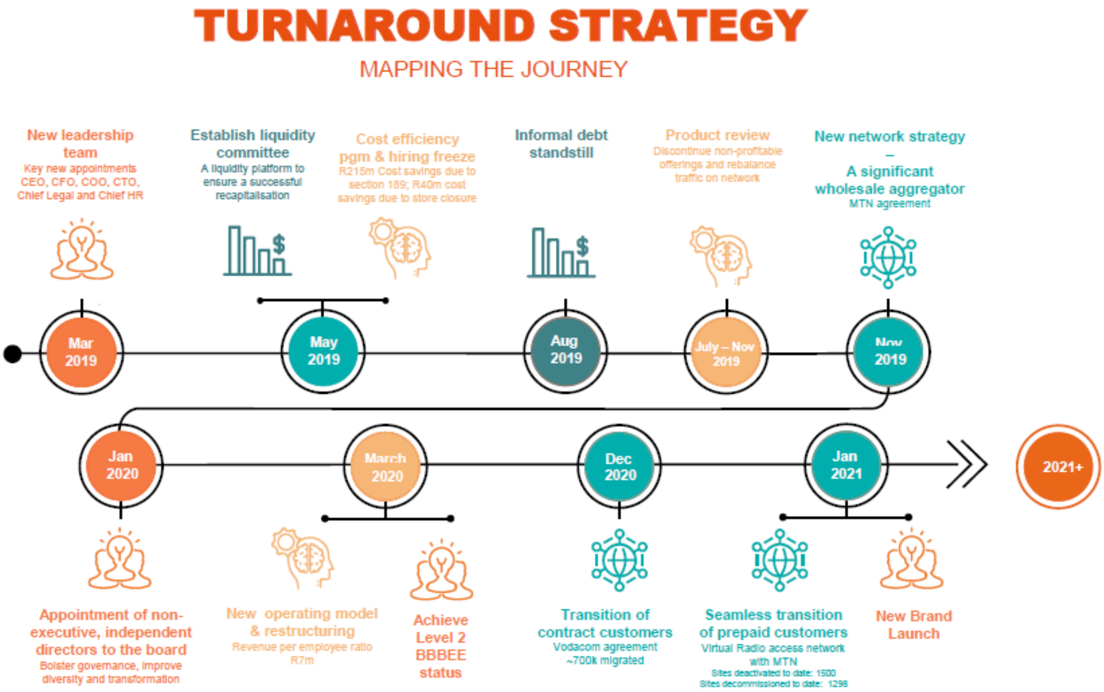
ICASA does not appear to have taken this range of relevant data on network quality into consideration and instead, has lumped MTN and Vodacom together as if there is no competition between them. As set out in more detail in the later sections on individual markets, this is not the case.

Cell-C is in the process of completing a business turnaround strategy and is expected to become an increasing competitive threat once again

It has been widely reported that Cell-C has faced financial difficulties in recent years. However, it has recently recapitalised its business and implemented a turnaround strategy based on new wholesale agreements with Vodacom and MTN[45], as summarised by the following figure.

[44] Ookla stated that "Examining the percentage of an operator's known locations where a device has access to 4G LTE service, we found that MTN had the best 4G Availability in South Africa during Q1 2021 at 90.5%." https://www.speedtest.net/global-index/south-africa
[45] https://mybroadband.co.za/news/telecoms/344041-cell-c-winding-down-its-radio-access-network.html

Figure 22: Cell-C's turnaround strategy



Source: Cell-C FY 2020 ANNUAL RESULTS – 20 April 2021

Whilst Cell-C will rely more heavily on wholesale agreements, its CEO has stated that it is not becoming an MVNO:

> *"We are not becoming an MVNO, I must be clear about this. We have got our own spectrum, licence, number range, brand, customers, and core billing"*[46]

Cell-C's has argued that its new business model will allow it to compete like-for-like with other mobile networks:

> *"For a subscriber, it is going to be fantastic service delivery as we can compete like-for-like with any of the other networks because we have got exactly the same thing,"*[47]

In line with the view that Cell-C is in a good position to be an important competitor going forward, ICASA is allowing Cell-C to take part in the spectrum auction, and expects it to be one of the two operators (in addition to Telkom) who acquire spectrum in the opt-in round:

> *"In the unlikely scenario that Cell C and Telkom do not opt-in (unlikely because of their significant existing RAN coverage), and instead Rain or Liquid do, only then would the opt-in round be applicable to Liquid or Rain..."*[48]

Consistent with this, Cell-C has submitted an application to ICASA to bid in the upcoming spectrum auction. If for any reason, ICASA decides that Cell-C should not participate in the auction, then Rain should be able to take Cell-C's place in the opt-in round given that it is willing to meet the coverage obligation applicable to Tier-2 operators (see the next sub-section).

[46] https://mybroadband.co.za/news/telecoms/344041-cell-c-winding-down-its-radio-access-network.html
[47] https://mybroadband.co.za/news/telecoms/344041-cell-c-winding-down-its-radio-access-network.html
[48] Paragraph 128 of ICASA's answering affidavit to MTN (1 March 2021) – Case no.: 3619/2021

Cell-C has lost market share over recent years. However, Cell-C has intentionally decided to focus more on attracting profitable subscribers rather than just maximising its number of subscriber, as stated in its latest annual results:

> *"Our strategy is to focus on profitable subscribers rather than size of subscriber base."*[49]

In line with this, Cell-C has managed to significantly improve its profitability in recent times, with its EBIDTA increasing by 27% and its EBIT increasing by 134% between H1 2020 and H2 2020[50].

Vodacom's commercial agreements with Rain and Liquid have increased the level of competition

The South African mobile market is characterised by a number of different commercially negotiated wholesale agreements. In its Findings ICASA, has reviewed the various agreements and has concluded that these are pro-competitive[51]. Vodacom agrees with this, although considers that ICASA has placed too little weight on the impact of Vodacom's agreements with Rain and Liquid when assessing whether the various mobile markets defined by ICASA are effectively competitive. The growth of Rain and Liquid is particularly relevant for the retail market. Further, based on its ITA application (see below), Rain has ambitious plans to further roll-out its network. This may mean that Rain would be able to offer MVNO access, APN services and/or NR for coverage at some point in the future. Yet this has also been ignored by ICASA.

<u>These arrangements are pro-competitive</u>

Vodacom agrees with ICASA's conclusion that its agreements with Rain and Liquid are likely to be pro-competitive:

> *"..it is also important to consider the counterfactual within the current market context.* ***The arrangements may have facilitated the entry and expansion of Rain as a wholesale and retail competitor in 4G and 5G mobile broadband, which is also pro-competitive.*** *Furthermore, the arrangement between MTN and Cell C likely allows for Cell C's continued presence in the market. Thus, if the counterfactual is that, for example, Cell C exited the market, and Rain maintains a smaller presence, this implies that the agreements have had some benefit. While the Commission has raised concerns over the fact that the incumbents have not responded to price decreases by smaller operators, they still provide alternatives to consumers and may expand further in the future and have a greater competitive impact."*[52]
>
> *"The competitive effect of these agreements at present allows for increased funding and capacity for at least two smaller operators and are therefore not incompatible with competition in the market in the current context."*[53] [Emphasis added]

Acacia, ICASA's adviser on the MBSI, also came to a similar conclusion in an expert report it has prepared as part of ICASA's answering affidavit to Telkom's request for the ITA to be interdicted and reviewed:

> *"...they had a real impact on competition in the market in South Africa in terms of enhancing access to facilities, to national roaming at better terms and in minimising capital expenditure for operators that are constrained while allowing them to compete. These agreements, have*

[49] Page 19 of Cell C FY 2020 annual results – 20 April 2021
[50] Page 15 of Cell C FY 2020 annual results – 20 April 2021
[51] For example, ICASA has stated that "The net impact of these deals is increasing the ability for operators such as Rain to compete in retail markets, providing consumers with additional choice. Furthermore, Cell-C benefits from better roaming quality and limiting the cost of infrastructure build which it cannot afford at this stage. As such, these agreements potentially provide a mechanism for increasing retail competition and consumer choice." ICASA - "draft mobile broadband services regulations" - paragraph 125
[52] ICASA - "draft mobile broadband services regulations" - paragraph 122
[53] ICASA - "draft mobile broadband services regulations" - paragraph 127

allowed for smaller operators such as Cell C and Rain to leverage their spectrum advantage to negotiate favourable sharing agreements. This includes Rains' facilities leasing agreement and Cell C negotiating a managed services agreement. This has had the effect of creating increased services competition in South Africa by maintaining Cell C as a competitor while allowing Rain to expand its offerings"[54]

Consistent with the positions of ICASA and Acacia, Rain has been able to roll-out its network at pace (see Figure 9) and unlock a significant amount of network capacity due to its agreement with Vodacom. That is, Rain's agreement with Vodacom has provided an important springboard for Rain to be able to develop its retail presence - Rain has been able to enter and grow in the South African retail and wholesale mobile markets, in competition with Vodacom, and other MNOs. Rain has itself stated that:

"These arrangements can have profoundly pro-competitive effects, as has been the case for Rain. It has used the revenue from its roaming agreement with Vodacom as collateral to build out its network and through this, to better compete with the larger operators..."[55]

<u>Rain plans to expand in future</u>

Based on its ITA application, Rain appears to have plans to significantly expand its market position for both 4G and 5G services. It intends to bid for 700MHz/800MHz, 2.6GHz and 3.5GHz spectrum. Based on its ITA application, Rain states that it has plans to become a "credible national operator":

"Rain business plan has always been to launch a mobile product once we have enough coverage both indoors and outdoors. With acquiring sub 1 Gigahertz spectrum Rain will be able accelerate those plans and launch a full mobile service competitor.

Rain mobile will be a 4G data and voice service. The packages will be targeted at the mid to low end of the market.

As a new entrant Rain can offer innovative and disruptive tariff plans. Rain is currently the only operator offering an unlimited data for phone tariff plan. Rain will introduce a lower entry tariff plan based on the key needs of the market. The new mobile price plan will be offered on a pre-paid and post-paid basis.

The service will be offered and marketed nationally. Rain will utilise its existing channels and add new formal and informal distribution channels."[56]

"Rain is comfortable that it will at minimum meet the 80% coverage obligation at 5Mbps cell edge throughput within 5 years but is planning to deploy its network even wider in order to make it a ***credible national operator****."*[57] [Emphasis added]

"It is envisioned that this spectrum will ultimately be deployed across around 12,000 sites for Rain to meet its coverage obligation and business strategy."[58]

[54] AA15 - Acacia's report regarding the BRG report of "ICASA's answering affidavit - Telkom app 2021-02-01" - paragraph 48
[55] Paragraph 78 of Rain's response to MTN's affidavit
[56] Rain ITA application – part 1 page 5
[57] Rain ITA application – part 1 page 15
[58] Rain ITA application – part 1 page 17

Rain also has ambitious plans for expanding its 5G services:

> *"The first application of Rain's 5G network is broadband at homes and small businesses. As the network coverage grows and more 5G devices become available, 5G will become the standard for mobile and IOT networks."*[59]
>
> *"A full 5G service will be deployed, including broadband data and voice services."*[60]

<u>There is nothing preventing Rain from also offering wholesale access to other parties</u>

Vodacom agrees with ICASA's conclusion that the various agreements it has entered into with Rain and Liquid do not involve the transfer of control of spectrum:

> *"the Authority's view is firstly, that MTN and Vodacom have not acquired the spectrum, since they are only able to make use of it through roaming. Secondly, the arrangements are typically not exclusive. Thirdly, these agreements are generally structured to allow for roaming on the remaining available RAN capacity, at the capacity provider's discretion, and Cell C, Rain and Liquid Telecom each use capacity for their own subscribers."*[61]

[redacted]

Given the non-exclusive nature of Rain's agreement with Vodacom and Rain's ambitious plans for further rolling-out its network, Rain will increasingly become an important supplier of wholesale access. This could therefore further increase competition for roaming for capacity, MVNO access, APN services, and possibly even roaming for coverage, depending on how extensively Rain rolls-out its network.

4.2 ICASA is wrong to focus on the combined position of Vodacom and MTN

In the section above, Vodacom has explained why it cannot unilaterally behave to an appreciable extent independently of its competitors and customers. Vodacom confirms there is no evidential basis to support any allegation of co-ordination and explains below why it cannot, jointly with MTN, behave to an [redacted] extent independently of its competitors and customers

Throughout its Findings, ICASA makes a number of references to the combined position of Vodacom and MTN:

- ICASA argues that Vodacom and MTN represent a duopoly in the retail market:

> *"It is true that MTN and Vodacom have invested significant amounts in infrastructure over the past years, and that speeds, coverage and data volumes have increased over time. However,* ***there remains a persistent duopoly in many regions in South Africa, discussed in further detail below, and this is evidence of ineffective competition****."*[63] [Emphasis added]

[59] Rain ITA application – part 1 page 6
[60] Rain ITA application – part 1 page 18
[61] ICASA - "DRAFT MOBILE BROADBAND SERVICES REGULATIONS" - paragraph 18
[62] Vodacom's AA in relation to Telkom Rain application Paragraph 224
[63] Paragraph 82 of Findings

ICASA also presents the combined market share of Vodacom and MTN across different provinces (split by urban and rural) in Table 1 of its Findings.

- For the market for sites, ICASA presents a table (Table 3) listing the municipalities where Vodacom and MTN have a combined market share of above 60%.

- For the market for NR for coverage, ICASA finds that both Vodacom and MTN have SMP on the basis that there are only two operators with close to national coverage:

  "The Authority finds that with coverage levels of 99% and only two options available to purchasers of roaming for the purpose of national coverage, combined with significant barriers to entry, MTN and Vodacom are dominant and have significant market power in the market for national roaming."[64]

  "MTN and Vodacom are dominant in the market for wholesale national roaming since there are only two operators that provide this service for coverage purposes in South Africa."[65]

Under the ECA, when assessing the effectiveness of competition, ICASA has to perform *"a forward looking assessment of the relative market power of the licensees in the markets or market segments"*[66]. However, ICASA appears to have done no detailed analysis and has placed very limited emphasis on the head-to-head competition between Vodacom and MTN across the various markets it has defined. Under the ECA, ICASA cannot simply assume that there is ineffective competition by estimating the combined market shares of the two largest players. Instead, a proper assessment of market power (or, equivalently, the effectiveness of competition) needs to take into account the extent to which operators can behave independently of their competitors. If ICASA were to undertake this analysis, it would find that MTN imposes a strong competitive constraint on Vodacom, in addition to the significant competitive constraint that other operators (i.e. Telkom, Cell-C, Rain and to a lesser extent Liquid) place on Vodacom.

Further, even if there was a duopoly between Vodacom and MTN, ICASA cannot automatically assume that this means that there is ineffective competition. Under the EC's regulatory framework for telecoms (and EC competition law more generally), a duopoly will only imply that there is ineffective competition where there is joint dominance. Under EC law[67], three key conditions have to be shown for there to be joint dominance:

- There must be sufficient market transparency for operators to know whether other operators are adopting a common strategy.

- The tacit coordination must be sustainable over time, meaning that the operators must have an incentive not to depart from their common strategy. For this to be the case, there must be adequate deterrents to ensure that there is a long-term incentive to not depart from the common strategy.

- It must be the case that the likely reaction of current and future competitors who are not part of the common strategy would not jeopardise the co-ordinated behaviour.

ICASA has not explored any of the above issues, has proffered no facts to suggest any such co-ordination, and has no basis on which to argue that the alleged duopoly between Vodacom and MTN demonstrates that there is ineffective competition. Given this, ICASA has not identified any evidence

[64] Paragraph 192 of Findings
[65] Paragraph 6(c) of Draft Regulations
[66] Act No. 1 of 2014: Electronic Communications Amendment Act, 2013 (4A).
[67] COMMUNICATION FROM THE COMMISSION (2018/C 159/01) - Guidelines on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and services – paragraph 84

(rather than theory) to support its proposal to impose remedies on both Vodacom and MTN across a number of markets.

Joint dominance is more likely if there is a clear focal point for any co-ordination. The EC considers a potential focal point is the refusal to provide wholesale access:

> *"a refusal by network owners to provide wholesale access on reasonable terms may be a potential focal point of a common policy adopted by members of an oligopoly"*[68]

However, ICASA itself acknowledges, in its Findings, that there is wholesale access for NR for capacity, NR for coverage, MVNO services and APN access. Therefore, the refusal to provide wholesale access cannot be a plausible focal point. Co-ordinating on the terms of wholesale access is impractical, as there is a lack of transparency (the EC's first condition) - Vodacom cannot see what wholesale contracts MTN is offering to access seekers (and vice versa). Indeed, there is strong evidence of Vodacom and MTN competing for wholesale customers, including:

[redacted]

NKOM did not find joint dominance in the wholesale market in Norway[69]

Norway is the only country in the European Economic Area (EEA) to impose SMP regulation on mobile services (other than mobile call termination).

Given that Telia and Telenor had a combined market share of just under 90% of the market, Nkom assessed whether the operators had joint dominance. However, Nkom did not find sufficient evidence of this. Nkom highlighted that the assessment of joint SMP must be based on a focal point for coordination, i.e. behaviour that the operators agree to. Nkom considered that refusing to provide wholesale access was a potential focal point – it assessed both outright refusal to supply and conditions that limit the ability of access buyers to compete on equal terms. However, amongst other reasons, Nkom decided that joint dominance in the wholesale market was unlikely because:

- Differences in the quality of service provided is a factor that complicates coordination and suggests that the operators would not necessarily have the incentives and the possibility to engage in co-ordinated behaviour.

- Wholesale agreements made an important contribution to Telia's profitability and would continue to do so within the next two to three years. According to Nkom, this may have indicated that Telia will consider itself better off by selling access to wholesale customers than by denying access.

- It is uncertain if the wholesale market (i.e. the terms of access) is sufficiently transparent for the operators to be able to monitor adherence to the common policy of refusing wholesale access.

