

Vodacom (Pty) Ltd submission on the draft "Call Termination Regulations" and Market Review document pursuant to section 67(4) of the Electronic Communications Act, no. 36 of 2005 in Notice 314 of 2010 (GG NO. 33121 published on 16 April 2010)

Vodacom (Pty) Ltd written submission in response to Notice 314 of 2010 with regard to the Authority's intention to prescribe "Call Termination Regulations" pursuant to section 67(4) of the Electronic Communications Act (No. 36 of 2005)

(GG NO. 33121 published on 16 April 2010)

INTRODUCTION

Vodacom thanks Independent Communications Authority of South Africa ("the Authority")s for the opportunity to comment on the draft "Call Termination Regulations" ("the draft Regulations") pursuant to section 67(4) of the Electronic Communications Act, Act 36 of 2005 ("the ECA") and section 4 of the Independent Communications Authority of South Africa Act, Act 13 of 2000, as amended ("the ICASA Act"). Vodacom records its intention to participate in the public hearings scheduled for the 28th to the 30th of June 2010.

Vodacom welcomes the intent of the draft Regulations. It is noted that whilst there is still a debate about what level mobile termination rates ("MTR") should be set at to maximise the well-being of South African consumers [urban *and* rural], Vodacom accepts the approach of the Authority to set the proposed cost-based MTR estimate on available and verifiable real cost data. Vodacom agrees that the wholesale network cost-based rate is around the R0.40 level.

In saying that, however, Vodacom notes that the proposed glide path from the current MTR to R0.40 is far too aggressive, and will significantly impact on the wholesale and price structures of the South African communications industry. Specifically, we note that the Authority is proposing a 50% decline in MTRs in the current financial year. This will have significant negative impacts on prevailing business models.

Vodacom recommends delaying the first step in the proposed glide path (reduction to R0.65) until March 2011. This will assist businesses to factor the new rates into their business models and decisions for the next financial year.

Vodacom's input in this submission is divided into four parts. Part I of the submission addresses our concerns with the proposed glide path. Part II outlines Vodacom's support of the Authority's proposal for symmetrical MTRs. Part III, assesses the legality of the procedure followed by the Authority in its effort to regulate call termination. Part

Vodacom (Pty) Ltd submission on the draft "Call Termination Regulations" and Market Review document pursuant to section 67(4) of the Electronic Communications Act, no. 36 of 2005 in Notice 314 of 2010 (GG NO. 33121 published on 16 April 2010)

IV of the submission sets out Vodacom's comments on the draft Regulations and the Market Review document, including suggested drafting formulations.

PART I

Glide path

Vodacom re-iterates that it supports the Authority's estimate of a wholesale network cost-based MTR of around R0.40. Vodacom commends the Authority for allowing a glide path in the reduction of call termination rates and supports the view expressed by the Authority in the Market Review document, recognising that:

"the path of reductions in wholesale call termination charges should give due consideration to two key objectives, reductions should:

- be achieved sufficiently quickly in order to deliver substantial benefits; and*
- allow sufficient time for licensees to adjust to new charging levels and structures and take these changes into account in the business plans and planned capital expenditure."*¹

As the Authority is aware, the mobile licensees have as recent as 1 March 2010 reduced their peak mobile termination rate from R1.25 to R0.89. This reduction amounts to a reduction of around 30%. Due to the fact that the reduction and implementation date was anticipated from at least August 2009, operators have been able to take measures to absorb shocks to their operating models and systems precipitated by this reduction in MTRs.

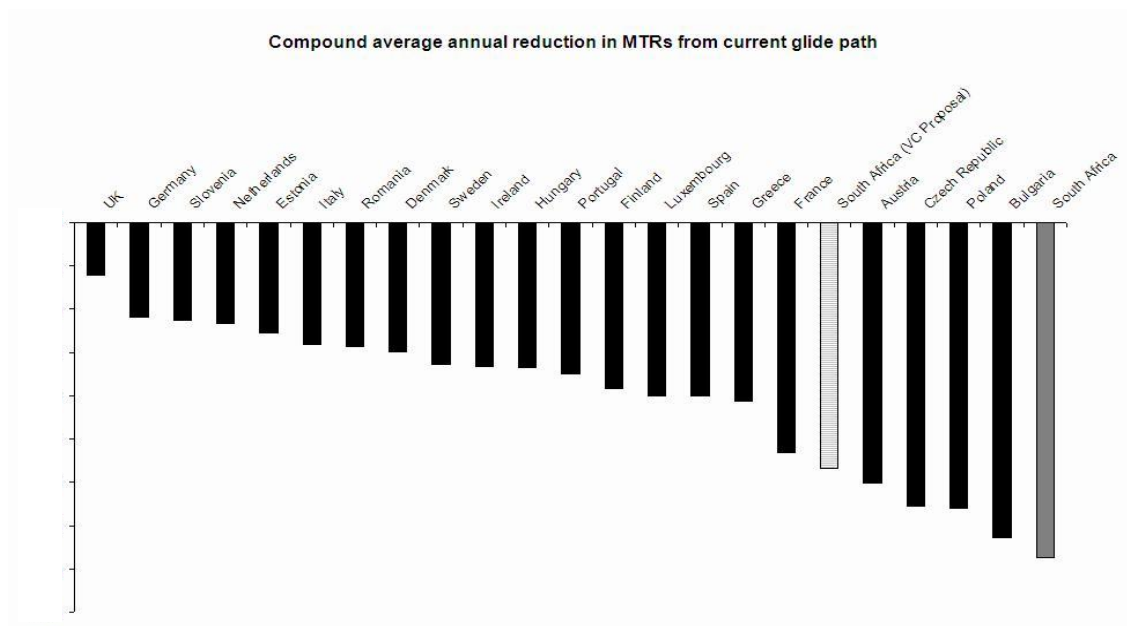
Draft Regulation 9(1)(b) proposes a further reduction to a 'single' (peak and off-peak same) rate of R0.65 to be implemented by July 2010 as part of a glide path, which will have the effect of increasing peak mobile termination reduction