[68] COMMUNICATION FROM THE COMMISSION (2018/C 159/01) - Guidelines on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and services – paragraph 84
[69] Nkom (2020) - Analysis of the market for access and call origination on public mobile telephone networks - Annex 1

- It is uncertain whether any tacit collusion could be maintained over time, given that the third operator (Ice) was increasingly becoming a competitive constraint.

All of the above factors would also be relevant to South Africa, given that:

- MTN's lead on network quality would complicate co-ordination;
- Wholesale agreements make an important contribution to the profitability of Vodacom and MTN;
- There is a lack of transparency in wholesale markets; and
- There would be a risk that Telkom, Cell-C, Rain and/or Liquid would undermine any co-ordinated behaviour between Vodacom and MTN.

In terms of the retail market, MTN has recently introduced tariffs with very low prices, which helps demonstrate that Vodacom and MTN are not acting in a co-ordinated way (see Section D). It's also very evident that MTN has managed to establish a clear lead on network quality (see Section B.4.1), which will help increase the attractiveness of its retail offers relative to Vodacom's.

5. ICASA's analysis has failed to demonstrate that there are vertical relationships that could harm competition

Under the ECA, ICASA can designate an operator as having SMP if ICASA can demonstrate that it:

> *"has a vertical relationship that the Authority determines could harm competition in the market or market segments applicable to the particular category of licence"*[70]

In its Findings, ICASA concludes that Vodacom has SMP in the markets for retail services, sites and roaming for coverage on the basis that Vodacom (and MTN) have harmful vertical relationships that could harm competition. For the retail market, ICASA states that one of the reasons why it considers that vertical relationships could harm competition is because it has received a number of complaints[71]:

> *"In any event, the Authority has received a number of complaints from stakeholders regarding foreclosure of access to incumbent site infrastructure, high wholesale roaming and other wholesale charges, and the Competition Commission raised concerns about wholesale site access, national roaming and APN charges. There are therefore reasons to be concerned about foreclosure. The Authority therefore considers the vertical relationships that MTN and Vodacom have could harm competition. This means that MTN and Vodacom have SMP in terms of the Act."*[72]

However, regulators often receive complaints from access seekers. Rather than just accepting such complaints at face value, it is important that ICASA assesses the validity of such complaints. Vodacom notes that no complaints have been lodged with the Complaints and Compliance Committee (CCC), which suggests that the complaints that ICASA has received were rejected as having no merit, and were opportunistic rather than grounded in robust evidence. But even if ICASA decided that such complaints

[70] No. 36 of 2005: Electronic Communications Act, 2005, 67(5)(c)

[71] ICASA also makes a similar statement for sites: *"MTN and Vodacom are also in vertical relationships between their upstream site infrastructure and downstream activities This could harm competition, since each operator has a reduced incentive to provide access to its site infrastructure, as this would result in lower downstream market shares and profit margins There have been complaints during the course of this inquiry that access to MTN and Vodacom's site infrastructure is problematic "*Paragraph 153 of its Findings. In addition, ICASA argues that vertical integration means that there is SMP for national roaming services for coverage: *"The Authority finds that with coverage levels of 99% and only two options available to purchasers of roaming for the purpose of national coverage, combined with significant barriers to entry MTN and Vodacom are dominant and have significant market power in the market for national roaming This is compounded by the fact that these companies are vertically integrated and incentives in the retail market may impact on their pricing of roaming at the wholesale level MTN and Vodacom therefore have SMP due to their vertical relationships that could harm competition "*Paragraph 192 of its Findings

[72] Paragraph 98 of Findings

were valid, ICASA should also consider whether the behaviours that the complaints relate to are actually harming competition. This will depend on whether access seekers have other viable options. As already discussed, given that Vodacom faces effective competition in the markets in which it competes, even if it did foreclose access seekers or charge high prices (which it does not), this would not harm competition as access seekers could switch to rivals.

For the sites market, ICASA has also incorrectly categorised the site sharing between Vodacom and MTN as a vertical relationship, whereas it is more accurately viewed as a horizontal relationship (given that Vodacom's and MTN's sites are at the same level of the supply chain):

> *"MTN and Vodacom are also in vertical relationships with each other in relation to site sharing in that they provide each other with paired site access to a significant extent. While this arrangement has benefits for these licensees and consumers since costs are lower, this vertical relationship could harm competition since space on site infrastructure might not be available for third parties, entrenching MTN and Vodacom's market positions."*[73]

6. ICASA's analysis suffers from a lack of transparency

ICASA has not supplied Vodacom with the underlying data behind its Findings. This makes it inherently difficult for Vodacom to fully comment on ICASA's Findings and impacts on the fairness of the process. This is particularly an issue with respect to ICASA's market share calculations for the sites and retail markets. A lack of transparency was also an issue with ICASA's Discussion Document. Based on its own internal estimates, Vodacom was able to establish that the market share calculations for the wholesale site infrastructure access market ("sites market") included by ICASA in its Discussion Document was not correct. As a result, ICASA has recognised that there were material errors in its calculations and has subsequently made, in its Findings, significant changes to its market share calculations for this market. That is, according to the Findings, Vodacom has SMP in 39 municipalities as opposed to the 104 municipalities suggested in the Discussion Document.

Vodacom has been trying to verify how ICASA has reached this conclusion. [redacted] It is difficult for Vodacom to establish the reasons for this discrepancy given the lack of transparency over ICASA's calculations, so putting Vodacom in a position where it cannot fully respond to ICASA's Findings. And, while Vodacom notes ICASA's claim that the information used to determine these shares is confidential, it is important also to note that Vodacom has offered solutions to ICASA on this matter, such as the creation of a "confidentiality ring" including only the operator's legal and expert advisors.

ICASA has also stated that it has received a number of complaints about Vodacom refusing to provide access to its sites[74] and it appears to lend weight (against Vodacom's interests) to the fact that these complaints were made. However, ICASA has not shared such complaints with Vodacom, and so Vodacom is unable fairly to address and rebut such allegations and the content of the alleged complaints. Regulators often receive complaints from access seekers. Rather than just accepting such complaints, it is important that ICASA assesses the validity of such complaints. Vodacom notes that no complaints have been lodged with the CCC, which suggests that the complaints that ICASA has received are opportunistic rather than grounded in robust evidence.

Overall, it is Vodacom's strong belief that ICASA must do more to ensure its consultation processes are as transparent as possible, so to provide all stakeholders with a fair and reasonable opportunity to respond.

[73] Paragraph 154 of Findings
[74] *"There have been complaints during the course of this inquiry that access to MTN and Vodacom's site infrastructure is problematic "* Paragraph 153 of Findings

C. The remedies proposed for NR, MVNO access and APN services are unjustified

Before setting out its views on the individual markets defined by ICASA, Vodacom responds, in this part of its submission, to those pro-competitive terms and conditions (remedies) included by ICASA in Section 7 of its Draft Regulation which are common across multiple markets. It sets out its views on remedies specific to individual markets in Sections D to G.

As set out in more detail below, Vodacom supports a number of aspects of ICASA's remedy proposals. In particular, it supports ICASA's decision and reasoning not to impose pro-competitive terms and conditions in retail markets. It also supports ICASA's decision and reasoning not to impose direct price controls in wholesale markets. In addition, notwithstanding Vodacom's position that the site access market has effective competition, Vodacom understands ICASA's proposed monitoring of the site access market, as this would be aligned with the principle that any interventions should be focussed on the most upstream markets/inputs possible. However, it is important that ICASA takes into account the impact of this remedy (in addition to the spectrum auction, the establishment of the WOAN and existing FLR) when assessing whether any additional intervention is required in downstream markets. This would be consistent with the EC framework for assessing the need for SMP remedies in telecom markets.

Nonetheless, although ICASA has not proposed any direct pricing remedies, Vodacom notes that its Draft Regulations do set out a range of monitoring remedies that it intends to impose across a number of wholesale markets. In particular, ICASA is proposing to monitor granular information on effective retail and wholesale data prices for:

- NR for coverage;[75]
- MVNO access; and
- APN services.

ICASA also proposes that if any wholesale price is above any category of retail price, and regulated operators cannot justify this on the basis that this is cost based or temporary, then it will refer the matter to the CC, who may initiate a margin squeeze investigation.

As set out in detail in this section, Vodacom has a number of concerns in relation to ICASA's proposals.

- First, given the proposed nature of these monitoring remedies, especially the level of granularity, there is a risk that they could create an undue burden on operators and raise false alarms. Further, there is a risk that the monitoring remedies could still carry some of the downsides of direct price regulation, which ICASA has decided against, such as deterring investment.
- Second, ICASA has concluded, in its Findings, that there is effective competition and no SMP operators in the market for MVNO services, and that no operator has SMP in the market for APN services. Since Section 67(4)(d) remedies cannot be imposed without finding both ineffective competition and SMP (explained further in Section A and C.3), ICASA's proposals to monitor margins for such services are inconsistent with its Findings and have no legal basis. Indeed, margin squeeze can only be a potential concern if the vertically integrated operator in question has market power. Given that ICASA has not found any operator to have any SMP in these markets, imposing this monitoring obligation on Vodacom and MTN in the markets for MVNO and APN access services is, also, unreasonable.

[75] The Draft Regulation is not clear that the monitoring remedies apply only to roaming for coverage. However, as set out elsewhere in this response, Vodacom notes that ICASA has not reviewed the market for roaming for capacity. As such, it has no mandate to impose pro-competitive conditions in that market.

ICASA has found that there is ineffective competition and SMP in the market for NR for coverage. Vodacom strongly disputes this (see Section F). Should ICASA maintain its finding of SMP and the ineffectiveness of competition in this market, however, it must amend the proposed remedy as follows:

- ICASA should only monitor margins at an aggregated level i.e.

  - Not split by the various categories that is proposed in the Draft Regulations i.e. not split by province (urban/rural), time of day, prepaid vs hybrid vs postpaid, consumer vs business.

  - Across rated data, voice and messaging services, rather than just data services.

- This would be consistent with Vodacom's portfolio of retail products (on which access seekers use NR for coverage to compete). It would also be consistent with ICASA's assessment of competition and best practice for conducting an ex-post margin squeeze test.

- ICASA should also consider that access seekers will typically only use NR for coverage for a relatively small proportion of their total traffic. This is especially the case for an operator like Telkom who entered the mobile market around a decade ago, meaning it has had ample time to roll out its own network. Where access seekers do use NR, they will have an incentive to cherry-pick the areas in which they choose to roam. That is, they will tend to use roaming in areas that are more expensive to cover, such as areas with low population densities. This is especially the case in areas where the cost the access seeker faces for NR services is lower than the incremental cost of deploying and maintaining their own network. As this incentive is reflected in roaming charges, these charges should not be used as a proxy for the costs that an operator faces when delivering services nationally.

In the following sections, we first explain why any form of intervention for NR, MVNO access and APN services are unwarranted given the relevant market characteristics. We then describes how interventions risk undermining investment incentives, which ICASA itself recognises when rejecting direct price regulation. Finally, we explain how ICASA should amend its proposed monitoring requirements if it maintains its view that there is a need for regulation.

1. Regulatory interventions for NR, MVNO access and APN services are unwarranted

Vodacom supports ICASA's decision not to impose pro-competitive terms and conditions in retail markets and agrees with ICASA's reasoning for taking this approach. Vodacom similarly supports ICASA's decision not to impose direct price controls on wholesale markets, or impose other restrictions on Vodacom's pricing structure.

With regards to sites, Vodacom supports the decision not to develop detailed guidelines for site access as part of the market review process given that this will be covered by the reference offer obligation on Tier 1 operators as part of the spectrum auction[76]. Vodacom also supports the decision not to impose any form of functional separation in relation to sites. Although Vodacom considers that the market for site access has effective competition, it understands why ICASA seeks to impose monitoring obligations for sites, as this is aligned with the principle that any remedies should be focussed on the most upstream market/input possible. However, it is important that ICASA takes into account the impact of this remedy (in addition to the spectrum auction, the establishment of the WOAN and existing FLR) when assessing whether any additional intervention is required in downstream markets.

[76] "165. Furthermore, while the Authority had proposed developing regulations for site access dealing with timeframes and conditions in the Discussion Document, the Authority's spectrum ITA has requirements for Tier 1 operators to: 165.1. "Produce a reference offer for site access to be offered to any licensee requesting site access and guidelines, including pricing, timeframes and policies for reserving space on masts." 166. As such, it is no longer necessary to develop detailed guidelines, as on a forward-looking basis it would be more reasonable to monitor the impact of the very similar requirements of the proposed spectrum licence conditions." ICASA's Findings.

For NR, MVNO access and APN services, Vodacom also agrees that it would be inappropriate to introduce any accounting separation requirements or require the operators to prepare reference offers. Again, such remedies would be disproportionate to the competition problems ICASA claims to have identified, while there is no basis for any remedies in the MVNO access and APN markets.

However, whilst ICASA is correct to reject a number of remedies, ICASA is still proposing to monitor the margins for NR for coverage, MVNO access and APN services at a very granular level. Whilst ICASA is not itself proposing to carry out a full margin squeeze test, it states that it will refer the matter to the CC if wholesale prices are above retail prices (and operators cannot justify such a difference as being cost-based or temporary in nature). Such an approach is unwarranted because:

- Margin squeeze can only be a concern if there is ineffective competition and SMP in the upstream markets, which is not the case in South Africa; and
- Telkom has itself highlighted that NR prices have improved in recent years.

1.1 Margin squeeze can only be a concern if there is ineffective competition and SMP in the upstream markets, which is not the case in South Africa

ICASA's proposed remedies are intended to identify possible cases of margin squeeze. The South African Competition Amendment Act defines margin squeeze as follows:

> *"margin squeeze' occurs when the margin between the price at which a vertically integrated firm, **which is dominant in an input market**, sells a downstream product, and the price at which it sells the key input to competitors, is too small to allow downstream competitors to participate effectively"*[77] [Emphasis added]

The above quote makes it clear that the CC can only find that there is a margin squeeze where a firm is dominant in the upstream market. The reason why authorities are only concerned about potential margin squeezes where one or more operators have true market power in the relevant upstream market is because an operator without such market power definitely would not have the ability nor the incentive to commit a margin squeeze.

In the event that a vertically integrated operator did not hold SMP upstream, it would face competitive constraints from other operators (i.e. its competitor(s) at the wholesale level) and would therefore be unable to behave independently of them. Put another way, its wholesale customers would have the option to switch to buying the required wholesale input(s) from its competitors. As such, the vertically integrated operator would not have the ability to harm access seekers by setting wholesale and retail prices consistent with a margin squeeze, as the access seeker could simply move to another upstream provider. It also wouldn't have the incentive to try to commit a margin squeeze, given that access seekers could simply move to a competitor, which would result in the vertically integrated operator losing wholesale revenues without any offsetting increase in retail revenues.

Given this, it only makes sense for ICASA to apply a "margin squeeze screen" of the type it is proposing in markets where both (i) there is ineffective competition and (ii) at least one operator holds a position of SMP/dominance in the upstream market. As explained later in this report:

- ICASA is wrong to conclude that there is ineffective competition for NR services (see Section F for more details). There is strong competition between Vodacom and MTN in the provision of wholesale NR for coverage (as recognized by Telkom in its own response to the Discussion Document), while several developments in the market will unequivocally lead to increased levels of competition over the next 2-5 years. Further, ICASA has not presented any robust evidence in order to arrive at its conclusion that Vodacom and MTN have SMP in the NR market.

[77] Competition Amendment Act, 2018 - GOVERNMENT GAZETTE, 14 FEBRUARY 2019

- In its Findings, ICASA has itself concluded that there is effective competition for MVNO access and that no operator has SMP (see Section G). There is, therefore, no reason for ICASA to be concerned about possible margin squeeze for MVNO services and no economic or other rational basis on which to impose remedies to monitor information on MVNO margins.

- As explained in Sections A and G, ICASA also has no legal basis to impose remedies, including margin monitoring, on operators who do not have SMP and who do not operate in a market where competition has been found to be ineffective. In its Findings, ICASA has itself concluded that no operator has SMP for wholesale APN services. Therefore, it would be irrational for ICASA to impose remedies through Regulations addressing possible margin squeeze for wholesale APN services. Given this, ICASA does not have an economic or legal basis on which to monitor information on wholesale APN margins.

1.2 Telkom has itself highlighted that NR prices have improved in recent years

Access seekers who are negatively impacted by a wholesale operator's pricing have a strong incentive to argue that price regulation is required. However, in response to the Discussion Document, Telkom – a major user of NR for coverage – has itself stated that:

> *"Telkom does not believe that regulation needs to be introduced that requires national roaming services to be offered, because they are already being offered in the market. Moreover, the prices and quality of these services have improved in recent years, as the Discussion Document correctly notes. This market is currently changing, and the Authority should adopt a "wait and see" approach and monitor the market as the conditions may change in future."*[78]

[redacted]

[redacted]

[redacted]

2. Interventions risk undermining investment incentives

Regulatory interventions, especially more intrusive ones, risk undermining investment incentives, which would ultimately harm consumers. Given this and notwithstanding Vodacom's position that the

[78] Telkom submission to the ICASA - Discussion document on the Market Inquiry into Mobile Broadband Services in South Africa

wholesale NR market is effectively competitive, Vodacom agrees with ICASA that an ex ante price control in this market is not necessary or appropriate.

Investment is a key driver of consumer outcomes in mobile markets, as it helps to expand coverage, deliver higher speeds, reduce latency and build resilient networks. By expanding network capacity (and subject to constraints arising from spectrum availability), investment can also help to reduce effective retail prices, as operators have an incentive to price their services in a way that makes the most efficient use of their available capacity.

Price regulation of wholesale services can deter both access seekers and the access provider from investing in their networks, particularly for new technologies. Following the spectrum ITA, ICASA stated that it intends to ensure that there are five credible national wholesalers in the market[79]. This is less likely to materialise if wholesale services are subject to price regulation, given that the regulation of wholesale services can reduce access seekers' incentives to invest. This is because the lower wholesale NR prices are set, the greater the degree to which access seekers will prefer to rely on wholesale services rather than investing in their own networks[80]. The setting of price caps also involves uncertainty due to their reliance on forecasts of costs and volumes and therefore caps may erroneously be set inappropriately high or low.

Price regulation may also reduce the ability and incentive of the regulated operators to invest. This is because:

- It may reduce the return that the operators providing wholesale services are able to generate from making investments. If regulation results in the expected return falling below the relevant Weighted Average Cost of Capital, for example as a result of a price cap being set at an inappropriately low level, or market demand not materialising as expected, then a rational operator is unlikely to make the investments in the first place.

- Investments in new technologies, in particular, are inherently riskier as there is less certainty about future demand. Regulation which does not reflect this risk in the allowed level of returns is likely to deter potential investment.

- Price caps can reduce operators' pricing flexibility to respond to competitive threats or customer demand, thereby dampening overall competitive dynamics and consumer choice in the market.

Given the above, Vodacom agrees strongly with ICASA's statement that:

> *"the Authority submits that an approach that incentivizes infrastructure competition and allows for commercially negotiated deals is preferable. Investments resulting in competitive differentiation should be allowed sufficient room to be recouped.* ***Regulations that disincentivise dynamic competition and investment (such as price regulation) should be avoided insofar as they dampen incentives to rollout infrastructure and lead to a lack of differentiation in the market."***[81] [Emphasis added]

3. If ICASA decides to maintain its monitoring remedies for NR, MVNO access and APN services, then the remedies need to be changed

It is inappropriate and/or beyond the scope of Section 67 for ICASA to impose any remedies for MVNO access and APN services, given the competitive nature of the wholesale markets concerned and clear absence of SMP. Nevertheless, Vodacom has also assessed, on their own merits, the remedies put

[79] See paragraph 6.2 at https://www.icasa.org.za/uploads/files/ita-for-the-radio-frequency-spectrum-licences-for-imt-spectrum-bands.pdf
[80] Although noting that Tier-2 operators will ultimately be required to provide at least 80% population coverage within 5 years
[81] Paragraph 201 of Findings

forward by ICASA and sets out here its concerns regarding the specific nature and proposed implementation of those remedies.

In the Draft Regulations, ICASA has proposed to collect granular information that would enable it to test the relationship between Vodacom's effective retail prices and wholesale prices for data services across a number of different segments (the Draft Regulations appear to include 23 different categories[82]). If Vodacom's wholesale price exceeds its effective retail price for data for any of these segments, then ICASA will seek an explanation from Vodacom as to why this is the case, with any 'negative margins' on this basis having to be justified on the basis of being cost-based or temporary. In effect, therefore, Vodacom understands that ICASA's proposed margin monitoring exercise amounts to a 'screening' mechanism.

Indeed, ICASA implies that if it is not satisfied with an operator's justification, it will consider referring the matter to the CC for prosecution. This point is not clear, however, and so must be clarified in the Final Regulations.

Given the lack of clarity in the way the Draft Regulation has been drafted and the very granular nature of the proposed test, there appears to be a risk that ICASA's 'screening' tests have unintended consequences. In particular, the risk of an SMP operator being referred to the CC as a result of a simple comparison of retail and wholesale prices may have the unintended effect of acting as a price control on those services. As explained in Section C.2, ICASA is opposed to this type of regulation and Vodacom has a multitude of concerns about such an interventionist and distortive approach. Furthermore, Vodacom understands that if the CC were to conduct an investigation into alleged margin squeeze, it would adopt a significantly more detailed and robust approach than the 'screening' tests put forward by ICASA. This means there is a significant risk, with the test proposed by ICASA, that the CC is called on to make a number of unnecessary investigations into allegations of margin squeeze, so adding significantly to the regulatory costs of all parties, with no commensurate benefit.

In its Findings, ICASA points to the complexities with monitoring margins for wholesale services, for example noting that:

> *"...there are challenges in what effective retail rate should be used given variations in price depending on promotions, time of day, variation in consumer and business rates..."*[83]

ICASA goes on to say that as a result, any such remedy must be carefully defined. Vodacom agrees with this but finds that, despite ICASA's apparent awareness of the issue, the proposals contained in the Draft Regulations have significant shortcomings both in principle and in practice. There is no justification for a remedy to be imposed where there is no apparent rational relationship between the remedy and the regulatory purpose. In the following subsections Vodacom explains that, if ICASA continues to consider that a monitoring remedy is required, it should be modified in the following ways:

- Any monitoring of margins should be carried out at a much more aggregated level i.e.:
  - Not split by the various categories proposed in the Draft Regulations i.e. not split by province (urban/rural), time of day, prepaid vs hybrid vs postpaid, consumer vs business.
  - Across rated data, voice and messaging services, rather than just data services.
- A number of elements need to be excluded from any margin monitoring.

[82] i) 16 provinces (split by urban and rural), ii) by prepaid, hybrid and postpaid customer segments, iii) by consumer and business customer segments, iv) data used between 5am and 12 midnight and data used from 12 midnight to 5am
[83] Paragraph 202 of Findings

- It should recognize that users of NR services primarily rely on their own network and have a tendency to cherry-pick when relying on NR services.

- It should only require operators to justify their prices under certain conditions.

3.1 The case for an aggregated screening test

As already noted, the Draft Regulations appear to be proposing to compare effective retail prices with wholesale prices across 23 different categories[84]. Such a granular analysis would be inappropriate for either NR or MVNO services (we discuss APN in Section G.3), as it suffers from a number of issues and is not economically rational. Instead, ICASA should adopt an aggregated screen across the full portfolio of Vodacom products which national roaming supports (i.e. rated data, voice and SMS), at a national-level, because[85]:

- It would be more consistent with ICASA's Findings and operators' business models;

- There would be a lower risk of unintended consequences;

- It would be more aligned with best practice for ex-post margin squeeze tests; and

- It would help avoid a number of practical issues with granular tests.

<u>It would be more consistent with ICASA's Findings and operators' business models</u>

ICASA has no economic justification for the proposed granularity of its tests. Regulators typically opt for granular tests where there is a material concern that the provider subject to the margin test has the ability and incentive to weaken its rivals' positions by engaging in 'targeted' margin squeezes focused on identifiable key segments. This is because an aggregated test would fail to capture this if higher margins were earned on less competitive services.

The aggregation of the margin tests should be linked to business models. All MNOs compete across all segments for which ICASA has proposed to introduce the monitoring obligations. This means a given access seeker does not need to be able to match or undercut Vodacom's retail prices in every segment but must only be able to compete profitably for Vodacom's portfolio/mix of customers as a whole – an access seeker can then choose how it sets its retail prices for individual segments. Given that MNOs compete across all segments[86], Vodacom's rivals would be unlikely to suffer significant damage to their overall competitive position if they faced lower, or even negative margins in a particular segment. Indeed, ICASA has itself argued that the competitive dynamics are similar for voice, data and SMS:

> *"Since no evidence was presented to contradict this, the Authority considers voice, SMS, and data services as part of one aggregated market. This is not because these services are substitutes for one another from the demand side (as ISPA explains is not the case), i.e. the Authority does not consider an SMS or voice call to be a substitute for browsing the internet. Market aggregation is also not the same thing as considering supply-side substitution (emphasized by MTN, for instance), at the market definition stage. The Authority considers supply-side substitution when assessing the effectiveness of competition (see Section 6.2.3). Rather,* ***the Authority aggregates these markets because competitive dynamics are similar in all three cases and so are aggregated for analytical purposes.****"*[87] [Emphasis added]

[84] i) 16 provinces (split by urban and rural), ii) by prepaid, hybrid and postpaid customer segments, iii) by consumer and business customer segments, iv) data used between 5am and 12 midnight and data used from 12 midnight to 5am
[85] This test is also recommended in the Feasey Report (paragraph 81).
[86] Rain may be a possible exception at present. However, it may start offering voice services in future based on its ITA application.
[87] Paragraph 57 of Findings

ICASA's proposals do not appear to be justified based on any specific competition concerns identified in relation to any particular segments, but rather are predicated on a loose intention to analyse competition and SMP in mobile services more broadly. Furthermore, it would be illogical to consider data alone without considering integrated tariffs, since a considerable share of data is sold via these tariffs. It also makes sense to consider voice and SMS in the test as a result of consumers buying these services together.

A test which focused on individual services or customer segments would serve only to protect specific firms rather than the overall competitive process – an approach which is not appropriate for a regulator.[88]A more appropriate test would (subject to the points set out in section C.3.2 below) be conducted in line with Vodacom's overall retail portfolio (on which access seekers use NR for coverage to compete), as Vodacom's rivals (especially those who require NR for coverage) compete for Vodacom's customers as a whole, rather than for specific segments of customers. An aggregated test such as this also reflects the cost structure of the mobile sector, where a number of services are provided across a single network, meaning that – in pricing its services – an operator has to decide how much of this fixed and common cost it recovers from different customers across different products and time horizon. An aggregated test therefore allows common costs to be recovered flexibly across services and customer groups. Simply put, in a sector with a high degree of fixed and common costs, looking at the "margin" on a single segment does not provide any information on whether the overall portfolio of prices offered by that provider is appropriate.

Finally, it is also important to note that if ICASA needs to compare any effective retail and wholesale prices as part of its Regulations, the relevant level at which prices should be compared is national (i.e., ICASA should not screen prices in individual regions or sub-regions). This is because operators tend to compete by offering a mobile service across the whole of South Africa[89]. Indeed, the main reason why operators purchase roaming for coverage purposes is so that they can offer a good level of coverage nationwide.

<u>There would be a lower risk of unintended consequences</u>

Given the proposed nature of these monitoring remedies, especially the level of granularity, there is a risk that they could create an undue burden on operators and raise false alarms. Such a risk would be reduced with a more aggregated margin screen.

Vodacom cannot tailor its wholesale price for some segments. This is important because ICASA's proposal fundamentally fails to recognise that there is much greater price differentiation in retail markets than in wholesale markets. For example, retail price differentiation between pre-paid and post-pay segments, or between different tariff bundles, is used by MNOs as a means to optimise their networks for the best customer experience and value. However, Vodacom cannot apply the same level of differentiation in its wholesale rates - simply because there would be no way of monitoring if a given unit of wholesale roaming was used to supply a pre-paid or a post-pay customer, for example. If it did try to set different wholesale prices for different segments, this would inevitably lead to arbitrage.

Despite this, according to ICASA's approach, if there are any segments where Vodacom's retail prices are below its wholesale prices, then in order to pass ICASA's screen for every segment Vodacom would need (if it cannot justify the difference in retail and wholesale price based on costs or show that the difference is temporary in nature) to either reduce its wholesale prices or increase its retail prices for that segment. As a result, to avoid wholesale prices being above retail prices in a given segment, Vodacom may need to also reduce its wholesale prices for other segments (given the risk of arbitrage), even if retail prices are already above wholesale prices for such segments. Put another way, if Vodacom has any segments with particularly low retail prices, then Vodacom may need to reduce its wholesale

[88] The issues in following this approach and a read-across to case precedent are discussed in the Feasey Report (paragraphs 82-84)
[89] Rain and Liquid may be somewhat of an exception. However, they do not purchase roaming for coverage purposes. Further, Rain also appears to have ambitions to become more of a national operator in future, based on its ITA application.

prices across a number of different segments just to ensure that retail prices are above wholesale price for the segment with particularly low retail prices. This could have a number of detrimental impacts:

- **Vodacom may have a reduced ability to invest and compete**. Although lower wholesale prices may strengthen the ability of Telkom, Cell-C and others to compete at the retail level, thereby attracting consumers in the short term, it would also have a negative impact on Vodacom's ability and incentives to invest in its network for the long term, if ICASA's granular screens led to wholesale prices being below or only marginally above cost. Failure to invest would impact negatively on all users. Access seekers would also have a weak incentive to invest in their own network coverage (although they would need to meet the 80% population coverage obligations within 5 years if they win additional spectrum). This would be inconsistent with ICASA's position that it wants to maintain investment incentives for NR (see Section C.2) and ensure that there are five credible national wholesalers.

- **Granular tests might undermine the viability of the WOAN**. As discussed above, granular margin screens might lead to very low average wholesale prices. Low wholesale charges would potentially undermine the viability of the WOAN (although noting that ICASA has no justification for monitoring MVNO margins – see Sections C.1.1). It is therefore important for ICASA to ensure that its granular margin screen interventions do not lead to unsustainably low wholesale prices for data services.

- [redacted]

  [redacted]

<u>It would be more aligned with best practice for ex-post margin squeeze test</u>

The tests which would be conducted by the CC following a referral from ICASA would be ex-post margin squeeze tests. Competition authorities typically conduct ex-post margin tests based across a portfolio of services offered by a provider rather than focusing on a narrow set of services, let alone focusing on individual segments for a specific service (e.g. the granular data tests which ICASA is proposing). This is because the objective of the test is to ensure that an efficient access seeker is able to compete against the dominant operator, rather than to ensure they are able to compete in the provision of a specific service and/or services offered to a particular segment of customers. If the purpose of ICASA's screen is to identify possible cases of margin squeeze, then clearly it must ensure its screen is closely aligned to the actual test that the CC would be expected to conduct. Otherwise, the screen will be of no use and is potentially unhelpful – it will generate unnecessary referrals ("false negatives"), risk disrupting the market and increase the regulatory burden on all parties.

As noted in the Feasey Report, provided in Annex A, the European Commission (EC) has in several landmark cases concluded that an aggregated approach should be used when assessing, on an ex-post basis, whether a margin squeeze has been committed. For example:

- In the case of Telefónica (2007)[90], an aggregated approach was taken *"based on the principle that competitors must at least be able to profitably replicate Telefónica's product pattern"*[91]. The EC added that its approach was:

  "consistent with a new entrant's internal decision making process in that it assesses the profitability of its investment in a network by considering the complete range of products that it is able to offer in the relevant downstream market".[92]

- In the case of Slovak Telekom (ST) (2013)[93], the EC also followed an aggregated approach based on an almost identical rationale:

  "This approach (referred to as the "aggregated approach") is based on the principle that competitors must at least be able to profitably replicate ST's portfolio of retail services. The aggregated approach is consistent with a hypothetical entrant's internal decision-making process in that it assesses the profitability of its investment based on the complete range of services that it is able to offer on the relevant downstream market."[94]

In South Africa, the CC took an aggregated approach in its assessment of a margin squeeze case against Telkom (2013)[95]. In that case, the CC took the effective price of a portfolio of products (IP VPN products, to be more specific) as the relevant price to be used for the test, rather than the price of any individual product or price charged to any particular group of customers.

As noted above, the Feasey Report provides more detail on these cases and others[96], as well as an explanation of why it is important for SMP operators to be allowed a degree of flexibility in the way that they price their services[97].

It would help avoid a number of practical issues with granular tests

Assessing margins at a more granular level than customers' purchasing decisions also creates practical challenges, as detailed in Annex B. These include limitations to Vodacom's ability to split out the revenues associated with granular segmentations, complex and potentially subjective fair value allocations, and Vodacom's inability to be able to report effective rates by time of day, challenges with province, rural and urban reporting, timing differences between bundle allocations and usage, and accounting differences relative to the reported financials.

Since integrated plans represent a significant share of Vodacom's retail revenues, it is more practical and reliable to conduct margin tests based on the revenues earned from all retail mobile services (on which access seekers use NR for coverage to compete) sold to consumers.

Finally, it goes without saying that such a granular reporting requirement places a significant burden on the operators and is a disproportionate regulatory intervention.[98] Significant benefit would be achieved by ICASA if it engaged and consulted with the operators on the nature of information that may be easily compiled and provide ICASA with the relevant (and not irrelevant) granularity and insight.

3.2 A number of elements need to be excluded from any margin monitoring

[90] https://ec.europa.eu/competition/antitrust/cases/dec_docs/38784/38784_311_10.pdf
[91] Ibid., paragraph 386
[92] Ibid., paragraph 388
[93] https://ec.europa.eu/competition/antitrust/cases/dec_docs/39523/39523_5272_13.pdf
[94] Ibid., paragraph 832
[95] P.4, Annexure B ('Retail Pricing Policy') of Settlement Agreement between the CC and Telkom S.A. dated 13 June 2013
[96] In particular, paragraphs 61 to 72 provide a summary of case precedent
[97] See the Feasey Report (paragraph 71)
[98] See the Feasey Report (paragraph 94)

MBB data traffic exclusion

ICASA has itself stated in its Draft Regulations that fixed wireless data traffic ("**FWA**") should be excluded from the margin screening tests. Vodacom agrees with this, given the difference in service and demand characteristics, which ultimately impacts the way MNOs compete in their service offerings.

Although not stated explicitly by ICASA, Vodacom assumes that its reference to excluding FWA services would also capture Mobile Broadband ("**MBB**") services. This is because:

- MBB and FWA services have very similar characteristics and hence are priced similarly.
- Access seekers do not typically use national roaming for MBB/FWA services.

MBB and FWA services have very similar characteristics and are priced similarly

There are a number of important similarities between MBB and FWA services which differentiate them from traditional handset-based mobile data services.

- FWA and MBB services represent a means of filling in the significant gaps in fixed DSL and fibre broadband coverage in South Africa. That is, they aim to give fixed-like connectivity to South Africans (helping drive digital connectivity) through a FWA or mobile construct. Both FWA and MBB services are primarily used while stationary, typically at home or a business premises. This is in stark contrast to handset-based mobile data services which are valued for their mobility and typically used by consumers, on a regular basis, outside their place of residence or work, for example while traveling or commuting.
- The application of these services is such that both typically require a separate device such as a router or tethered dongle on the premises that allows multiple devices and applications (mobile devices, computers, televisions, security cameras, etc.) to use a single FWA or MBB connection[99]. This limits the "mobile" nature of these services - unlike handset-based mobile data services for which the SIM card sits in the mobile device.
- FWA and MBB services typically offer higher data allowances to cater for the above applications.
- Both MBB and FWA services exclusively relate to data traffic, whereas most consumers use handset-based mobile data services alongside voice and messaging services.