¹ ICASA Wholesale Call Termination Market Review for the period 2010-2013 document, page 72

Vodacom (Pty) Ltd submission on the draft “Call Termination Regulations” and Market Review document pursuant to section 67(4) of the Electronic Communications Act, no. 36 of 2005 in Notice 314 of 2010 (GG NO. 33121 published on 16 April 2010)

from 30% to almost 50%, with an additional reduction of 15% for off-peak mobile termination rate - all in the space of a few months.

To assist the Authority in its assessment of an appropriate glide path, the table below is included showing the glide paths agreed by NRAs around the world. From this it is clear that there is very few, if any, precedents for a 50% decline in one year. Taking the yearly decline (CAGR) of the proposed glide path, Vodacom notes that it will be one of the steepest glide paths proposed. If the Authority adopts Vodacom’s proposal to delay reduction to R0.65 until March 2011, South Africa will still experience one of the steepest declines in MTRs.



Vodacom respectfully submits that the proposed additional reduction to the mobile termination rate to be implemented by 01 July 2010 would effectively result in the implementation of an immediate and very significant wholesale price reduction which, as noted by the Authority, will impact negatively on business plans and capital expenditure programmes of the affected operators.

Vodacom (Pty) Ltd submission on the draft "Call Termination Regulations" and Market Review document pursuant to section 67(4) of the Electronic Communications Act, no. 36 of 2005 in Notice 314 of 2010 (GG NO. 33121 published on 16 April 2010)

Vodacom acknowledges that MTRs have traditionally been high in South Africa. This has, while ensuring diffusion of mobile technology to the benefit of all South Africans and economic growth, resulted in a uniquely South African industry structure. As a result, we anticipate significant disruption to the South African communications industry structure. Vodacom recommends that the Authority should ensure that industry disruption is minimised as much as possible.

An implementation date of July 2010 neither allows sufficient time for licensees to adjust to new charging levels and structures; nor space for business plans and planned capital expenditure programmes to be adapted. Highlighted below are some of the negative impacts that may be occasioned to the operators by the sudden reduction of rates without a smooth glide path-

- Competition may be distorted especially in the case of operators dependant on the current termination revenues. In this case, a severe and immediate drop in termination revenues will hamper the ability of such operators to compete as there is insufficient time allowed to adapt and change business models and assumptions. For example: renegotiation of existing national roaming agreements between affected operators in the market.
- Insufficient time to re-negotiate contracts with distribution partners (e.g. Service providers).
- Business plans will be disrupted as it will be impossible to re-plan and adjust capital expenditure commitments on such limited time scale contemplated in ICASA's Regulations and it will be impossible to review tariff plans and bundled offers to adjust to the new price structure in time

Vodacom (Pty) Ltd submission on the draft "Call Termination Regulations" and Market Review document pursuant to section 67(4) of the Electronic Communications Act, no. 36 of 2005 in Notice 314 of 2010 (GG NO. 33121 published on 16 April 2010)

and to comply with the reasonable notice period required by distribution channels and customers in respect of tariff changes and product offerings.

Vodacom, therefore, submits that it is critical for the Authority to reconsider the proposed further reduction of mobile termination rates for 2010 and **recommends that the implementation date for the first reduction in terms of the glide path be moved to 1 March 2011 at the earliest.**

Not only is Vodacom's concern with the start point of 1 July 2010 for the glide path, but Vodacom also wants to express a preference for the retention of the blended rate concept – maintaining the peak and off-peak rates differentiation - as opposed to the proposed move to a single rate. Should the Authority, however, be of the view that a single set rate is good for South Africa, Vodacom recommends that consideration – for reasons of allowing space for licensees to adapt and adjust their business models – should be given to delaying the implementation of a single rate to coincide with the end point of the glide path period by phasing in the single rate through a gradual narrowing of the difference between peak and off-peak rates over an agreed glide path period.

PART II

SYMMETRIC MTRs

Vodacom agrees with the proposal by the Authority to set symmetrical MTRs, as this is consistent with the economic and competitive reasons for the regulation of MTRs – to estimate the price that would exist in a contestably competitive market. In a competitive market, new entrants would not be able to charge a higher price due to their lack of scale or any other, including cost, "disadvantage".