[redacted]

[redacted]

Figure 23: Record of some of Vodacom's responses to Telkom's monthly "Big Deals"

[99] Although some handsets can be used as a mobile "hotspot", not all handsets support this functionality and the speed and reliability of these connections is significantly limited.

Month and year	Telkom offer	Vodacom response offer
December 2018	▪ 70GB Anytime data ▪ 50GB Night data ▪ Router ▪ Price: R459/month	▪ 50GB Anytime data ▪ 50GB Night data ▪ Router ▪ Price: R479/month
February 2019	▪ 20GB Anytime data ▪ 10GB Night data ▪ WiFi Router ▪ Price: R199/month	▪ 20GB Anytime data ▪ 20GB Night data ▪ SIM-only ▪ Price: R199/month
March 2019	▪ 10GB LTE Anytime Data ▪ MiFi Router ▪ Price: R139/month	▪ 10GB LTE Anytime Data ▪ 5 GB LTE Night data ▪ SIM-only ▪ Price: R179/month

[redacted]

The similarities in service characteristics, purposes and usage between MBB and FWA services, including differences to handset-based mobile data services, suggest clearly that MBB services should be treated in the same way as FWA services in that they should be excluded from ICASA's proposed screen of mobile service margins.

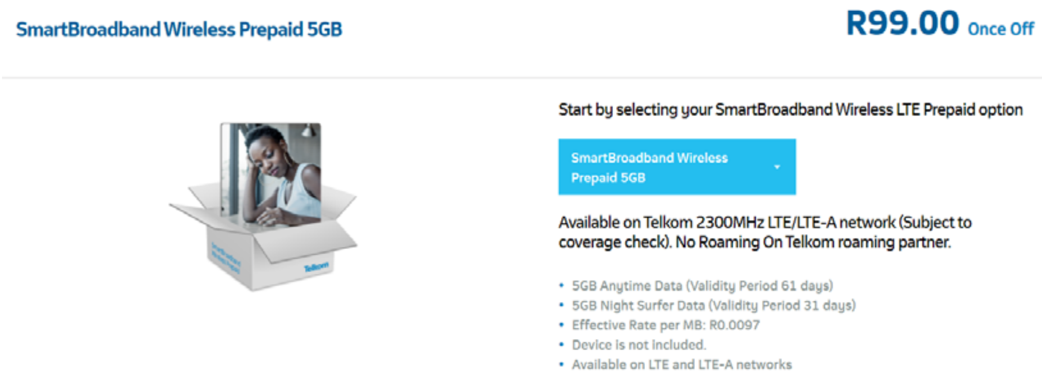
Access seekers do not typically use national roaming for MBB/FWA services

Another key difference between MBB/FWA services and mobile data services is that access seekers typically focus MBB/FWA on areas where they have deployed their own network and do not rely on national roaming as a wholesale input to providing MBB/FWA services. For example, Telkom notes that many of its MBB/FWA products are specifically provided over its own 2300MHz network (in the areas that it is deployed). Furthermore, Telkom's terms and conditions state that:

- Should a subscriber use the SmartBroadband Wireless (FWA) service for mobility purposes Telkom shall not be liable for lack of LTE network coverage, reliability or throughput outside its fixed LTE coverage areas. This is a clear differentiator from handset-based mobile data services, which are available outside fixed LTE coverage areas and make use of roaming agreements to provide more extensive coverage.

- Subscribers cannot access any roaming service from Vodacom. For example, Telkom's SmartBroadband Wireless Prepaid offering on its website explicitly states that this is the case, as shown in the Figure below.

Figure 24: Telkom SmartBroadband network availability



Source: https://secure.telkom.co.za/today/shop/personal/plan/smartbroadband-wireless-prepaid-5gb-pv/

Since national roaming is rarely used in the provision of these services, it would also be non-sensical to include the associated revenues in any margin screening test for those wholesale services.

Exclusion of free services

Vodacom considers that there are strong arguments for excluding free services (data, voice and messaging) from ICASA's margin squeeze screens. As part of its social contract to support South African citizens, Vodacom's free traffic makes up a considerable share of its total traffic.

[redacted]

- [redacted]
- [redacted]
- [redacted]

[redacted]

- [redacted]
  - [redacted]
  - [redacted]

- [redacted]

[redacted]

3.3 ICASA should recognize that users of NR for coverage should primarily rely on their own network

NR for coverage relates predominantly to remote areas

ICASA has defined a product market covering NR for coverage. This means that any regulation for this market should take into account that the roaming service should only be used in those areas where:

- access seekers are unlikely to have their own network on a forward-looking basis; or
- they cannot rely on NR for capacity.

Given Telkom's significant own network presence and the upcoming ITA coverage obligation, NR for coverage should be limited to only those areas where traffic and population density is low. The implications of this for the proportion of traffic that is own network and the degree of cherry-picking is discussed in the following sub-sections.

Users of NR services primarily rely on their own network

Customers of the wholesale NR services offered by Vodacom and other operators primarily rely on their own networks to support the provision of retail services to their end-customers. Therefore, when carrying out any margin screen ICASA should use the weighted average between own network costs[100] and roaming prices, rather than assuming that roaming is used everywhere. This is consistent with the Feasey Report (paragraph 27), which highlights that:

> *"the cost of a wholesale input such as national roaming for coverage is often only a small proportion of the total costs which a rival operator will need to recover when providing its retail services".*

The Feasey Report (paragraph 28) goes on to say that as a rival, i.e. a NR access seeker, expands its network and reduces its reliance on the NR service:

> *"the effective wholesale price paid by a rival operator to an SMP operator will be a poor proxy for the input costs which that rival operator can expect to incur in competing in the retail market. National roaming will represent only a proportion of the input costs, and there is every reason to expect the price of this input to diverge – significantly - from its average unit cost of providing the retail services".*

[redacted]

[100] Ex-post margin squeeze tests typically use the own network costs of the host network. This means that that margin screen should be based on Vodacom's own network costs rather than the access seeker. This is to avoid promoting inefficient entry

- [redacted]

[redacted]

Where operators do use roaming, they have a tendency to cherry-pick

In practice, NR customers tend to "cherry pick" where to use roaming, especially when they have (as Telkom has) been in the market for many years. This behaviour relates to the selective purchase of NR services in areas where it is most expensive for operators to roll out their own network (for example, where the topography makes rollout relatively expensive and/or where the level of traffic which their network would support is relatively low). ICASA appears to recognize this issue:

> *"..explicitly linking retail and roaming prices could potentially create competitive distortions in the two markets as reductions in retail prices will affect roaming margins despite having a different cost base. This could occur, for example, if retail prices are predominantly based on costs in dense areas and roaming prices are predominantly based on costs in remote areas. It also may inadvertently force a link between retail and roaming prices that are not based on dynamics in those markets. This is particularly as if there are large differences in the traffic patterns and costs of provision that are used for retail as opposed to roaming pricing."*[101]

[redacted]

[redacted]

[101] Paragraph 202 of Findings

[redacted]

[redacted]

Given this cherry-picking behaviour, NR prices cannot be directly compared with retail prices. This is because NR prices are set taking into account a higher reliance on NR in high cost areas, i.e. in anticipation of such cherry-picking behaviour. Any such comparison should therefore take into account the degree of the cherry-picking behaviour, which is likely to be higher if the share of roaming traffic within the access seeker's total network traffic is low (as the primary use of roaming will be to serve low density areas). The need for such an adjustment is recognized in the Feasey Report (paragraph 38), which explains that:

> *"Since roaming for coverage tends to be provided in higher cost rural areas where the purchasers lack networks of their own, the [cost-reflective effective wholesale NR] price will obviously be higher than the average unit cost of providing [NR for coverage] services across the network as a whole".*

Paragraph 47 of the Feasey Report elaborates on this, highlighting that:

> *"deriving wholesale price thresholds from retail prices which reflect average costs across the entire network ignores the significant differences between those costs and the costs involved in providing national roaming for coverage".*

Given all of the above, a direct comparison between the effective retail price with NR prices is likely to be misleading, due to the strong incentives that access seekers have to cherry-pick. Vodacom recognises that there is a partially offsetting effect, however, in that downstream costs are also not taken into consideration in the margin screen proposed in the Draft Regulations. Put another way, ICASA's proposed screen takes into account neither downstream costs nor the impact of cherry-picking behaviour. ICASA's approach could therefore be interpreted as assuming that one effect will net off against the other.

ICASA has provided no evidence on the relative effects, however, and Vodacom is concerned that this should be considered in detail (regardless of the level of granularity) if the screen is to be set at the appropriate level. The Feasey Report (paragraphs 33-36) provides a brief discussion of how ICASA might approach an assessment of relative wholesale NR prices and retail prices, by making an adjustment for the extent to which operators rely on roaming whilst taking into account downstream costs.

Vodacom's view is that the cherry picking factor is likely to dominate, especially given that cherry-picking is likely to become more important as Telkom continues to deploy its own network (for

[redacted]

[redacted]

In order to be consistent with the relevant business model (roaming for coverage purposes) and also the forward looking nature of the market review, ICASA needs to consider the extent of cherry-picking that would be expected from a hypothetical operator, which fully optimises its use of roaming. In particular, such an assessment must only include traffic used for coverage purposes[102] when assessing the degree of cherry-picking. Linked with this, the assessment should take into account that on a forward-looking basis, smaller operators will have greater own network coverage (e.g. due to the coverage obligation), so the areas where it needs coverage for roaming purposes is likely to be more limited in future.

3.4 Other concerns

ICASA should only require operators to justify their retail and wholesale prices under certain conditions

Vodacom is concerned that, as currently set out, the ICASA screening process may lead to a number of unjustified and costly requests for it to justify its pricing. This does not seem appropriate in a world where access seekers have not raised concerns. Therefore, ICASA should amend the draft Regulation so that it only seeks justification of the relativities between retail and wholesale prices when a purchaser of NR services has disputed the wholesale prices they are being asked to pay by a SMP operator. Vodacom notes this is also consistent with the views expressed in the Feasey Report (paragraph 95).

D. Retail market: Mobile retail services provided in regional geographical areas

Vodacom welcomes ICASA's decision to not impose remedies in the retail market. In line with best practice, any necessary interventions should be focused on the most upstream input/market possible and remedies only imposed in more downstream markets if the upstream interventions, including the upcoming spectrum auction and WOAN interventions, are insufficient to ensure effective competition downstream.

However, for the reasons set out below, Vodacom does not accept ICASA's conclusion that there is ineffective competition in some retail markets i.e. in some areas of South Africa. Therefore, Vodacom sets out, in this section, why ICASA's conclusions in this regard are flawed, presenting, in detail, its views on ICASA's definition of the retail market, as well as on its assessment of SMP and the effectiveness of competition. In summary:

- Vodacom notes ICASA's product market definition and agrees with ICASA's decision to define sub-national markets.
- In line with ICASA's position, Vodacom also considers that 5G technology is unlikely to have a significant impact on competition over the period covered by the market review.

[redacted]

- ICASA should reconsider its analysis of the effectiveness of competition. This is because it has failed to take into consideration several important factors, including:

  - Evidence of limited barriers to expansion in the retail market, as demonstrated by the growth of Telkom and Rain;

  - Evidence on recent competitive dynamics relating to both price reductions and improvements in network quality (despite the spectrum constraints that operators are facing); and

  - The impact the release of spectrum through the ITA process will have on the market in the period covered by the market review; and the impact of the existing spectrum constraints on current market outcomes.

  These factors are discussed in more detail in Section D.3.1 below.

- In addition, ICASA has provided only a partial picture of market shares, focusing on the combined market shares of Vodacom and MTN in 2018 and 2019 (see Section D.3.2).

- Finally, ICASA has also failed to demonstrate that Vodacom and MTN have SMP, as detailed in Section D.4. Whilst Vodacom accepts ICASA has, in this instance, applied the formal definition of SMP from the ECA, it is essential that ICASA does not equate this with the ability of Vodacom and MTN to behave independently. This should be the purpose of ICASA's analysis of the effectiveness competition. That is, it is critical that ICASA properly analyses the effectiveness of competition in the defined markets.

1. Market definition

Vodacom notes that ICASA has included voice, SMS, and data services as part of one aggregated market and understands ICASA's reasoning for this and accepts that the 5GB "cut-off" used in the Discussion Document was an artificial construct. Nevertheless, Vodacom also notes that recently, dedicated mobile broadband services, used in the home or in business premises, often in place of a fixed broadband connection, have grown rapidly. Vodacom expects this growth will continue. Given the forward looking nature of this inquiry, ICASA should, therefore, consider carefully how this might impact its market definition.

With regards to the geographic market, ICASA has identified subnational geographic markets segmented between urban and rural areas, by province. Vodacom supports this finding, given that competitive conditions may vary across geographic areas.[103] As already detailed in Vodacom's response to the Discussion Document, Vodacom notes that there are certain features in South Africa that point towards there being sub-national markets for retail mobile services. For example,

- [redacted]

[redacted]

2. The launch of 5G services will not adversely impact competition

Operators in South Africa have started rolling-out 5G services to a select number of areas. [redacted]

[103] Without necessarily agreeing with the specific scope of the geographic markets identified

[redacted]:

> *"While 5G is relevant to a forward-looking analysis, the future applications and shape of these networks within the next few years in South Africa is not clear. While some networks have begun rolling out 5G, this is still in the early stages, and is in some cases linked to temporary spectrum assignments. The full impact of industrial and other usage and functionalities are still being developed internationally, and the potential for infrastructure development for private networks still has to be seen within the South African context. The technology is unlikely to have matured in the timeframe of this review."*[104]

Ofcom recently took a similar position in its review of the competitive impacts of its 5G spectrum auction:

> *"it is not clear that the ability to provide seamless 5G coverage will be a material driver of competition, as 4G technology will be able to provide a similar experience in many situations"*[105]
>
> *"it appears that MNOs have initially focused on deploying 5G in densely populated areas such as cities, whilst relying on 4G coverage in more rural areas where demand for data is lower. Whilst eventually 5G coverage will be expanded to cover these rural areas too, this is likely to take several years to complete. This all supports our view that the ability to offer 'widespread' 5G is unlikely to be a material driver of competition at least in the short to medium term."*[106]

Regardless of the role of 5G in this market review period, Vodacom does not agree with those submissions that argue that Vodacom may have a first mover advantage in 5G. This is consistent with ICASA's view that:

> *"MTN and Vodacom do not have an unnaturally strong advantage in launching 5G services. Liquid is a wholesale provider with non-exclusive agreements and RAIN has also launched 5G services"*[107]

This is also in line with the position taken by Acacia (ICASA's expert advisors), in the context of the expert report prepared by Acacia as part of ICASA's answering affidavit to Telkom's application for the ITA process to be interdicted and reviewed:

> *"As such, while a first mover advantage in 5G could be a concern it can be noted that (i) in terms of 5G spectrum Telkom had an allocation in the 3.5GHz range which gave it an advantage in considering 5G services,(ii) that Liquid is a wholesale provider that already has access to 5G spectrum and (iii) that RAIN has also launched 5G services based on its current allocation in that range (in part assisted by the financial boost from its roaming agreement). So 5G spectrum in the range is already in the market and as such a first mover advantage was already possible from other companies."*[108]

[104] Paragraph 49 of ICASA's Findings
[105] Paragraph 4.172; Ofcom - Award of the 700 MHz and 3.6-3.8 GHz spectrum bands; https://www.ofcom.org.uk/__data/assets/pdf_file/0020/192413/statement-award-700mhz-3.6-3.8ghz-spectrum.pdf
[106] Paragraph 4.166; Ofcom - Award of the 700 MHz and 3.6-3.8 GHz spectrum bands
[107] Paragraph 123 of ICASA's Findings
[108] AA15 - Acacia's report regarding the BRG report of "ICASA's answering affidavit - Telkom app 2021-02-01" - Paragraph 85

3. Vodacom disagrees with ICASA's assessment of the effectiveness of competition

ICASA considers that the retail markets it has defined have ineffective competition and will continue to be so on a forward-looking basis. It reaches this conclusion based on:

- the existence of barriers to entry;
- an analysis of the combined market shares for Vodacom and MTN at the level of individual provinces, combined with a split between rural and urban areas;
- international benchmarks comparing market outcomes in South Africa and elsewhere; and
- its view that the allocation of additional spectrum assigned to mobile operators through the parallel ITA process will not have a significant impact in the next three years.

However, Vodacom considers that ICASA, in its analysis, has underplayed a number of important factors that need to be assessed when examining the effectiveness of competition. ICASA has also provided only a partial picture of market shares. Were ICASA to examine these factors fully, as it should now do, it would find that retail markets are effectively competitive.

3.1 ICASA has underplayed or omitted several important factors

ICASA has underplayed or omitted several key factors when assessing the effectiveness of competition:

- **Firstly, ICASA has failed to take fully into account the limited barriers to expansion in the retail market** – a factor which should be a key element in any assessment of competition. Indeed, this is a critical omission, given the rise of Rain and Telkom's rapid growth (see Section below).
- **ICASA has ignored evidence on recent competitive dynamics in the retail market**. Had ICASA considered this evidence it would have been clear to it that Vodacom is not able to act independently in this market. In particular, and in addition to the rise of Rain and Telkom's rapid growth:
    - MTN has become the market leader in terms of network quality (see Figures 15, 16 and 17);
    - Operators have implemented important price reductions across a wide range of different types of tariffs. As a result of this intense competition and its social contract, Vodacom has undertaken a significant pricing transformation, despite the spectrum constraints that it faces and the resulting negative consequences for its network quality - see Section D.3.1.
- **ICASA has largely ignored the impact, in the period covered by this market review, of the spectrum release** described in ICASA's parallel ITA process. Whilst the full impact of the release of spectrum is likely to be felt over a prolonged time period, there will still be a significant impact in the next 3 years, for the reasons set out in detail in Section B.2. In summary, this is because:
    - High capacity spectrum (above 1GHz) will be immediately available, so allowing operators to increase their network capacity. This will, in turn, allow operators to improve network quality while also giving operators increased flexibility to price more aggressively;
    - Operators will be able to roll-out their own networks on a widespread basis as a result of the assignment of low frequency spectrum – given the current state of the analogue switch off, it is likely that licenced operators will be able to start the rollout immediately;

- The spectrum award will increase the role of MVNOs in the retail market. This is, in turn, for two reasons:
    - o First, because each winning bidder will have to provide open access to MVNOs and demonstrate that these MVNOs have a sustainable business model; and
    - o Second, because the higher capacity provided by additional spectrum will facilitate larger MNOs, which are currently capacity constrained, to offer network access to MVNOs on more competitive terms.
- The obligation included in the ITA for Tier-1 operators to publish a reference offer for access to their sites will have an immediate impact, as Tier-1 operators have to produce the reference offer straight after the completion of the spectrum auction.
- The creation and launch of the WOAN, which will happen during this market review period, will further enhance competition in upstream markets (e.g., for MVNO access services), which will in turn have an impact on the retail market.

- **ICASA has ignored the role of spectrum constraints on current market outcomes**. Whilst ICASA recognises that the spectrum auction will have a "formidable impact" on the market, it ignores the impact that the current spectrum constraints have had on market outcomes, so contaminating its analysis e.g. in relation to its international benchmarking analysis undertaken on price and non-price outcomes (see Section B.3).

A number of these points (notably Telkom's recent growth, the impact of the ITA and the role of current spectrum constraints) also affect ICASA's analysis of other markets. Vodacom has covered these points in detail in Section B.4 of this response. Therefore, in what follows Vodacom expands on why: (i) there are limited barriers to expansion in the retail market; and (ii) recent competitive dynamics are incompatible with ICASA's finding that retail markets have ineffective competition.

<u>There are limited barriers to expansion in the retail market</u>

Assessing whether or not there are barriers to players expanding output is a key element in any assessment of competition. Indeed, in markets where there are entry barriers, competition can still be strong if barriers to expansion are low (and this is especially the case in South Africa, given it already has six existing MNOs - Vodacom, MTN, Telkom, Cell-C, Rain and Liquid). This is because low barriers to expansion mean that existing competitors can impose a significant competitive constraint on each other. This, in turn, limits the possibility that some market players can behave independently, as would be the case in a market where there is ineffective competition.

It is therefore critical that ICASA looks into the evidence on barriers to expansion, given that:

[redacted]

- [redacted]

  "Rain's customer base grew exponentially in 2020. The pace of Rain's development has exceeded its own expectations".[111]

- Whilst Cell-C has lost market share recently, this is unsurprising given that it has decided to focus more heavily on the profitability of its subscribers rather than maximising its subscriber base (see Section B.4.1). Cell-C is in the process of completing a business turnaround strategy, which should strengthen its position going forward, as recognised by its CEO:

  "Operationally the business is stronger and a successful recapitalisation will secure the long-term sustainability of Cell C."[112]

Competitive dynamics are incompatible with ineffective competition

Developments in the market are also incompatible with a finding that competition in the market is ineffective. Competition is working well and delivering for consumers, both in terms of prices and non-price outcomes. As users will have a range of different preferences, the strong competition on both non-price and price outcomes will help ensure that users can find an operator/tariff that matches their specific preferences.

[redacted]

Increases in quality have been accompanied by **a strong level of price competition** in the market, despite spectrum constraints. Mobile operators compete with each other using a diverse range of offers, including, amongst other: standard monthly bundles, short validity bundles, personalized offers, regional offers, URL bundles, etc.[117] This variety of offers is in response to the different needs of users.[118] A proper assessment of price competition in South Africa therefore requires a holistic approach, considering the whole range of products in the market, rather than only a sub-set of these[119].

When one considers the whole range of Vodacom's data products, prices for mobile data services have changed significantly over time, reflecting:

- Vodacom's recognition of the importance of catering to a wide range of needs (including affordability), that cannot be addressed by standard monthly bundles/ plans alone; and

[redacted]

112 https://www.cellc.co.za/cellc/newsroom-detail/cellc-turnaround-strategy
113 This could have been done more effectively with sufficient spectrum

[redacted]

116 The roaming transaction with Rain has also helped. Although it is not a substitute for acquiring spectrum.
117 For more details, see Vodacom's response to the CC's Provisional Findings Report.
118 Vodacom's response to the CC's Provisional Findings Report provides a more detailed description of user needs.
119 As, for example, the CC did in its Data Services Inquiry, where it focused almost entirely on headline prices for 30 days validity bundles.

- The need to respond to pressure from rivals, who compete on a wide range of dimensions, beyond headline prices.

Vodacom's response to the Discussion Document already included[120] some key examples of the products and price changes introduced by Vodacom in response to competition, covering the period 2013- March 2019, including:

- Vodacom's Smart and Red products, which were introduced in 2013 in response to the integrated offers introduced by rivals.

- The hourly and daily bundles introduced in 2014, which helped to bring the benefit of larger monthly bundle pricing to marginal and poor customers who otherwise would not have been able to afford the outlay of a monthly bundle.

- The NXT LVL new tariff for youth customers introduced in 2016, which offered discounted data bundles and integrated offerings exclusively for under 25s.

- The weekly bundles introduced in 2017, in response to the launch of similar offers by rivals.

- The launch of the Siyakha platform, also in 2017, targeted at lower income customers, offering very low-cost voice and data bundles, entry-level smartphones, and targeted content offerings, including free access to content on specific education, health and employment websites, and a free, text-based version of Facebook.

- The introduction of URL bundles for popular services (such as WhatsApp or Facebook) in 2018, which again led to substantial reductions in effective rates.

- In March 2019, halving the price of out of bundle data and introducing initial price reductions on 30-day data bundles.

Since 2019, price competition has become even stronger: with the extension of both regional and personalised offers, price reductions for 30-day bundles and the launch of Fixed LTE broadband plans. This is illustrated below. Clearly, such intense price competition is incompatible with a finding that competition in the market is ineffective.

Expansion of regional offers

In the second half of 2020, MTN put additional price pressure in the market with its MyMTNTown offer,[121] which offered discounted data bundles based on the location of the customer. MTN also launched its Ska Wara Bundle sale that offered qualifying prepaid customers up to 99% discount on selected data, voice and social bundles. In response, Vodacom expanded its discounted bundles in specific locations in the Western Cape, KZN, Gauteng and Limpopo. Examples of these offers included the following:
- 5GB + 5GB @ R99 for 14 days;
- 10GB + 10GB @ R149 for 14 days;
- 5GB + 5GB @ R99 for 7 days;
- 5GB + 5GB @ R99 for 7 days;
- 1GB @ R10 for 1 day; and
- 1GB @ R19 for 7 days.

Expansion of personalised offers

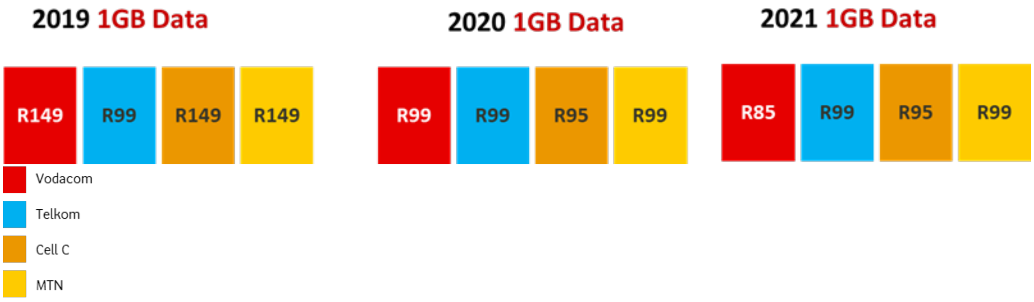
[120] In page 46.
[121] https://businesstech.co.za/news/telecommunications/428436/mtn-launches-new-area-specific-data-bundles/

In September 2019, Vodacom introduced "Recurring Bundles" which offered Contract customers discounted personalized voice and data bundles up to 75% off open market prices.

Enhanced competition for 30-day bundles

In July 2019 Vodacom commenced with the phased implementation of its "Monthly data transformation" by reducing, amongst others, the headline rate for 1GB from R149 to R115 if purchased via USSD and to R99 if purchased via the Vodacom App. Since 2019, Vodacom's prices for 1GB data bundles have decreased from R149 to R85 across all purchasing channels, with Vodacom's 30 day 1GB bundle currently being cheaper than those offered by MTN, Telkom and Cell-C.

Figure 26: Comparison of the 1GB 30 day validity price over time



In July 2020 Cell C extended its All-in-One bundle promotion through which customers can get double the data when they purchase any All-In-One bundles[122]. In terms of this promotion Cell C customers can, amongst others, get 2GB for R95.

Rain has imposed additional competitive pressure on the market, offering the cheapest price in the market for 1GB of mobile data at R50. This was also reflected in the international price benchmarking that ICASA presented in its Discussion Document[123]. On top of this, Rain has been the first operator in South Africa to introduce unlimited mobile data tariffs.

Fixed LTE broadband offers

Notwithstanding Vodacom's position that FWA/MBB products should be excluded from ICASA's margin screen, it is worth highlighting the intense price competition for such services. In October 2019, Telkom introduced new Sim-only fixed-LTE broadband plans for contract and prepaid customers, with prices starting at R59/month for 5GB of data (plus 5GB of "night surfer" data). The new plans came after MTN's owned Internet service provider Supersonic unveiled its first fixed-LTE packages using MTN's 4G network.[124]

Vodacom responded to these initiatives through its Red Hot deals. These offered big price cuts on large data bundles.[125]

More recently

MTN has introduced further significant price reductions for new prepaid customers[126]. Specifically, new MTN consumers will be able to purchase 5GB of anytime data (plus 5GB of night time data) for just R99.

[122] https://www.cellc.co.za/cellc/static-content/PDF/All-In-One%20-TandC.pdf
[123] See ICASA's Figures 9 and 11
[124] https://techcentral.co.za/telkom-unveils-new-fixed-lte-plans-220gb-for-r999/92969/
[125] https://mybroadband.co.za/news/cellular/312921-vodacom-secret-red-hot-deals-big-price-cuts-on-large-data-bundles.html
[126] MTN BozzaGigs LTE will be available to all new MTN prepaid customers, who have been active for less than 30 days on the MTN network. The MTN BozzaGigs LTE data bundles can be used on a mobile or Mobile Broadband device

Figure 27: MTN's new price plans

Total Inclusive value	Anytime data	Night express data (00:01 - 04:59)	Validity	Price
10GB	5GB	5GB	30 days	R99
15GB	7.5GB	7.5GB	30 days	R129
20GB	10GB	10GB	30 days	R149

Source: https://mybroadband.co.za/news/cellular/393999-mtn-launches-new-prepaid-bundles-10gb-for-r99.html

Further, MTN has also recently reduced its everyday bundle prices considerably.

Figure 28: MTN's new pricing for everyday bundles

EverydayGigs				
Validity	**Total data allocation**	**Daily allocation**	**Old price**	**New price**
1 Day	1GB	1GB	R29	R29
	2GB	2GB	R49	R49
3 Day	3GB (New)	1GB	-	**R69**
	6GB (New)	2GB	-	**R99**
	9GB (New)	3GB	-	**R129**
Weekly	7GB	1GB	R149	**R99**
	14GB	2GB	R199	**R179**
	21GB (New)	3GB	-	**R249**
Monthly	30GB	1GB	R499	**R349**
	60GB	2GB		**R499**
	90GB (New)	3GB	-	**R699**

Source:https://mybroadband.co.za/news/cellular/397449-mtn-cuts-prepaid-data-prices-and-launches-new-bundles-including-60gb-and-90gb.html

Telkom has just announced it will introduce new affordable packages in the prepaid segment. Serame Taukobong, Telkom Consumer's CEO, "*said the company has plans for exciting products for the prepaid mobile data market but would not be drawn into disclosing details*"[127]. Already in April, Telkom launched a new tariff plan named Thola More, which replaces the company's voice-focused offering – SIM Sonke, including data and extra SMS / calling benefits upon recharging.

3.2 ICASA only provides a partial picture of market shares

ICASA argues that there is ineffective competition due to there being a persistent duopoly between Vodacom and MTN in many regions of South Africa:

[127] https://www.techfinancials.co.za/2021/05/26/telkom-mobile-wants-to-rethink-prepaid-mobile-data-market/

"It is true that MTN and Vodacom have invested significant amounts in infrastructure over the past years, and that speeds, coverage and data volumes have increased over time. However, ***there remains a persistent duopoly in many regions in South Africa, discussed in further detail below, and this is evidence of ineffective competition.****"*[128] [Emphasis added]

There are several reasons why ICASA's conclusion in this regard is flawed:

- Even if there were a "duopoly" in certain areas, this does not mean there is a lack of competition. Indeed, there are a number of examples where regulators have deregulated markets in the presence of a duopoly. For example, in 2017, the telecoms regulator in Portugal (Anacom) decided to deregulate the wholesale market for broadband access in a number of areas where the incumbent operator faced competition from at least one operator with NGA coverage of at least 50%, subject to the market share of the incumbent operator being below 50%.[129]

- It is unclear why ICASA has decided to list the joint market share of Vodacom and MTN in Table 1 of its Findings. As discussed in Section B.4.2, Vodacom and MTN do not act in a co-ordinated manner, which means that it is inappropriate for ICASA to focus on the combined position of Vodacom and MTN. On the contrary, there is evidence showing that MTN and Vodacom compete strongly with each other and with the other providers in the market:

  - For example, MTN has spent R50 billion in investments to improve its coverage, network quality and speeds.[130] This has resulted in MTN leading on the main quality indicators for mobile data services. As explained above, this helps explain why MTN now has the largest share of 4G gross additions.

  - It is also difficult to reconcile Telkom's significant growth with MTN and Vodacom apparently enjoying a duopoly position. This is particularly the case given that a significant proportion of Telkom's subscribers come from these two operators (as shown in Figure 15).

- ICASA only provides information on market shares for two years (2018 and 2019). Such a short window of time does not provide any evidence on the dynamics of the market.

- ICASA's SMP analysis in Table 2 of the Findings, whilst only providing information for just two years, still illustrates volatility in the Vodacom and MTN market shares in the individual sub-national markets – which demonstrates effective competition. Stability of market shares is a key condition for the identification of SMP. The EC Guidelines for the assessment of SMP in electronic communication markets state that:[131]

  "*An undertaking with a large market share may be presumed to have SMP, that is, to be in a dominant position, if its market share has remained stable over time (79). The fact that an undertaking with a significant position on the market is gradually losing market share may well indicate that the market is becoming more competitive, but it does not preclude a finding of significant market power. On the other hand,* ***fluctuating market shares over time may be indicative of a lack of market power in the relevant market***"[132] [emphasis added].

  Section D.4.1 provides a more detailed discussion on the observed volatility of market shares in South Africa.

[128] Paragraph 82 of ICASA's Findings
[129] Final Decision of the Analysis of wholesale local access markets at a fixed location and of wholesale central access at a fixed location for mass-market products. Definition of product and geographic markets, assessments of SMP (significant market power) and imposition, maintenance, amendment or withdrawal of regulatory obligations. 2017
[130] See https://businesstech.co.za/news/telecommunications/482591/these-are-the-best-and-worst-mobile-networks-in-south-africa-5/
[131] Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services (2002/C 165/03).
[132] *Op Cit* Paragraph 75.

3.3 ICASA has not assessed the effectiveness of competition in the sub-national markets identified

Finally, beyond providing the combined market share of MTN and Vodacom in the sub-national markets defined, ICASA's analysis on the effectiveness of competition is not specific to the 16 sub-national retail markets that it has defined. It only has a generic/national discussion of the effectiveness of competition at the retail level. As such, it has not properly identified ineffective competition in the retail markets it has defined.

4. The analysis of SMP is incomplete and, therefore, inaccurate

Following the ECA, ICASA's assessment of SMP is based on an analysis of market shares and vertical integration:

- Based on market shares estimated at the province level and distinguishing between rural and urban areas, ICASA concludes that Vodacom is dominant in 7 regions in 2018 and 2019, whilst MTN is dominant in 5 regions in 2018 and 2 regions in 2019.
- ICASA concludes that the *"vertical relationships that MTN and Vodacom have could harm competition. This means that MTN and Vodacom have SMP in terms of the Act."*[133]

Vodacom considers that ICASA's conclusion of MTN and Vodacom having SMP is not supported by robust evidence. Instead, a proper analysis of the evidence will show that no operator has a dominant position in the retail markets.

<u>ICASA's own market share analysis is volatile</u>

ICASA finds Vodacom and MTN dominant (and therefore to have SMP) in 7 and 2 markets respectively (paragraph 94 and Table 2). However, Vodacom notes that, as indicated by Table 2, these dominance findings are volatile over a short time period, in that they vary year to year. According to ICASA's analysis, in 2019:

- MTN is no longer a dominant operator in urban Eastern Cape, rural Free State and urban Northern Cape.
- Vodacom is no longer dominant in urban KwaZulu-Natal and becomes dominant in rural North West.

[133] Paragraph 98 of Findings

Figure 29: Dominance findings at the retail-level

Table 2: Dominant operators (90-day active subscriber share of more than 45%), by province and rural / urban split

Province	Urban / Rural	Dominant, 2018	Dominant, 2019
Eastern Cape	Rural	MTN	MTN
	Urban	MTN	
Free State	Rural	MTN	
	Urban	MTN	MTN
KwaZulu-Natal	Rural	Vodacom	Vodacom
	Urban	Vodacom	
Limpopo	Rural	Vodacom	Vodacom
	Urban	Vodacom	Vodacom
Mpumalanga	Rural	Vodacom	Vodacom
	Urban	Vodacom	Vodacom
North West	Rural		Vodacom
Northern Cape	Rural	Vodacom	Vodacom
	Urban	MTN	

Source: ICASA

Such volatility is a clear indicator that there is competition in the markets. For example, there is no underlying, structural reason that would explain why Vodacom is suddenly "dominant" in the rural North West market. Rather, Vodacom's increased market share in that market between 2018 and 2019 is the result of normal, competitive interaction, as is the decline Vodacom has seen in its market share in other markets. Transient gains in market share do not make an operator dominant.