Vodacom notes that it is accepted that asymmetric MTRs distort competition – indeed they are intended to do so in order to 'compensate' for competitive disadvantages which small operators or recent entrants are otherwise claimed to face. If asymmetric MTRs had no impact upon competition then it is hard to see why NRAs would use them. But it is also claimed that the benefits arising from these asymmetries – in the form of increased competition provided by smaller network operators or new entrant who might otherwise exit the market – justify the intervention.²

The UK Competition Commission³ ("UKCC") in 2009 undertook an extremely detailed and thorough investigation into MTRs. One of the key issues raised was the need for asymmetric MTRs. The UKCC, while acknowledging that in some

² This is considered in detailed modelling of authors such as Peitz (2005), who points to the fact that although asymmetric termination rates may encourage market entry, they result in a net loss of economic welfare and reduce investment incentives for the established firm. See Peitz, M. "Asymmetric regulation of access and price discrimination in telecommunications", International University in Germany, School of Business Administration, Working Paper 28/2005, January 2005. See Figure 3 in relation to economic welfare.

³ http://www.competition-commission.org.uk/appeals/communications_act/mobile_phones_determination.pdf.

Vodacom (Pty) Ltd submission on the draft "Call Termination Regulations" and Market Review document pursuant to section 67(4) of the Electronic Communications Act, no. 36 of 2005 in Notice 314 of 2010 (GG NO. 33121 published on 16 April 2010)

circumstances asymmetric MTRs may bring long-term benefits to the industry, there are a number of negative effects:

"If it is not based on differences in efficient costs, the beneficiary MNO will be able to make excess profits from MCT and may use those excess profits to compete harder for any given subscriber in the retail market. This could give the MNO a competitive advantage over its rivals that is caused by differential regulatory treatment, not greater efficiency or better service;

- *The asymmetric MCT rate will raise the wholesale costs for other MNOs and FNOs. This may put upward pressure on the other operators' retail prices, making it harder for them to compete with the beneficiary MNO, adding to the distortions of competition between MNOs and potentially hindering competition between mobile operators and between mobile and fixed operators.*
- *Asymmetry may mute the incentives of the beneficiary MNO to reach efficient scale, as doing so would cause it to lose the protection of the asymmetry, and may also lead to, or sustain, inefficient entry.*
- *Asymmetric MCT rates may not be an effective mechanism for intervention as any increase in retail prices (if they are applied specifically to calls to the beneficiary MNO) would ultimately be harmful to the beneficiary MNO, as they may reduce the amount of traffic and termination income received by it, and may hinder its growth." (Para.5.4.53)*

Vodacom wishes to emphasise the findings above that the imposition of asymmetric MTRs for smaller MNOs could, amongst others, result in the retail cost to call those networks increasing. That is, asymmetric MTRs promote high

Vodacom (Pty) Ltd submission on the draft "Call Termination Regulations" and Market Review document pursuant to section 67(4) of the Electronic Communications Act, no. 36 of 2005 in Notice 314 of 2010 (GG NO. 33121 published on 16 April 2010)

off-net pricing: and in so far as the Authority believes this to be a problem, asymmetric MTRs would not be good for competition.

For the above reasons, Vodacom welcomes the pro-competitive decision of the Authority to recommend symmetric MTRs.

PART III

OVERAL PROCEDURAL APPROACH TO IMPLEMENTATION OF CHAPTER 10 AND SECTION 67(4) OF THE ACT IN PARTICULAR

Vodacom has continuously - in a plethora of past submissions emphasised the need for regulatory certainty in so far as the import and meaning of Chapter 10 of the ECA is concerned *via* the promulgation of the section 67(4) regulations. In Vodacom's view the value of these regulations is and should not be restricted to the current market review process, but significantly should also play a vital role for future market reviews for the following reasons:

- set boundaries on the definition and appropriate remedies for markets other than call termination; and
- set the tone for assessing the appropriateness of remedies imposed when the call termination intervention is revisited in a few years.

Vodacom's submission, therefore, is that the section 67(4) Regulations should provide the foundation and guideline for all subsequent Chapter 10 market inquiries into markets or market segments. The clarity that should be provided by these regulations in amplifying the requirements of Chapter 10 of the ECA should provide the degree of regulatory certainty that is obtained in other jurisdictions that have similar regulatory obligations, such as the European Union and Malaysia.

In providing our comments to the draft Regulations, it is instructive to set out Vodacom's overall understanding of the full Chapter 10 market review process and how its various elements hang together. The section 67(4) "enabling" Regulations and the underlying steps of the market review process that they inform and guide, are illustrated in Figure 1 below.

Vodacom (Pty) Ltd submission on the draft “Call Termination Regulations” and Market Review document pursuant to section 67(4) of the Electronic Communications Act, no. 36 of 2005 in Notice 314 of 2010 (GG NO. 33121 published on 16 April 2010)