<u>The role of vertical integration in a finding of SMP</u>

As stated in Section B.5, ICASA has failed to prove the existence of vertical relationships that are harmful to competition. Furthermore, ICASA's statement regarding why existing vertical relationships are harmful for competition (paragraph 98 of the Findings) is purely based on a hypothesis that MTN and Vodacom could foreclose markets to competition. Contrary to this and as detailed in Sections E and F, the wholesale markets for NR and site access are, when assessed fully, effectively competitive and they are expected to be even more competitive going forward. Telkom itself, as an access seeker of NR, has recognized this when stating that:

> *"competition between Vodacom and MTN for national roaming customers has been dynamic in the recent years, leading to price reductions and quality improvements. This enables it to compete more effectively than it could under historical national roaming agreements."*[134]

Indeed, the launch of the WOAN and the allocation of additional IMT spectrum will serve to make the wholesale markets even more competitive.

Given this, if there has not been foreclosure until now (which, given the range of commercially negotiated wholesale agreements there clearly has not been), the risk of foreclosure looking forward is even lower, in view of the expected changes in the market.

5. Remedies

Vodacom welcomes ICASA's decision to not impose remedies in the retail market. In line with best practice, any necessary interventions should be focused on the most upstream input/market possible

[134] ICASA's Final Findings – paragraph 182

and remedies only imposed in more downstream markets if the upstream interventions, including the upcoming spectrum auction and WOAN interventions are insufficient to ensure effective competition downstream.

Vodacom specifically disagrees with Cell-C's proposal to introduce remedies to limit on-net / off-net price differentials and supports ICASA's decision not to accept this suggestion. Adopting Cell-Cs proposal would be irrational for a number of reasons. First, the focus of this Inquiry is on data services and ICASA has not identified specific market failures related to the provision of voice services[135]. Second, ICASA has already regulated mobile call termination rates to cost based levels and imposed asymmetric mobile call termination rates to the benefit of smaller operators. ICASA has also intervened to enhance number portability. Both of these measures were in part designed to support retail competition for voice services. Third, the role of on-net / off-net differentials is becoming increasingly less relevant, given the rise of VoIP services such as WhatsApp.

E. Upstream Market 1: Wholesale site infrastructure access in local and metropolitan municipalities

We now turn to ICASA's assessment of Upstream Market 1. Vodacom supports the changes that ICASA has made to its analysis of this market. In particular, Vodacom agrees with ICASA's decision to recognise that only sites controlled by an operator should contribute towards its market share. Notwithstanding its concerns over whether pro-competitive measures are required, Vodacom understands ICASA's proposed monitoring remedy for sites, as long as ICASA takes into account the impact of this remedy when assessing the effectiveness of competition in downstream markets.

However, Vodacom would not support the imposition of any more stringent remedies. The market is already subject to considerable regulation in the form of the FLR and, following the spectrum auction, Tier 1 operators (as defined in the ITA) will be required to produce reference offers for site access. Furthermore, Vodacom disagrees with ICASA that competition in the market is ineffective. It also has concerns with ICASA's market definition and its analysis of market shares (determination of SMP).

Specifically:

- In line with its response to the Discussion Document, Vodacom still considers that the product market definition should be expanded to include micro solutions, lampposts, billboards and unused rooftops (due to demand side substitutability).

- Vodacom considers that there is effective competition in the sites market. Vodacom has made a number of arguments in support of this view in its response to the Discussion Document (e.g., on the importance and role of tower companies, and the impact of existing FLR and relevant local policies on communication infrastructure). However, ICASA's Findings did not reply in earnest to Vodacom's points, and Vodacom is concerned that ICASA has not properly taken these into account in its Findings. Vodacom is also concerned that the Findings seem to be based largely on un-validated complaints from other operators[136]. These should not count as a reliable source of evidence (see Section B.6).

- Based on Vodacom's own analysis of market shares (shared with ICASA on 29 July 2020, Vodacom still has concerns that there are methodological and/or data integrity issues with the market share analysis for sites which underpins the SMP Findings. (Vodacom has not been able to replicate the Findings, even when adopting ICASA's product market definition). Given this, Vodacom is unable to

[135] As set out in the preceding section, Vodacom does believe it is important to consider voice services in the margin screen test proposed by ICASA. This is because most operators' business model is to offer both voice and data services. This is different, however, to imposing a remedy specifically on voice services.
[136] To Vodacom's knowledge, no formal complaints have been submitted to the CCC

respond appropriately to the Findings due to the lack of transparency around its approach to the analysis.

The following sections set out Vodacom's position on these points in more detail.

1. Vodacom disagrees with the proposed market definition

Vodacom disagrees with the proposed market definition as all demand-side substitutes have not been included in the definition. Unused rooftops, micro sites, lampposts and billboards are in fact demand side substitutes, and therefore should have been included in the market definition.

ICASA has excluded unused rooftops from the market on the basis that:

> *"suitable rooftops have already been taken up by MTN and Vodacom, who were first to market as mobile network operators. It is also difficult to obtain permission to use rooftops to build new sites, as approvals may be needed from various authorities, as explained in the Discussion Document. It is therefore not the case that any rooftop space across South Africa is a substitute for existing rooftops used by mobile operators."*[137]

Vodacom does not believe that ICASA's reasoning on this point is sound. In particular, ICASA has overstated the difficulties associated with obtaining the necessary permissions for mobile operators to build new sites on rooftops. For example, as Vodacom set out in its response to the Discussion Document, the approval of rooftop sites where the antennas or antenna poles do not protrude higher than three meters above the highest point of the roof are relatively easy to obtain[138]. In metro areas, authorities typically prefer rooftop sites over traditional sites, meaning that approval will be easier for these types of sites[139]. Indeed, the draft policy document from the City of Cape Town considers granting the right to build rooftop installations without Council consent[140].

Furthermore, property owners controlling rooftops typically do not give exclusive access to Access Seekers.

Given that ICASA's rationale for excluding unused rooftops from the market definition (alleged first mover advantages and the apparent difficulty in obtaining these permissions) is flawed, it follows, therefore, that ICASA must amend its market definition to include unused rooftops. To do otherwise would be unreasonable. While it may be challenging to include unused rooftops in market share calculations in practice, ICASA should acknowledge that these calculations therefore overestimate actual market shares and recognise that it is a viable substitute which provides an effective competitive constraint.

ICASA has also excluded micro sites, lampposts and billboards from its market definition for sites. Again, Vodacom submits that this is appropriate. This is because there is chain of substitution between these types of sites and the sites that ICASA has included in its product market definition.

In particular, lampposts and billboards are used in the same fashion as <15m macro sites and certain rooftops - the coverage of these is likely to be concentrated in a small area and is intended to 'fill in a gap'. An access seeker that was looking to access a <15m macro site could generally find reasonable alternatives in the form of lampposts and billboards. It is also incorrect to suggest, as ICASA does[141], that these sites will only be important for 5G roll-out.

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[137] Paragraph 133 of Findings
[138] Vodacom recently had a rooftop installation approved in 3 months in the City of Cape Town
[139] See e.g. p. 14 onwards of the City of Cape Town's Telecommunications Infrastructure policy: https://www.ellipsis.co.za/wp-content/uploads/2014/07/HYS_Draft_Telecommunication_Policy.pdf
[140] Ibid., p. 10
[141] Paragraph 135 of Findings

2. Vodacom disagrees with ICASA's analysis of the effectiveness of competition in the sites market

Vodacom disagrees with ICASA's conclusion that there is ineffective competition in the sites access market. This is because:

- ICASA has failed to properly take account of the existing FLR;
- Competition in the sites market is strong and will likely intensify; and
- ICASA has overstated the barriers to entering and expanding in the market.

<u>ICASA has placed too little emphasis on the existing FLR</u>

ICASA does not appear to have taken into account the impact of the existing FLR when assessing the sites market. Operators already face access and non-discrimination obligations under the FLR. Furthermore, local policies on communication infrastructure often force MNOs and TowerCos to share existing structures. Ignoring the impact of these regulations is an important oversight, especially as ICASA has, when assessing this market, taken into account the impact of the reference offers that, under the ITA, Tier 1 operators will be required to publish:

> *"…while the Authority had proposed developing regulations for site access dealing with timeframes and conditions in the Discussion Document, the Authority's spectrum ITA has requirements for Tier 1 operators to:*
>
> *"Produce a reference offer for site access to be offered to any licensee requesting site access and guidelines, including pricing, timeframes and policies for reserving space on masts."*
>
> *As such, it is no longer necessary to develop detailed guidelines, as on a forward-looking basis it would be more reasonable to monitor the impact of the very similar requirements of the proposed spectrum licence conditions."*[142]

In the same way that the reference offers will limit the ability of any operator to act in an anti-competitive manner, so do the FLR. In fact, the reference offers required by the ITA will make the FLR' non-discrimination provisions easier to enforce. As such, the sites access market will already be subject to significant regulation, even absent any "pro-competitive remedies" imposed through this process.

<u>Competition in the sites market is strong and will likely intensify going forward</u>

As Vodacom has argued in its response to the Discussion Document, widespread site-sharing in South Africa suggests that competition in the sites market is effective. Despite ICASA's claim that the bulk of the site sharing occurs between Vodacom and MTN[143], smaller operators such as Cell-C[144] and Telkom (and also TowerCos) also benefit from site-sharing. 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 FLR. If Vodacom does not provide an operator with site access, then the access seeker knows that another party will.

[redacted]

[142] Paragraph 165 and 166 of Findings
[143] ICASA states "much of the sharing that happens is between MTN and Vodacom."
[144] Although Cell-C may stop using site-sharing in future, given the change in its business model

These competitive dynamics are also evidence that, despite Vodacom and MTN both having a material site network, competition between them and other providers of sites is sufficient to maintain good outcomes for access seekers. Vodacom recognizes that ICASA's concerns are partly based on complaints by other access seekers, but as explained in Section B.6, without proper interrogation these should not be given much weight.

Access seekers have viable alternatives to getting access to MTN's and Vodacom's infrastructure

Vodacom disagrees with ICASA' view that there are substantial barriers to entering and expanding in the market for site access[145]. The supply of mobile sites has been expanding rapidly in the past few years and will continue to do so given both the entry of a number of Tower Companies ("**TowerCos**") and the large amount of unused infrastructure available for development. As such, operators should have no problem expanding their network either through site access or rolling-out their own sites (which can be done via different types of sites); and therefore face no barriers to compete effectively in the more downstream markets.

As Vodacom has argued with regards to the relevant market definition, micro sites, billboards, lampposts and unused rooftops should form part of the market. The time needed to get approval and establish sites using these types of infrastructure is not too limiting. Therefore, contrary to ICASA's view[146], there is generally plenty of viable alternatives to operators seeking infrastructure access.

ICASA also has not adequately explained why barriers to entry into the site sharing market are high. For instance, ICASA has failed to respond to Vodacom's arguments in its response to the Discussion Document which demonstrated the opposite through the growth of Gyro and other TowerCos. It is also important to note that economies of scale are not significant in the site market - that is, there are limited cost advantages from having 4,000 sites rather than 500 sites. Instead, the priority for site owners is to maximise the number of tenants on a given site.

On a national basis, Telkom, through its Gyro unit, has become one of the largest operators in terms of tower ownership. At the same time, ICASA has made the questionable argument that Telkom does not in fact have an extensive site network[147]. According to Telkom's latest financial results, Gyro's mast & tower portfolio consists of over 6,200[148] towers spread across South Africa, up from 5,100 in FY2019 (an increase of 26%). Telkom also forecasts that Gyro will deploy 2,000 additional sites for the next three years.

> *"Gyro has an active tower expansion programme that is supported by build-to-suit agreements from anchor tenants. We also proactively identify and secure strategic sites that we deem suitable for all mobile operators in order to support their requirement for market expansion. [...] Despite the severe impact of the COVID-19 lockdown regulations on the tower build plan during the first half of FY2021, we accelerated the tower site acquisition programme, resulting in at least 2 000 sites in the permitting phase. We obtained 368 building plan approvals and completed the construction of 116 towers."*[149]

The growth of other tower companies also demonstrates that the number of shareable sites is expanding dynamically[150]:

- American Tower now has a total portfolio of 2,666 sites.

[145] Paragraphs 150 of Findings
[146] Paragraph 144 of Findings
[147] ICASA states "while Telkom is rolling out infrastructure, it still does not have extensive coverage at this point."
[148] Telkom SA SOC Ltd Annual Results Presentation For the year ended 31 March 2021
[149] Telkom Annual Results Booklet 2021, p18
[150] TowerXchange Africa 2019 Special Edition

- Helios Towers acquired SA Towers: It has 500 sites ready to be built or in the process of being permitted, with plans to build a further 300 sites per year.

- MiS has built up a portfolio of almost 2000 rooftop sites across all regions of South Africa, [redacted]

TowerCos may play a particularly important role in the sites market, as their sites are especially well-suited for sharing. In contrast, some of the sites controlled by the MNOs were rolled-out when there were fewer operators in the market, which may mean that space on such sites is more restricted given the original design. The capacity on many of the sites are much lower than newly build TowerCo sites[151].

Overall, the availability of alternative sites, and the rapid growth of Telkom's and TowerCos' sites in recent years as well as their future deployment plans demonstrate that competition in the sites market is effective.

3. The SMP designations are not well supported

Vodacom disagrees with ICASA's findings that Vodacom's vertical relationships give it significant market power. It also has concerns that ICASA' market share analysis is inaccurate. [redacted]

<u>ICASA's analysis of vertical integration is misleading</u>

In general, ICASA has failed to show that vertical integration is harming competition across a number of different market (see Section B.5). This is also true for the market for sites.

ICASA argues[152] that Vodacom's vertical integration gives it SMP. The Findings imply that this is because vertical integration gives operators an incentive to foreclose access to their site infrastructure. However, this is a highly unrealistic presumption given the competition between Vodacom, MTN, Telkom/Gyro and other TowerCos (as evidenced by the two preceding subsections). Any attempt by one operator to engage in foreclosure would be thwarted by another operator offering access. Therefore, unless ICASA can prove there is some form of co-ordinated behaviour between suppliers (which it has not done), it cannot claim that there is a risk of foreclosure.

ICASA has also stated that the fact MTN and Vodacom have not sold off their towers, as they have done in other countries,[153] is evidence that vertical integration gives them unfair competitive advantages. To start with, this is factually incorrect, as Vodacom understands that MTN has announced plans to sell off its towers.In its latest quarterly update, MTN has stated that:

> *"MTN SA has issued interested parties with an invitation to offer non-binding expressions of interest to the Company, as it explores the potential sale and leaseback of its passive tower infrastructure. Both global and local intermediaries have been engaged by MTN SA to act as financial advisors in connection with the proposed transaction. Following the initial announcement in 2020 regarding the potential transaction, MTN SA has received over 20 expressions of interest from a wide and varied set of industry players, both in South Africa and internationally, and we expect the process to be concluded by the end of Q3 2021."*[154]

More fundamentally, a lack of willingness to sell or functionally separate is not in itself proof that vertical relationships lead to ineffective competition. There may be legitimate business reasons for a

[151] The available square meters on a site taking into account wind load capability of a tower
[152] Paragraphs 153-155 of Findings
[153] ICASA states "At the same time, the same stakeholders do not appear to be willing to functionally separate or even divest sites to tower companies in South Africa, as they have done in other countries."
[154] https://www.mtn.com/wp-content/uploads/2021/05/Quarterly-trading-update-for-the-period-ended-31-March-2021-1.pdf

company's management to consider it more efficient to manage tower assets under the same company. If anything, the willingness of some companies to sell/separate tower assets indicates that there is no general advantage to outright ownership of these assets. For example, Cell-C would not have sold its towers if these were a key strategic asset. Instead operators typically sell their towers if they:

- Need to improve their financial position; and/or
- They consider that a separate TowerCo would be able to operate the site network more efficiently.

As such, ICASA should revise its position that direct ownership of tower assets by Vodacom gives it significant market power. ICASA also needs to avoid a situation where operators who may choose, for legitimate business reasons, to maintain their tower businesses, are placed at a regulatory disadvantage, compared to others.

ICASA's analysis of market shares does not appear to be correct

If the sites market is defined correctly, as set out by Vodacom in the relevant section above, it would most likely follow that there are very few, if any, municipalities where an operator has a market share above 45% for sites. However, and notwithstanding the issues with the market definition, Vodacom has a number of concerns over the calculations that ICASA has used in order to analyse market shares, and hence determine SMP in this market.

As a first point, it is unclear how many and which municipalities ICASA finds Vodacom to be dominant in. ICASA's Table 4 only names 36 municipalities in which it proposes that Vodacom has a market share greater that 45%, whereas paragraph 152 states that there are 39. More generally, however, and whichever the actual number is, [redacted]

These discrepancies raise concerns over how ICASA has calculated market shares as well as over the data used in its analysis. However, it is difficult for Vodacom to establish the reasons for these discrepancies given the lack of transparency over ICASA's calculations, so putting Vodacom in a position where it cannot fully respond to ICASA's Findings (as discussed in Section B.6). And, while Vodacom notes ICASA's claim that the information used to determine these shares is confidential, it is important also to note that Vodacom has offered solutions to ICASA on this matter, such as the creation of a "confidentiality ring" including only the operator's legal and expert advisors.