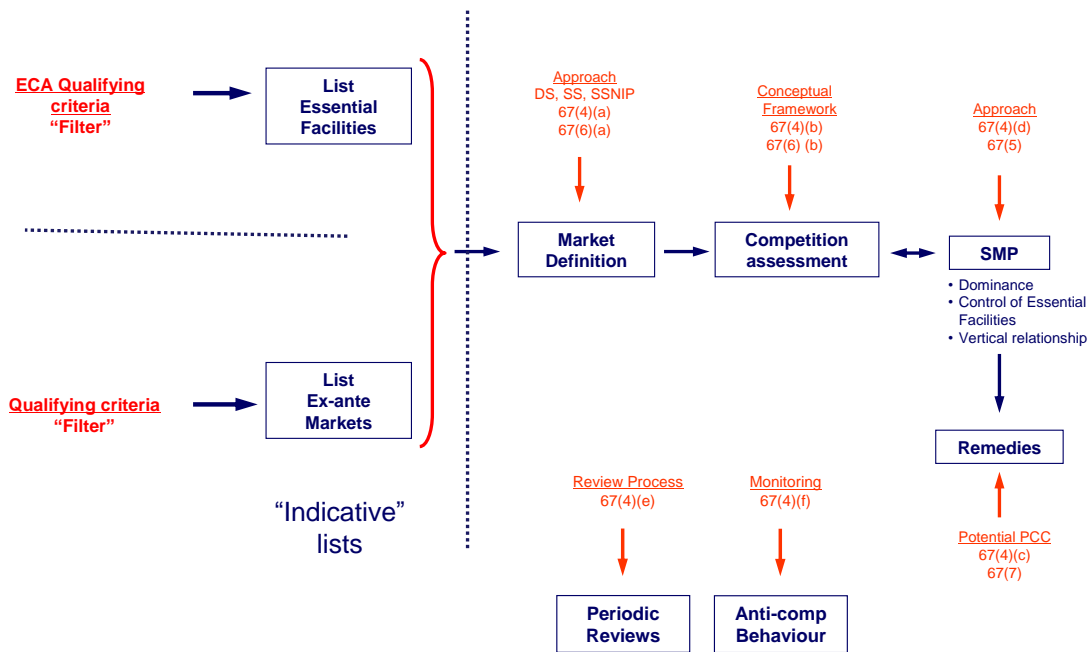


Figure 1: Overview of Chapter 10 Market review process

Vodacom takes note of the Authority’s view that the review of the call termination market has been an ongoing process since 2007 starting with the Publication of the Findings pursuant to section 4C of the ICASA Act of an Inquiry Conducted in terms of section 4B (“2007 Findings Documents”) and that no significant substantial new evidence would cause a change in the Authority’s view on market definition.⁴

However, based on the market review process illustrated under Figure 1 above, Vodacom submits that ICASA would be erring in law by inventing a process for market reviews which fails to heed the a two-stage process required for the development and implementation of the section 67(4) Regulations:

⁴ ICASA Wholesale Call Termination Market Review for the period 2010-2013, page v

Vodacom (Pty) Ltd submission on the draft "Call Termination Regulations" and Market Review document pursuant to section 67(4) of the Electronic Communications Act, no. 36 of 2005 in Notice 314 of 2010 (GG NO. 33121 published on 16 April 2010)

- Firstly, the regulations must define the relevant market or market segment that the Authority wishes to investigate, and set out the methodology to be used in determining the effectiveness of competition in such market or market segment; the pro-competitive measures that the Authority may impose in order to remedy market failure in such market or market segment; and the other matters listed in section 67(4).
- Secondly, the Authority would apply those regulations by implementing the designated methodology for determining effective competition in the relevant market or market segment, and imposing any pro-competitive measures that it regards as necessary in order to address any market failures in markets that it finds to be uncompetitive (according to the methodology prescribed in the Regulations).

Parliament's intent in requiring the two-stage process enunciated above is, in Vodacom's view, evident from the conditional and forward looking language in the opening paragraph of section 67(4):

"The Authority must prescribe regulations defining the relevant markets and market segments, as applicable, that pro-competitive conditions may be imposed upon licensees having significant market power where the Authority determines such markets or market segments have ineffective competition."

The above language read with sections 67(4)(a)-(c) of the ECA is in Vodacom's view inconsistent with an interpretation of section 67(4) in which the requisite regulations simultaneously prescribes, in the same regulatory instrument, both the methodology to be followed for a market review process in respect of a particular market, and the outcome of such process.

Vodacom (Pty) Ltd submission on the draft "Call Termination Regulations" and Market Review document pursuant to section 67(4) of the Electronic Communications Act, no. 36 of 2005 in Notice 314 of 2010 (GG NO. 33121 published on 16 April 2010)

Vodacom submits that the Authority has not followed the aforementioned two-stage process in issuing the draft Regulations. Instead, it has inverted the process, first conducting a market review of the call termination market and then issuing the Regulations. In Vodacom's view the process followed by the Authority is both irregular and outside the scope of its powers for at least two reasons:

- Firstly, the market review process conducted by the Authority did not take place pursuant to any regulations and, to that extent; is outside the powers of the Authority under the ECA. The wording of section 67(4) of the Act does not permit a market review process by the Authority outside of any properly issued regulations (certainly, the informal Guideline would not suffice for that purpose).
- Secondly, the draft Regulations themselves do not comply with the requirements of section 67(4) of the Act in that they purport to combine not only the methodology required to be followed for a market review process but also the outcome of such a review in respect of the call termination market, including the pro-competitive measures to be imposed on licensees found to have significant market power in that market.

In the circumstances, Vodacom believes that the draft Regulations, if issued in their current form, would be unlawful and open to judicial review.

PART IV

Detailed comments on the draft Regulations and the Market Review document

A. DETAILED COMMENTS ON THE DRAFT REGULATIONS

Comments are provided in the same order and with the same numbering as set out in the draft regulations (Notice 33121 of 2010)

1. Definitions

Vodacom notes that the draft Regulations contain a definition of the term '**Downstream markets**' although this term is not used anywhere in the draft Regulations but only in the attached Market Review document. Based on the aforementioned, Vodacom recommends that the term 'downstream markets' should be deleted from the draft Regulations as it is immaterial.

In line with Vodacom's comments under draft Regulation 6(2) below, Vodacom submits that the definition of "**Established SMP Licensees**" should be amended so that it is not be defined with reference to '*additional pro-competitive remedies imposed*'. Vodacom suggests the following definition:

"Established SMP licensee" means a licensee with SMP that adheres to the objective criteria as set out in Regulation 6(2).

With respect to the definitions of "**Mobile call termination**", Vodacom submits that for the sake of certainty, the definition should be amended by adding the following words at the end of the sentence "*at any location where there is coverage.*"

With respect to the definitions of "**Retail service**" and "**Wholesale service**", Vodacom submits that for the sake of legal certainty, the terms have already been defined in the Act and therefore the definitions should be consistent with those in the Act.

2. Purpose of the Regulations

Although Vodacom understands that the Authority used section 67(4) of the Act as basis for the purpose of these draft Regulations, Vodacom submits that as these Regulations focus on the wholesale call termination market the purpose as set out is too general and therefore should be amended to specifically address the wholesale call termination market.

3. Market definition

Vodacom has no comments.

4. Methodology

Regulation 4(1)(a)

Vodacom refers the Authority to the comments under **Part III: Overall procedural approach to implementation of Chapter 10** and the two-stage approach to be followed in prescribing section 67(4) Regulations discussed therein.

Vodacom contends that the methodologies to be applied in a market review process is required to ensure that the same methodology as set out in the Regulations can be used for each and every subsequent market review as

different methodologies may lead to different conclusions. Furthermore, in order to review pro-competitive conditions imposed on licensees subsequent to a market review process, the same market review process and methodologies need to be applied to be able to effectively review the continued need for pro-competitive remedies.

Based on the aforementioned, Vodacom submits that draft Regulation 4(1) repeats the factors to be considered as provided for under section 67(4) of the Act but does not specify the methodology to be used when considering these factors (i.e. how?). In addition, it is uncertain whether the Authority intends to publish new Regulations addressing the methodology used as the current Regulation is not forward-looking in stating that "...the Authority **has** applied..."

The current draft Regulation will therefore not suffice in setting out a methodology for future market reviews and is insufficient to provide for a consistent approach in subsequent market review processes.

5. Effectiveness of competition

Vodacom submits that this draft Regulation should be amended by adding the words "*call termination*" between the words "*voice*" and "*service*" so that it reads as follows:

"Pursuant to regulation 4, the Authority has determined that competition in the call termination markets is ineffective in the provision of both fixed and mobile voice call termination services"

6. SMP determination

Regulation 6(2)

Vodacom submits that the Authority should specify the objective criteria to be applied in determining which licensees are "*Established SMP licensees.*" Transparent and clear distinguishing factors must be set out clarifying how "*Established SMP Licensees*" are identified.

Therefore, the definition of "*Established SMP licensee*" in draft Regulation 1 should be amended accordingly.

In addition, the Authority must ensure that references to legal entities are correct e.g. the legal entity, Telkom (Pty) Ltd does not exist and the reference should be amended to read Telkom SA Limited.

In this regard, Vodacom further wishes to note that a legal entity that may be an *Established SMP licensee* in one market may be *SMP* or even non-SMP in another market; e.g. although the criteria used to determine "Established SMP" is not clear, it is submitted that, Vodacom is not an established SMP licensee in the fixed call termination market.

PRO-COMPETITIVE MEASURES

7. Access, non-discrimination, transparency

Draft Regulation 7 provides that all SMP licensees must comply with sections 67(7)(a),(c) and (d) of the Act.

Compliance with section 67(7)(c)

Section 67(7)(c) of the Act provides for-

"a prohibition against discrimination in relation to matters connected with access, provisioning of services, interconnection and facilities leasing."

As remedies are imposed in a specific market in order to correct an identified market failure where it is found that there is ineffective competition, Vodacom submits that these draft Regulations deal with the wholesale call termination market, i.e. interconnection and therefore, it is not justified that SMP licensees should be required to also comply with requirements in relation to access, provisioning of services and facilities leasing.

In addition, the distinction between the non-discrimination requirements in section 37(6) and that of section 67(7)(c) of the Act are not clear. Vodacom submits that the non-discrimination requirement in section 67(7)(c) of the Act, as a remedy, differ from the section 37(6) requirement.

As submitted during previous consultation processes, Vodacom re-iterate that non-discrimination is imposed as a remedy in other jurisdictions. In contrast, in South Africa non-discrimination is imposed as a general requirement of the Act (see section 37(6) of the Act), as applicable, in respect of interconnection. Vodacom therefore contends that should there be no clear distinction between the requirements of the aforementioned provisions, section 67(7)(c) of the Act should be deleted from the draft Regulation, as it is redundant.