Despite the above, Vodacom has attempted, through a number of case studies, to ascertain what might be driving the differences between the results. From these, Vodacom notes that there are a number of municipalities where ICASA's finding that Vodacom is dominant seems highly inconsistent with Vodacom's own analysis of its data. While Vodacom's data may not be perfect, ICASA should explore the reason for these discrepancies.

- [redacted]
- [redacted]
- [redacted]

Based on these examples, Vodacom has a number of concerns about ICASA's analysis:

- ICASA seems not to have included Gyro's monopoles.

- ICASA may not to have included other relevant TowerCo assets, for example ATC lattices and MiS rooftops[155]

- Some of the discrepancies might be driven by ICASA's treatment of "duplicate sites"[156]. It is unclear what these are, what the justification for removing them is and how ICASA has done this in practice.

In summary, therefore, even under its current market definition, ICASA's finding that Vodacom has a market share greater that 45% in 39 municipalities appears to be a material error. ICASA should be transparent about its analysis and ideally involve operators' legal and economic advisors to resolve the above mentioned concerns with its methodology and the data used.

Vodacom also maintains that the market definition should be changed to include micro sites, lampposts, billboards and unused rooftops, which would further reduce the number of municipalities where it has SMP. In addition, the overall level of space[157], as mentioned in Vodacom's submission on the Discussion Document, should be taken into account when determining the overall size of the market.

4. Despite the above, Vodacom does not oppose the proposed remedies for sites

Vodacom does not believe that remedies are necessary in the site access market, as the market is competitive and the existing FLR are already effective. Nevertheless, Vodacom understands ICASA's proposed monitoring remedy for sites, as long as ICASA takes into account the impact of this remedy when assessing the effectiveness of competition in downstream markets.

That said, Vodacom would not support any more stringent remedies, as they may harm investment incentives without delivering significant benefits. If ICASA were to propose additional remedies, it should reply in earnest to Vodacom's arguments in this section with regards to market definition, the SMP analysis and the effectiveness of competition. Vodacom also notes that even if ICASA was to uphold its approach to the analysis of the site access market, it can only impose remedies in the municipalities where it finds SMP. Further, ICASA should only impose remedies on those sites that are included within the relevant market. Therefore, if ICASA maintains its view that micro sites, billboards and lampposts are not part of the relevant market, then it should not impose any remedies on such sites, as it appears to be proposing in paragraph 1.1.5 of the Draft Regulations.

Furthermore, a key issue for ICASA to consider when assessing whether to impose additional remedies is that it can only impose site remedies on licensed operators. Given this, the imposition of site remedies may create an uneven playing field between licensed operators and TowerCos that are not licensed (and who therefore would not face any remedies) but who are in a similar position in this market to licensed operators. As a result, ICASA should avoid imposing more intrusive site remedies on licensed operators, as this could distort competition in the sites market. It could also create an incentive for licensed operators to sell their sites when doing so would actually not be efficient, but would rather be based only on the opportunities for regulatory arbitrage.

[155] MiS may not have control over these rooftop sites, but as per ICASA's methodology they still need to be included in the denominator
[156] Paragraph 146.3 of Findings
[157] I.e. The available square meters on a site taking into account wind load capability of a tower

F. Upstream Market 2: Wholesale NR for coverage

In this section Vodacom sets out, in more detail, its views on ICASA's market definition for the wholesale market for NR for coverage, as well as on its assessment of SMP and the effectiveness of competition. In summary:

- Vodacom considers that any NR market for coverage purposes should be limited to remote areas.

- ICASA has not shown there to be ineffective competition in this market. In fact, a full assessment of this market would reveal strong competition. In particular:

  - There is already strong competition between MTN and Vodacom to provide coverage roaming services, as Telkom has already recognized in its response to the Discussion Document;

  - ICASA has underplayed the changes occurring in the market and which can be expected to increase the level of competition even more in the next 2-5 years, namely:

    - Roaming customers will have even stronger bargaining power because own network roll-out will become more viable as a result of:
      - The allocation of additional low frequency spectrum;
      - Strong competition in the site access market, including the impressive growth in the number of sites made available by Telkom's Gyro unit and its process of converting the rest of its sites to accommodate mobile services.
      - The obligations in the site access market (from the existing FLR, the ITA and potentially from this market review process).

    - The coverage obligations attached to the spectrum auction.

    - The launch of the WOAN.

- ICASA's conclusion that Vodacom and MTN have SMP in this market is not based on any evidence.

As set out separately in Section C of this response, Vodacom also has significant concerns with the margin monitoring remedies that ICASA is proposing to impose in this market. This part of Vodacom's response should, therefore, be read in conjunction with Section C.

1. Vodacom considers the market for roaming services should be limited to remote areas

Vodacom notes that, between the Discussion Document and Findings, ICASA has amended its market definition for roaming services. That is, in the Findings and Draft Regulations, ICASA has defined a market for NR that allows for supplementary coverage, with a national geographic scope.

Thus, Vodacom understands the relevant market includes areas where there is not demand for NR for coverage, e.g. areas where potentially all operators have coverage. This is not appropriate. Instead, the scope of the market should be limited to those areas where it is unlikely to be viable for an access seeker to have its own network. In view of the coverage obligations included in the ITA,[158] the market for roaming for coverage should be limited to remote areas unlikely to be covered by more than one operator on a forward looking basis.

[158] Tier-2 operators will have to cover at least 80% of the population within 5 years

2. ICASA has not demonstrated that there is ineffective competition on a forward looking basis

ICASA concludes that the market for coverage-based roaming is, and will remain, ineffectively competitive within the forecast period. It reaches this conclusion based on:

- The observation that "there has historically been ineffective competition in this market";[159]
- The supposed existence of very high market shares for NR;
- The existence of high barriers to entry; and
- Uncertainty regarding the changes that may occur on a forward looking basis, in particular with regards to the impact of the parallel spectrum award process on countervailing power and the deployment of 5G.

In Vodacom's view, ICASA's analysis is flawed in a number of areas, so invalidating its conclusion that there is ineffective competition in the market.

- First, ICASA's assessment of the effectiveness of competition should be forward-looking, so it is unclear why it is referring to the nature of competition historically.
- Second, ICASA has not calculated market shares for the market it has defined. Despite this, it concludes that market shares for coverage-based NR are very high.
- Third, ICASA assumes that MTN and Vodacom do not compete for NR services, so underplaying the facts that a) NR coverage have been provided on the basis of commercial agreements since Cell-C's entry into the market in 2001 and b) Cell-C and Telkom have switched NR providers.
- Fourth, ICASA adopts a static view, underplaying a number of important factors that are likely to enhance competition in the market in the period covered by this review, including: the assignment of new spectrum, the launch of the WOAN and Telkom's (Gyro's) rapid conversion of sites to make them suitable for mobile services.

When assessing whether there is a case for imposing remedies on the NR market for coverage, ICASA should bear in mind that it is not necessary for all operators to have exactly the same level of coverage, given that coverage is only one dimension of competition. Consumers will have a range of preferences, with some valuing coverage more than others. Given this, to justify intervention, ICASA would need to demonstrate that, on a forward-looking basis, there are a significant number of geographic areas where there is a lack of effective competition for roaming services. Vodacom strongly contends that this is not the case, given that Telkom and others will increasingly roll-out their own networks, and even where only Vodacom and MTN are present, there will be strong competition between them for offering roaming services. While there may be some limited areas where only Vodacom or MTN have network coverage, this is unlikely to represent a significant number of geographic areas, meaning that any regulatory intervention would be unwarranted.

2.1 ICASA erroneously assumes that the presence of only two operators means that there is ineffective competition

ICASA has not calculated any market shares for the "roaming for coverage" market. It simply states that market shares are "very high":

[159] Paragraph 185 of Findings

> *"The only parties that are able to offer national roaming for the purpose of coverage are MTN and Vodacom with population coverage of close to 99% for 2G and 3G, and 4G coverage is not far behind. As such, market shares in terms of national roaming are very high."*[160]

While it is true that there are only two operators capable of providing widespread "roaming for coverage", and as such at least one of them will necessarily have a high market share, this does not imply that competition is ineffective. On the contrary, there is clear evidence that MTN and Vodacom compete aggressively to provide services in this market.

In recent years, Cell-C has switched some of its roaming traffic from Vodacom to MTN, whilst Telkom has switched its roaming traffic from MTN to Vodacom. This demonstrates that switching roaming provider is a real possibility for access seekers. In the case of Cell-C, it currently has wholesale agreements with both MTN and Vodacom, which would make it easy for it to switch traffic between the two, depending on who was willing to provide the most attractive offer.

This competition has led to significant price reductions for roaming, as per the data presented below, and quality improvements. This has been recognized by ICASA:

> *"The prices of the latest agreements are substantially lower than those historically. The new agreements have meant that prices for roaming have come down."*[161]

And it has also been recognised by Telkom, as a customer of NR services for coverage:

> *"Telkom stated that competition between Vodacom and MTN for national roaming customers has been dynamic in recent years, leading to price reductions and quality improvements. This enables it to compete more effectively that it could under historical national roaming agreements".*[162]

Despite this, ICASA concludes that NR prices are high:

> *"In the context of the very high levels of concentration, high prices and substantial barriers to entry, the Authority considers the market for national roaming to be ineffectively competitive within the forecast period."*[163]

[redacted]

It is also the case that regulators elsewhere have recognised that a two player market is not necessarily susceptible to ex-ante regulation.[165] Similarly, it is often the case that mobile markets have a limited number of competitors, with only two or three having national coverage. Despite this, regulators rarely find that there is ineffective competition in mobile markets[166] and where they have the market characteristics have been quite different to South Africa.[167]

[160] Paragraph 186 of Findings
[161] Paragraph 200 of Findings
[162] Paragraph 182 of Findings
[163] Paragraph 191 of Findings
[164] Telkom, as stated in paragraph 182 of Findings
[165] See section D.3, where we comment on the Portuguese precedent
[166] With the exception of the wholesale market for call termination
[167] HHIs for different mobile markets were reported as part of Vodacom's response to ICASA's Discussion Document – Figure 15

One important feature of the mobile markets[168] where SMP has been found is where SMP operators have typically not provided access on commercial terms. For example, when the authority in Spain declared Vodafone, Movistar and Orange to be jointly dominant in the wholesale mobile market for access and call origination, there were no wholesale agreements in place. This is why the authority concluded that the three operators were coordinating on a common strategy not to provide access.[169] This is entirely different to the situation in South Africa, where Vodacom and MTN have embraced the provision of NR services ever since the entry of Cell-C in 2001.

2.2 On a forward looking basis the market for roaming for coverage will become even more competitive

ICASA has taken a static view of the market, concluding that

> *"potential changes that may occur on a forward-looking basis are not guaranteed"*[170]

This means that ICASA has not taken into consideration a number of key changes which are expected to have a significant and positive impact on competition in the period covered by this review.

ICASA has downplayed the impact of the spectrum auction

ICASA speculates that access seekers may have less countervailing power following the spectrum auction:

> *"Based on the new contracts that have been signed there is evidence that the dynamics in the market are changing. It is possible though that this countervailing power will be limited once again as spectrum constraints are lifted, and so the market may change."*[171]

This is problematic for two reasons.

- First, it is inconsistent with ICASA's argument that the spectrum auction will have limited impact over the upcoming market review period. Indeed, nowhere else in its analysis of the NR for coverage market does ICASA take into account the impact of the spectrum auction. While Vodacom disagrees with ICASA's decision to exclude the impact of the spectrum auction from its analysis of the relevant markets, it is clear that ICASA must at least be consistent in its approach to this – it cannot focus only on certain instances in which the spectrum auction may have an impact.

- Second, and more fundamentally, it is not clear on what basis the auction may reduce countervailing buyer power in this market. ICASA suggests that, once spectrum constraints are lifted, the countervailing buyer power of smaller operators, that have negotiated roaming contracts in tandem with agreements to provide additional capacity to Vodacom and MTN, will be limited. However, it is unclear how this affects the bargaining power of Telkom, as it is not providing any NR network capacity to either Vodacom or MTN. Further, as explained below, and contrary to ICASA's assertion, the allocation of spectrum is expected to increase the bargaining power of smaller competitors by reducing their reliance on NR services by increasing the viability of own network roll-out.

In actual fact, there are good reasons for why competition for NR services for coverage may further improve as a consequence of the spectrum award:

[168] National roaming or MVNO access
[169] Resolution AEM2005/933
[170] Paragraph 191 of Findings
[171] Paragraph 189 of Findings

- Telkom and Cell-C / Rain or Liquid[172] will be able to purchase low frequency spectrum in the opt-in round of the auction. Given that spectrum licences come with coverage obligations[173], smaller operators will reduce their reliance on the roaming services offered by Vodacom and MTN (increasing their bargaining power), while also becoming potential competitors for offering NR for coverage.

- The ITA includes an obligation for site reference offers and ICASA is proposing additional remedies for the site market. This is expected to expedite network roll-out, again reducing the reliance of smaller operators on NR services and thereby increasing their bargaining power.

- The launch of the WOAN may also increase competition in this market. ICASA itself stated in its Information Memorandum for spectrum that the WOAN will offer both NR and MVNO access. Whilst in the short run, the WOAN may not be in a position to offer roaming services at a national level, ICASA should at least consider the impact of the WOAN on the provision of NR in the areas where it is expected to deploy its own network over the next 2-5 years.

<u>ICASA has ignored the impact of Telkom's significant expansion</u>

[redacted]

3. ICASA has failed to demonstrate that any provider in this market has SMP

ICASA considers that competition is ineffective because of high barriers to entry combined with the fact that Vodacom and MTN are the only two providers with widespread coverage. It then concludes that both have SMP in this relevant market *"due to their vertical relationships that could harm competition".*[174]

Vodacom does not agree with how ICASA has assessed the existence of SMP. In particular, Vodacom is concerned that ICASA has not provided any evidence to support its conclusion. For example, as stated above, ICASA has not calculated any market shares for the "roaming for coverage" market. It simply states that:

> *"with coverage levels of 99% and only two options available to purchasers of roaming for the purpose of national coverage, combined with significant barriers to entry, MTN and Vodacom are dominant."*[175]

This is inconsistent with the ECA, under which ICASA is obliged to calculate market shares.

4. Vodacom disagrees with the remedies proposed for this market

ICASA is proposing that:

> *"companies with SMP in the market for national roaming for the purpose of coverage provide the Authority with the information set out in the draft Mobile Broadband Services Regulations".*[176]

[172] Although noting that Liquid does not appear to be interested in purchasing low frequency spectrum based on its ITA application
[173] Which means that smaller operators ("Tier-2" operators) will have to cover at least 80% of the population within 5 years. In practice, operators may well choose to roll-out their networks faster and/or more extensively than required by the coverage obligation
[174] Findings. – paragraph 192
[175] Findings. – paragraph 192
[176] Findings - paragraph 203

Vodacom considers that there is no need for any regulation of roaming services at all, given both the existing level of competition in this market and the extent to which this competition is expected to intensify in the future (as detailed in Section F.2).

As already emphasized by Vodacom in previous responses,[177] ex ante regulation in this market is usually imposed to support new entrants in the market. As Telkom and Cell-C are now established players in the mobile services market, such intervention in the market is unnecessary.

Furthermore, SMP regulation of wholesale mobile markets is usually imposed when there are no commercial agreements. This is not the case in South Africa, where both Vodacom and MTN have provided NR for coverage to new entrants, starting with Cell-C in 2001 and where both Telkom and Cell-C have switched roaming providers. Also, the FLR and the ITA obligations on sites for Tier-1 operators,[178] should reduce the need to impose additional obligations in the national roaming market, as they allow smaller players to leverage off established sites suitably located to optimise cell coverage. As mentioned above, any interventions should be focussed on the most upstream markets/inputs possible.

Vodacom has set out its concerns on the proposed margin screen obligation in Section C of this response and so does not repeat those points here. However, it does wish to further note that, while ICASA is, rightly, not proposing explicit price regulation, the monitoring requirements it is proposing to impose may be cumbersome and create regulatory uncertainty as to how this information is going to be used. In particular:

- [redacted]

- ICASA recognises the challenges associated with a comparison of roaming rates with retail tariffs:

  "explicitly linking retail and roaming prices could potentially create competitive distortions in the two markets"[180]

However, despite this, it seems that it will compare roaming tariffs with retail tariffs. This is because ICASA states that *"should roaming rates appear to exceed retail rates, these will be referred to the CC for investigation."*[181] For the reasons set out in Section C of this response, ICASA must recognise valid reasons for why coverage roaming and retail prices cannot easily be compared.

ICASA is also proposing to collect detailed site-level information on roaming traffic. It is unclear how ICASA intends to use this information, although Vodacom assumes that ICASA would seek to use it to determine the split of roaming traffic between higher and lower cost sites. It is also unclear how ICASA will ensure the data from different sources will be comparable or usable. Given the burden this may impose on operators, ICASA should consider a more proportionate approach. For example, it should collect this data only if it considers that an SMP operator has failed the required aggregated margin screen test, or if an access seeker has submitted a formal and reasoned complaint regarding the level of roaming charges.

[177] Section F.3.1. of Vodacom's response to the Discussion Document on the Market Inquiry into Mobile Broadband Services
[178] By regulating the related upstream market (the market for sites).
[179] This comes despite ICASA stating *"The Authority finds that while providers of traditional coverage roaming services can provide additional capacity, the providers of roaming that are being used for additional capacity (such as Liquid, Rain and Cell-C) are unable to provide coverage "* (Paragraph 174 of Findings).
[180] Paragraph 202 of Findings
[181] Paragraph 205 of Findings

G. Upstream market 3a and 3b: MVNO access and APN services

In this section, we comment on ICASA's Findings and Draft Regulations in relation to upstream markets 3A and 3B, for MVNO and APN services. In summary, and for the reasons set out below, Vodacom supports a number of ICASA's conclusions. In particular, Vodacom supports ICASA's conclusion that there is effective competition in the MVNO access market. On a forward-looking basis, the spectrum auction should also improve conditions for MVNO access, given the obligation to provide MVNO access and the boost to capacity. In contrast, however, ICASA believes there is ineffective competition in the market for wholesale APN services. Vodacom does not believe this conclusion is robust.