Vodacom (Pty) Ltd submission on the draft "Call Termination Regulations" and Market Review document pursuant to section 67(4) of the Electronic Communications Act, no. 36 of 2005 in Notice 314 of 2010 (GG NO. 33121 published on 16 April 2010)

Compliance with section 67(7)(d)

Section 67(7)(d) of the Act reads as follows-

"an obligation requiring the licensee to publish, in such manner as the Authority may direct, all such information for the purpose of ensuring transparency, in relation to-

- (i) Access, interconnection and facilities leasing; or*
- (ii) The provision of electronic communications network services, electronic communications services or any other service offered by the licensee applicable to the relevant market or market segments at issue."*

As remedies are imposed in a specific market in order to correct an identified market failure where it is found that there is ineffective competition, Vodacom submits that these draft Regulations deal with the wholesale call termination market, i.e. interconnection and therefore, it is not justified that SMP licensees should be required to also comply with requirements in relation to access, provisioning of services and facilities leasing.

As submitted during previous consultation processes, Vodacom re-iterate that transparency is imposed as a remedy in other jurisdictions, in contrast with the general requirements in respect of interconnection in South Africa. Thus, Vodacom contends that as the Interconnection Regulations provide for transparency with regard to information the requirement to comply with section 67(7)(d) of the Act should be removed from the draft Regulation, as it is redundant.

8. Publication of a Reference Interconnection Offer (RIO)

Vodacom submits that the Authority's rationale for requiring established licensees to publish a RIO also applies to non-established licensees, namely:

- ensuring sufficient information is available to plan interconnection requirements;
- ensuring that negotiations need not be started from scratch (thus not unduly delay negotiations); and
- ensuring that terms and conditions are offered on a non-discriminatory basis.

Vodacom is of the view that publishing a RIO does not place an unreasonable burden on any SMP operator and thus there is no need to exclude non-established SMP licensees from this obligation. Vodacom's view is based on the fact that operators have already drafted standard terms and conditions for interconnection which could be used as the basis for RIO.

Furthermore, although the Authority is not bound by the EU Access Directive⁵, Article 9(2) of the EU Access Directive states that-

"In particular where an operator has obligations of non-discrimination, national regulatory authorities [NRAs] may require that operator to publish a reference offer, which shall be sufficiently unbundled to ensure that undertakings are not required to pay for facilities which are not necessary for the service requested, giving a description of the relevant offerings broken down into components according to market needs, and the associated

⁵ (Directive 2002/19/EC)

***terms and conditions including prices.** The national regulatory authority shall, inter alia, be able to impose changes to reference offers to give effect to obligations imposed under this Directive."*

Based on the aforementioned, the Authority should consider requiring all SMP licensees to publish a reference offer which may contain the minimum requirements as listed in Appendix A of the draft Regulations. Such an obligation will ensure compliance with the non-discrimination requirement as well, by clarifying associated terms and conditions including prices in addition to the objectives listed above for requiring licensees to publish a RIO.

Vodacom recommends that the obligation to publish a RIO should apply to all SMP operators. Thus, wherever the term "*Established SMP*" has been used in Regulation 8 it should be deleted and replaced with the words "*All SMP Licensees*".

Regulation 8(7)

It is unclear to Vodacom what the rationale for requiring that interconnection based on a RIO should be concluded within a period fifteen (15) days from the date of the request. Vodacom's understanding, in essence, is that a RIO provides the starting point from which to negotiate. Additional flexibility may be required in commercial negotiations, where it may be desirable to agree to terms and conditions that are more appropriate to the particular agreement, which may also depend on the complexity of the interconnection service to be provided. Depending on the type of interconnection service required extensive input from various disciplines within the company as well as the relevant internal

Vodacom (Pty) Ltd submission on the draft "Call Termination Regulations" and Market Review document pursuant to section 67(4) of the Electronic Communications Act, no. 36 of 2005 in Notice 314 of 2010 (GG NO. 33121 published on 16 April 2010)

management approvals may be required by both parties to an interconnection agreement.

Based on the abovementioned and with reference to Regulation 3(3) of the Interconnection Regulations⁶, Vodacom submits that parties to an interconnection agreement based on a RIO should be allowed at least forty five (45) days from the date of request of interconnection within which to conclude an agreement.

Draft Regulation 8(7) should be amended by deleting the word fifteen (15) and replacing it with the words forty five (45).

Furthermore, in instances where licensees fail to reach an agreement on additional timeframe (beyond 45 days), both parties may submit motivations to the Authority for consideration in granting additional time within which to conclude the interconnection agreement based on a RIO. Therefore, in conclusion draft regulation 8(7) should be amended to read as follows:

"Provided that all requirements in the RIO are met by both licensees, a request for interconnection based on a RIO must be concluded within forty-five (45) days of such a request for interconnection unless otherwise agreed between the licensees. Should the parties fail to reach an agreement on the additional timeframe, both parties may submit motivations to the Authority for consideration and ruling."

⁶ Notice No. R.282 of 9 April 2010 (GG No. 33101)

9. Price control

Regulation 9(1)(a) and (b)

Vodacom accepts the approach of the Authority to set the wholesale network cost-based MTR estimate on available and verifiable real cost data. Vodacom further notes that there is still a debate about what level MTR should be set at to maximise the wellbeing of South African consumers (urban and rural).

In respect of the implementation date and glide path, Vodacom refers the Authority to the comments under **Part I: Glide Path**.

Vodacom submits the following-

- As the peak mobile termination rate has already been reduced from R1.25 to R0.89 as of 1 March 2010, the proposed additional reduction to be implemented by 01 July 2010 would effectively result in the implementation of an immediate and very significant wholesale price reduction which, as noted by the Authority, will have negative impacts on the industry and the market as a whole.
- It is therefore critical for the Authority to reconsider the proposed further reduction of mobile termination rates for 2010 and Vodacom **recommends that the implementation date for the first reduction in terms of the glide path be moved to 1 March 2011 at the earliest.**

Vodacom (Pty) Ltd submission on the draft "Call Termination Regulations" and Market Review document pursuant to section 67(4) of the Electronic Communications Act, no. 36 of 2005 in Notice 314 of 2010 (GG NO. 33121 published on 16 April 2010)

Regulation 9(2)

Vodacom concurs with the content of this Regulation and the explanation given by the Authority in the Market Review document⁷ as to what the Authority expects to be the outcome of the "*fair and reasonable*" obligation for non-established licensees as it results in symmetric termination rates. The Authority has stated that:

- *"Non-established licensees to charge a reciprocal rate with the rate set for Telkom if these licensees offer a fixed service, and*
- *Non-established licensees to charge a reciprocal rate with the rate set for Cell C, MTN and Vodacom if these licensees offer a mobile service."*⁸

However, as the terminology "*fair and reasonable*" can be subject to interpretation, Vodacom recommends that the explanation given by the Authority for "*fair and reasonable*" quoted above should be included in this draft Regulation.

Internationally it has been accepted that symmetric termination rates "*contribute to enhancing static economic efficiency (limiting allocative and productive inefficiencies), investment, innovation, regulatory certainty, and lastly, overall welfare.*"⁹

⁷ ICASA Wholesale Call Termination Market Review for the period 2010-2013 Page 66

⁸ Ibid

⁹ ERG's common position on symmetry of fixed call termination rates and symmetry of mobile call termination rates page 81

Regulation 9(4)

Vodacom respectfully submits that this draft Regulation grants the Authority wide powers with no clear basis. It is unclear to Vodacom how the Authority can reserve the right to make an industry determination on price control based on information submitted, without first setting the parameters to define the nature and circumstances under which the so-called information would be submitted and what role stakeholders would play before such an industry determination would be made.

Vodacom submits that this Regulation should be deleted.

10. Accounting separation and cost accounting

Vodacom submits that the word "*and*" should be inserted between *(f)* and *(g)*. Furthermore, Vodacom submits that cost accounting separation and cost accounting regulations should apply to all SMP licensees. However, the Authority should have the option to exclude a SMP Licensee from these obligations based on objective criteria set out in the Regulations to be prescribed.

In addition, for the sake of certainty, Vodacom submits that the words "*in relation to the wholesale call termination*" should be added at the end of the sentence.

11. Keeping of accounts, records and other documents (reporting)

Vodacom has no comments.

12. Schedule for review or revision of markets

Vodacom supports this Regulation as it creates certainty in the market as it is clear when the Authority intends to start the next market review.

13. Effective date

Vodacom has no comments.

14. Contravention and penalties

Vodacom has no comments.

APPENDIX A: Minimum content of Reference Interconnection Offer (RIO)

Vodacom has no comments.

APPENDIX B: Format for submission of bi-annual market report

3. Format for the compliance of information

Vodacom submits that should the Authority intend to issue Forms other than the one provided with this draft Regulation, Vodacom should be given the opportunity to provide its comments in respect thereof.

B. DETAILED COMMENTS ON THE MARKET REVIEW DOCUMENT

Vodacom does not provide comments on all sections of the market review document, however, Vodacom's failure to do so should not be seen as an admission of the content thereof.

2. An assessment of the effectiveness of competition and the identification of licensees with Significant Market Power

2.3.14.6.1 Large mobile licensees threaten each other

The Authority has indicated the historic trend in mobile termination rates, 1999-2009, in Figure 2.4 (page 43). However, the Authority has failed to indicate the reasons for the change of MTRs that applied between mobile operators (mobile to mobile calls) as well as, the historical trends that applied for interconnection between fixed and mobile operators (fixed to mobile calls and mobile to fixed calls). In the graphs below, the complete historical trend for mobile and fixed termination rates are illustrated.

In 1994, nominal rates, originally based on "sender keeps all" principle, were set for mobile termination. Originally, it was thought that traffic between mobile operators would not be significant and would be more or less balanced. These initial rates were set with the understanding that once more information on traffic patterns and call volumes were available, the rates will be renegotiated.