Furthermore, Vodacom is especially concerned that despite ICASA not meeting the legal requirement for imposing remedies in these markets (i.e., despite ICASA not finding that competition is ineffective and that one or more operators have SMP) it is, in fact, proposing monitoring remedies in these markets.

This is clearly inappropriate as the proposed approach falls outside of the scope authorised by Section 67, and therefore these remedies should be removed from the Regulations. Notwithstanding this, if ICASA does monitor margins for APN services, it should be comparing the average prices for wholesale APN services with the average prices for retail APN services (rather than all retail mobile services). This would more accurately reflect how APN access seekers use wholesale APN services.

In line with the rest of its submission, we turn first to ICASA's market definition. We then consider, separately, the MVNO market and the APN market, commenting first on the Findings in respect of the effectiveness of competition and SMP, and secondly, on ICASA's remedy proposals.

1. The market definition is appropriate

For the reasons set out below, Vodacom considers that the market definition set out by ICASA in the Draft Regulations and Findings is appropriate.

1.1 Product market definition

Vodacom considers that MVNO access (Upstream Market 3A) and APN services (Upstream Market 3B) belong in separate markets. This is consistent with ICASA's view as reflected in its Findings:

> *"...it is likely that MVNO and wholesale APN services (including resellers) are in separate markets from a demand side perspective. A SSNIP in the price of APN packages will not lead to consumers switching to an MVNO service. This was supported by representations made by ISPA, some of whose members offer branded reseller or wholesale services. They note that there is greater complexity to MVNO agreements and investment required in branding and distribution."*[182]

From a demand-side perspective, APN and MVNO access services clearly have very different characteristics and are used to fulfil different needs.

APN services are used to either:

- Access a private network (for example, accessible only by a company's employees); or
- Provide reverse billed data to a particular URL (for example, a bank may use an APN to grant its customers free access to the bank's website or mobile app).

In contrast, MVNO access is used to provide mobile services more generally to consumers, covering voice, messaging and data services, typically to mass market consumers.

[182] Paragraph 210 of Findings

This makes it unlikely that customers of either wholesale APN services or MVNO access would consider switching to the other wholesale service following a change in the relative price or quality of the services. That is, Vodacom does not consider that a SSNIP test with either APN services or MVNO access as the focal product would find the relevant markets to be any wider than APN services or MVNO access.

1.2 Geographic market definition

Vodacom agrees with ICASA's position[183] that the geographic market definition for both MVNO and APN services should be national, reflecting the national scope of these wholesale agreements and that customers of these services are typically looking to provide services on a national basis.

2. MVNO Access Market

Given ICASA's market definition, Vodacom now considers, separately for the two markets, ICASA's analysis of the effectiveness of competition and whether any provider has SMP.

2.1 Vodacom supports the conclusion that competition is effective in the MVNO access market

ICASA concludes in its Findings that competition is effective in the MVNO market.[184] This is because:

- multiple operators are able to offer MVNO services if they so wish;
- market share is not a reliable reflection of competitive dynamics in cases of competition for (vs in) the market; and
- the capacity available for operators to provide MVNO services is a more appropriate basis for the assessment of market shares (for example, relative to current revenue or customer shares).[185]

The Findings also sets out a number of reasons which impact the state of competition in the market for MVNO access, for example highlighting that:

> *"the ITA for high demand spectrum requires that MVNO offers be provided. This is likely going to have a significant impact on the market for MVNO services."*[186]

The Findings go on to state:

> *"There are also indications that as capacity constraints have eased; the larger operators are entering the MVNO market. For instance, Vodacom has supplied evidence that it has negotiated offers with MVNO providers but that these have ultimately been unsuccessful either because they chose to go with Cell C who was cheaper or because they did not proceed. MTN has also announced a new MVNO platform and a new MVNO partnership with Pick n Pay"*

Vodacom agrees with ICASA's conclusion that there is effective competition in the market for wholesale MVNO access. In addition to the aforementioned observations made by ICASA around the way competition should be assessed in this market, and in relation to ongoing/future market developments, Vodacom believes there are a number of important further reasons why the market for MVNO access is effectively competitive.

[183] Paragraph 211 of Findings
[184] Paragraph 222 of Findings
[185] Paragraph 218 of Findings
[186] Paragraph 218 of Findings

In particular, as discussed in Section B.2, both the spectrum ITA and the WOAN have the potential to have a significant impact over the upcoming market review period.

In the case of the ITA, MNOs who acquire spectrum in the ITA will have an obligation to provide open access to MVNOs while the assignment of spectrum will also result in significant additional capacity being available to the market, facilitating further entry and expansion. As highlighted in Section B.2 and in line with ICASA's observation that the easing of capacity constraints incentivise operators to enter the MVNO market, those MNOs who are currently capacity constrained will also be able to offer more attractive terms to MVNOs than they are currently able to offer.

The WOAN will also directly introduce another credible supplier of MVNO services, introducing another competitive constraint, as discussed in Section B.2.

Finally, Vodacom itself is in the process of concluding an MVNO agreement. This demonstrates the capacity of MNOs to offer MVNO access as well as the ease of entry for new MVNO players in the market.

2.2 Vodacom supports the conclusion that no operator has SMP in the MVNO access market

ICASA goes on to state explicitly that no operator has SMP:

> *"it is important to note there is no evidence that any participant in this market has significant market power."*[187]

Vodacom agrees with ICASA's assessment, and notes that competition will intensify further in the next few years as a result of the developments noted in Section B.2 above, making it extremely difficult for any operator to establish a position of SMP.

However, ICASA should have taken a similarly forward-looking view in its assessment of SMP for the other markets it has defined in this process. For example, current market shares were the main factor underpinning ICASA's competitive assessments for retail services and sites, while for NR, market shares were not taken into consideration at all. ICASA's ability to look beyond Cell-C's significant current market share in the market for MVNO access and not conclude that any operator has SMP seems appropriate. ICASA should have followed a similar approach with other markets.

Had ICASA undertaken a similarly forward-looking approach to its SMP assessments of the other mobile markets, it would have found no SMP in any of those markets.

2.3 Remedies

As discussed in more detail in Section C, ICASA's proposed remedies include price monitoring for MVNO services:

> *"However, the Authority's view is that competition concerns in the retail market will likely be **remedied** through wholesale interventions including with respect to APN and MVNO price monitoring, set out in the draft Mobile Broadband Services Regulations."*[188] [Emphasis added]

As already discussed in Section B.1, ICASA cannot impose Section 67(4)(d) remedies on MVNO services given that ICASA has itself concluded, as discussed above, that there is effective competition and that no operator has SMP in this market. Since Vodacom is in agreement with the Findings in relation to competition and SMP for MVNO access, Vodacom does not accept that ICASA is entitled to or should impose any remedies, including monitoring, in relation to MVNO access.

[187] Paragraph 221 of Findings
[188] Paragraph 227 of Findings

3. APN services

3.1 Vodacom disagrees with ICASA's conclusion that competition is ineffective in the APN services market

ICASA concludes in its Findings that competition is ineffective in the APN services market:

> *"wholesale prices above retail prices, together with the price trends over time strongly suggests ineffective competition in the provision of APN services."*[189]

Vodacom disagrees with the conclusion that there is ineffective competition for APN services for the following reasons:

- [redacted]

  > *"in the event that* ***any category of retail price is below any wholesale price*** *the SMP operator is required to submit detailed and fully auditable evidence to the Authority, with all assumptions clearly specified,* ***showing that this differential is cost based or temporary****."*
  > [Emphasis added]

- [redacted] This recent evidence is clearly inconsistent with ICASA's claim that price trends over time are somehow problematic.

- Section B.2.2 provides a detailed discussion of how the spectrum ITA will facilitate improved capacity and coverage which will in turn benefit all mobile services by increasing the quality and availability of services, including APN services. In line with ICASA's observation in the MVNO market that easing of capacity constraints promotes market entry, this highlights the role that increased spectrum will play in further improving competition in the provision of APN services, among other services, and ensuring MNOs are able to continue to compete effectively in future.

- In Section B.4.1 and as summarised when considering the effectiveness of competition in other markets, Vodacom provides a detailed explanation of why it considers all of ICASA's assessments of ineffective competition to be flawed. For example, it provides evidence of Telkom's rapid growth and MTN's significant lead in network quality – and to show that Vodacom does not in fact have market power in mobile markets, including wholesale markets.

- Also relevant to APN services is the ability of the WOAN to quickly become a credible national wholesale provider, as covered in Section B.2.2. There is no reason that the WOAN would not be able to enter the APN service market, providing further competitive constraint to Vodacom beyond the currently competitive market and the effects of the spectrum ITA described above.

3.2 Vodacom supports the conclusion that no operator has SMP in the APN services market

ICASA clearly states that it finds no operator to have SMP in the market for APN services:

[189] Paragraph 224 of Findings
[190] Section 7, page 8 of Findings

> *"From the Authority's assessment of the market, however,* ***there is no evidence that entities in the market have significant market power.****"*[191] [Emphasis added]

ICASA explains that this is, at least in part, a result of the ability for all operators to offer APN agreements (i.e., as a result of available capacity). This suggests that, as with its assessment of MVNO access services, ICASA has taken a forward-looking view of market developments in order to arrive at its conclusions in respect of SMP. Vodacom agrees with ICASA's approach and conclusions.

Echoing its statement made in relation to MVNO access services, Vodacom urges ICASA to also take such factors into consideration for other markets rather than taking a narrow, static view of market shares. Vodacom is confident that if ICASA were to take such an approach, it would find that competition is effective in all the relevant markets covered in this process.

3.3 Remedies

As set out in Section B.1, ICASA can only impose Section 67(4)(d) remedies on an operator in the event that it finds both ineffective competition in a market and an SMP designation on that operator. As such, given the absence of any SMP finding in the APN market, there is no legal or economic basis for ICASA to monitor margins or impose any other remedies on Vodacom or other operators in relation to wholesale APN services. Furthermore, as explained above, Vodacom believes that competition is effective in the market for wholesale APN services.

Notwithstanding this, if ICASA does monitor margins for APN services, it should be comparing the average prices for wholesale APN services with the average prices for retail APN services (rather than all retail mobile services). This would more accurately reflect how APN access seekers use wholesale APN services. This approach would also be consistent with ICASA's view that APN services, which meet specific data needs for businesses, are in a separate market to MVNO services, which allow access seekers to offer a range of services to their retail customers.

H. Conclusions

While Vodacom is pleased to see ICASA finalise the Market Inquiry, it is concerned that certain of the proposed regulations may not be within the ambit and purpose of the empowering legislation and, in making its findings, ICASA may not have taken account of all relevant considerations. In many respects, ICASA's Findings do not accurately reflect the sector as it stands today, let alone give a proper forward looking view of the sector that should be the centre piece of any market review. The mobile sector has changed significantly since ICASA began its Priority Markets process, but the Findings and Draft Regulations fail to recognise this. The result is that certain of the remedies and interventions proposed in the Draft Regulations appear unreasonable and/or are not apparently relevant or connected to the current or future reality in the relevant markets.

In particular, the Findings fail to:

- Recognise Telkom's sustained growth and success in the both the retail and various wholesale markets. For example, over the past two years, Telkom has more than doubled its mobile service revenues and mobile data revenues, while it is also the market leader in terms of mobile data traffic. [redacted]

[191] Paragraph 226 of Findings
[192] Source: Facebook Actionable Insights Trends

Recognise the many advantages that Telkom has in the market, amongst others: its greater access to capacity spectrum and fibre backhaul, its control of ducts and poles, as well as the multiple options it has for extending its network across South Africa.

Reflect the very considerable degree of competition in the markets – as evidenced by the strong competition between operators on both price and non-price matters. For example, operators have recently implemented a number of important price reductions, whilst operators have also made significant attempts (underpinned by large investments) to improve their network quality despite facing acute spectrum constraints. Operators have different unique selling points, which allows users to find an operator that best matches their specific needs.

- Recognise the broad raft of wholesale services offered in the market, including site access, DPS and NR. While it may be the case that only MTN and Vodacom can offer roaming services in remote areas, this does not mean that competition between Vodacom and MTN is not intense. Indeed, even Telkom, who, as a major customer of NR might be expected to argue for intervention in that market, has argued that no intervention is necessary[193].

- Apply a proper forward looking view to the sector and so omit many factors which will further drive competition going forward. Most crucially, the Findings underplay the role of spectrum in the sector – both failing to recognise how ICASA's parallel spectrum release process will ease capacity constraints, enhance competition in wholesale markets and improve outcomes in retail markets, and how the failure to release spectrum up to now has contaminated current market outcomes. This comes despite the fact that ICASA recognises that the spectrum auction will have a "formidable impact" (but not until after the upcoming market review period).

Vodacom has particular concerns over some of the pro-competitive measures ICASA has proposed

Vodacom has significant concerns about a number of the measures proposed in the Draft Regulations. As set out in more detail, below, Vodacom rejects ICASA's conclusions that competition is not effective in the retail mobile market, the site access market and the NR for coverage market. Vodacom also rejects ICASA's view that it has SMP in a number of these markets. Given this, Vodacom does not believe that ICASA has met the necessary threshold to impose pro-competitive conditions in these markets. As such, the proposed remedies should be withdrawn. But, even if ICASA did demonstrate properly that pro-competitive remedies were required, it does not appear to have considered how the measures it is proposing could cause significant, unintended harm to the future health of the sector.

Generally, Vodacom agrees with ICASA that direct retail market regulation is unnecessary and that any pro-competitive measures – if required – should focus on upstream wholesale markets. Vodacom also agrees that direct price controls in wholesale markets are likely to be significantly damaging to future investment in the sector. To that extent, were any pro-competitive measures required, ICASA would be correct to focus on monitoring remedies, as it proposes in the Draft Regulations. However, there is no economic rationale for ICASA to monitor tariffs at the level of detail it has proposed in Sections 7.1.5 to 7.1.7 and 7.2 of the Draft Regulations. Vodacom assumes that ICASA is, through this monitoring regime, attempting to identify retail pricing which might create margin squeeze concerns and so which should be investigated further by the Commission. If that is indeed the case then ICASA must align its approach more closely with how an actual margin squeeze test would be conducted by the Commission. Without doing this, ICASA risks raising false alarms and creating an entirely unnecessary regulatory burden on the sector, while also potentially indirectly either:

- forcing NR prices down to levels which are not compatible with the investment necessary in the sector or leading to the withdrawal of some NR services; or

[193] Telkom submission to ICASA - Discussion document on the Market Inquiry into Mobile Broadband Services in South Africa

[redacted]

Should ICASA persist with this obligation it should, therefore, only require SMP operators (in markets which are not effectively competitive) to submit aggregated average price data, covering all regions, and for the portfolio of voice and rated data services that the SMP operator offers and which access seekers use NR to compete against. Furthermore, with regards to NR specifically, ICASA needs to consider more carefully whether it is appropriate to compare retail prices with a wholesale price that an access seeker such as Telkom uses for only a very small proportion of its traffic. In particular, ICASA must take into account the ability for access seekers to cherry pick where they rely on roaming as opposed to own network build or other wholesale services, and hence the likelihood that prices for NR do not provide a good proxy for network costs across South Africa as a whole.

Finally, Vodacom notes that ICASA proposes to apply the same monitoring remedies also to MVNO and APN services. This is contrary to the legal framework in South Africa, which requires ICASA to both find that a market is ineffectively competitive, and identify one or more operators with SMP, before imposing pro-competitive conditions. ICASA has, correctly, not defined any operators to have SMP in the MVNO access or APN markets. It has also found the MVNO access market to be effectively competitive. It cannot, therefore, impose any pro-competitive conditions on providers in these markets.

ANNEX B – Practical issues with monitoring margins at a granular level

Vodacom will face some challenges to provide the revenue, usage and effective retail prices per some of the segments required by ICASA. Some of these challenges are set out below.

Reconciling to reported financial numbers

Vodacom's current financial reporting systems do not report the revenue information at the granularity required by ICASA. The only possible methodology for Vodacom is to refer to the customer-billed revenue from its reporting systems. Importantly, this will not be consistent with the accounting view of revenue, as this would be before any usage-based deferrals, credit notes and other accounting adjustments.

Integrated or multiple service offerings or bundles

[redacted]

From 1 April 2019, Vodacom, under IFRS15, recognises only two performance obligations namely the device and services. Services when offered under a subscription or multiple service offering are no longer split into individual service types using any fair value methodology.

Bundle allocation

The bundle revenue will be recognised when the bundle is sold to the customer. The customer will use the allocated voice minutes, data and SMS over time and there might be a timing difference between the revenue and the usage. This might distort the effective rate slightly. In some cases, customers may buy a bundle in one province, but then use the associated traffic allowance in another province. This could introduce some inaccuracies when trying to screen margins at the province-level, as proposed by ICASA.

Time of day

[redacted].

ICASA specifically requested revenue, usage and effective rates for 5am to midnight and midnight to 5am. In order to achieve this allocation, all the data usage (integrated, in and out of bundle, excluding Night Owl) needs to be allocated between 5am and midnight and midnight and 5am. In turn, the revenue will have to be proportionally allocated, based on the traffic distribution.

The impracticalities regarding the integrated or multiple service allocations and the free product offerings allocations will apply to and impact the "time of day" allocation as well.

[redacted].

Province, and within province, by urban and rural

A number of challenges apply to allocate revenue and usage to provinces, urban and rural.

The impact of the above on the categories requested by ICASA

ICASA is proposing to request data on effective retail and wholesale prices for:

- a) prepaid, hybrid, postpaid; b) consumer, business; c) province; d) within provinces by split by urban and rural; e) between 5am and midnight and midnight and 5am

[redacted]

- [redacted]

[redacted]

NR data volumes used by site

[redacted]