In 1998, rates were renegotiated because of high volumes, unbalanced call flows and non-discriminatory requirements. To minimise the impact, the change was phased in over three year glide path, from 1999 to 2001. Further negotiations followed, which increase the rates from R1.19 peak (R0.65 off-peak) to R1.23

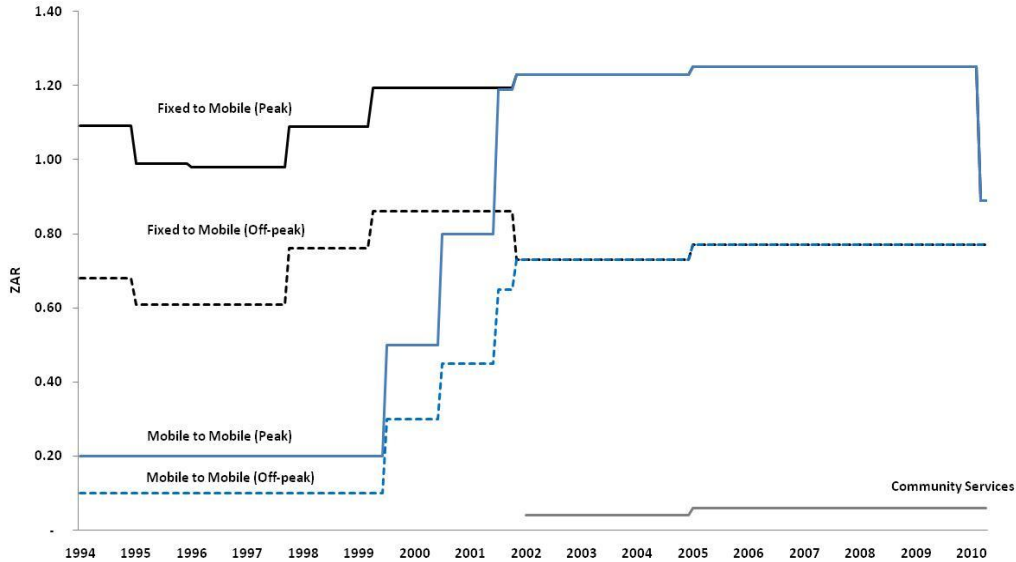
Vodacom (Pty) Ltd submission on the draft "Call Termination Regulations" and Market Review document pursuant to section 67(4) of the Electronic Communications Act, no. 36 of 2005 in Notice 314 of 2010 (GG NO. 33121 published on 16 April 2010)

peak (R0.73 off-peak) in November 2001, and to R1.25 peak (R0.77 off-peak) in January 2005. The peak rate has subsequently been decreased to R0.89 for peak mobile termination on 1 March 2010.

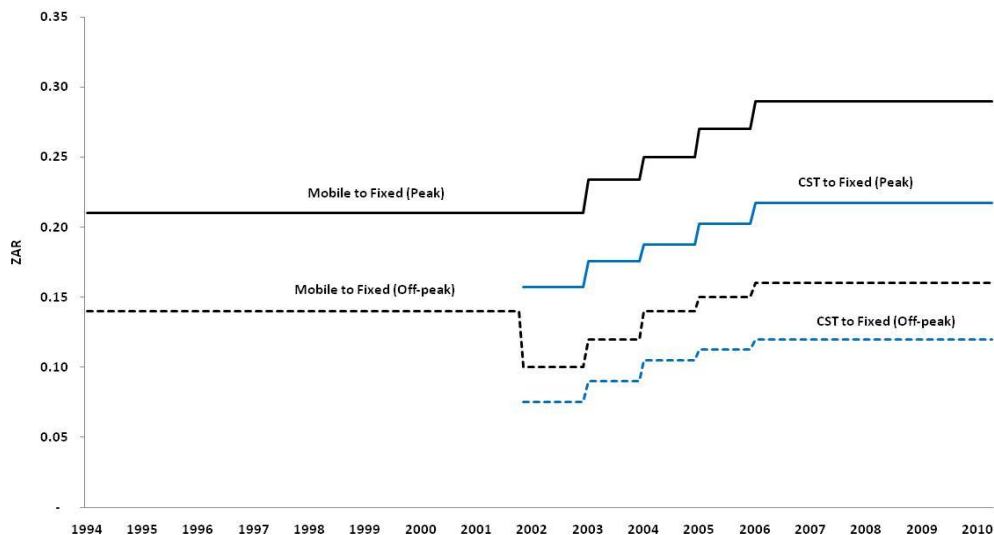
For fixed termination, rate increases were as follows: from R0.21 peak (R0.10 off-peak) increased in January 2003 to R0.234 for peak (R0.12 off peak), increased in January 2004 to R0.25 for peak (R0.14 off peak), increased in January 2005 to R0.27 for peak (R0.15 off peak), and finally increased in January 2006 to R0.29 for peak (R0.16 off peak).

Vodacom (Pty) Ltd submission on the draft "Call Termination Regulations" and Market Review document pursuant to section 67(4) of the Electronic Communications Act, no. 36 of 2005 in Notice 314 of 2010 (GG NO. 33121 published on 16 April 2010)

History: Fixed to Mobile and Mobile to Mobile Termination Rates



History: Mobile to Fixed and CST to Fixed Termination Rates



1. Wholesale Price Control Remedy

Inflation

Vodacom notes that the Authority has not made any reference to inflation adjustment in designing the wholesale price control remedy. Inflation has a fundamental impact on the cost of delivering services including wholesale call termination. Ignoring inflation will result in under-compensation in the recovery of efficiently incurred costs of operators and thus a flawed outcome which is unsustainable in the long term. It is further noted that the current remedy is designed using historical cost data which does not take into account any inflation.

Vodacom recommends that it is critical for the Authority to appropriately consider the impact of inflation in designing a wholesale price control remedy.

2.1 Efficient charge level - A blended rate or a single rate?

Please refer to Vodacom's comments on page 7 under **Part I: Glide Path**.