Vodacom (Pty) Limited's written submission on the Authority's Discussion Document on Regulatory Framework for Infrastructure Sharing

Government Gazette No. 39208 of 15 September 2015

EXECUTIVE SUMMARY

Vodacom (Pty) Limited's ("**Vodacom**") written representation gives treatment to the following matters under these broad themes:

INTRODUCTORY COMMENTS

These introductory comments aim to contextualise Vodacom's understanding of the purpose of the Discussion Document, the intended scope of the matters under its consideration and Vodacom's views regarding issues which ought not to be considered by the Authority within the context of the Discussion Document.

- **Inquiry under section 4B of the ICASA Act**. Vodacom commends the Authority for having invoked this provision as a basis for undertaking this exercise given the structured nature of the procedures contemplated therein.

- **Appropriate policy context of the inquiry**. Vodacom concurs with the Authority that the regulatory dispensation for infrastructure sharing ought to be viewed within the context of *South Africa Connect* and the National Integrated ICT Policy review process.

- **Matters <u>not</u> under the scope for the inquiry**. Here, Vodacom posits that the mandated sharing of the radio frequency spectrum and the mandated provisioning of electronic communications network services and electronic communications services ought not to be viewed as being part of this inquiry. These matters are plainly beyond the scope of setting-out a regulatory dispensation for infrastructure sharing.

- **Matters that are related to the inquiry**. The development of a policy for rapid deployment of electronic communications infrastructure by the Department of Telecommunications and Postal Services ("**DTPS**") in conjunction with Analysys Mason ought to be viewed as a complementary exercise which reinforces the proposed reforms of the infrastructure sharing regulatory dispensation.

  Further, the related exercise initiated by the Authority in respect of the efficient utilisation of infrastructure appeared to traverse matters related to fixed local access network unbundling. In this regard, Vodacom considers that this matter is squarely within the scope of the current

inquiry given its importance in any coherent overarching infrastructure sharing regulatory dispensation.

GENERAL COMMENTS

The General Comments of the written representation endeavour to elaborate on the following themes that are pertinent to the overall reform of the current infrastructure sharing regulatory dispensation:

- **Statutory regime for mandated infrastructure sharing in South Africa**. Our views of the current Electronic Communications Facilities Leasing Regulations, 2010 are set-out for purposes of positing Vodacom's interpretation of the statutory dispensation. Here, we make further proposals regarding the operative scope of this dispensation.

- **The utility of infrastructure sharing in ineffectively competitive markets, particularly fixed passive infrastructure**. We set-out the generalised understanding, with reference to some empirical analysis, of the overall benefits of infrastructure sharing in ineffectively competitive markets, while also noting that the demand for fixed passive infrastructure is derived from the increased demand for broadband services. We also emphasise the importance of having a more robust enforcement of an *ex ante* regulatory regime which operates to alleviate concerns regarding anti-competitive competitor foreclosure.

- **Optimization of the Electronic Communications Facilities Leasing Regulations**. On the desirability of having more robust enforcement of the current infrastructure sharing dispensation, we propose some reforms aimed at transforming the Authority's role from one of being *interventionist*, to one that is able to timeously address negotiation impasses and mediate accordingly. This proposal is intended to significantly reduce the overall transaction costs for the negotiation and conclusion of mandated infrastructure access agreements, while also enabling the Authority (without interfering in the commercial affairs of licensees) to pre-emptively resolve issues which would otherwise (if left unresolved) materialise into disputes requiring adjudication through an adversarial quasi-judicial process that is invariably not time-sensitive.

- Another proposed reform entails requiring licensees to whom the mandated access obligation pertains to develop technical product descriptions aimed at articulating the scope of infrastructure access that is available. Allied to this requirement is the incorporation of enhanced operational and procedural steps for the treatment and processing of requests for

mandated infrastructure access. With specific reference to ducts, proposed reforms to the current dispensation entail the adoption of the following:

- A mechanism for providing infrastructure plans reflecting sharing capacity availability;
- Approaches and procedures to determine availability of space for sharing;
- The articulation of engineering principles for allocating space and shared infrastructure deployment; and
- Service Level Agreements relating to time periods for each of the processes.

SPECIFIC COMMENTS

These comments specifically address the questions posed by the Authority, and while there exists considerable overlap between the questions, they also touch upon aspects of the themes that have already been addressed under our General Comments. For the sake of brevity and where necessary, we cross-reference the relevant answer to the theme that gives more elaborate treatment to the issues raised in the questions.

INTRODUCTORY COMMENTS

Vodacom (Pty) Limited ("**Vodacom**") welcomes the opportunity to submit our written representations in response to the Discussion Document regarding the Regulatory Framework on Infrastructure Sharing ("**Discussion Document**") *gazetted* in terms of section 4B of the Independent Communications Authority of South Africa Act, 2000 ("**ICASA Act**").[1] Vodacom believes that the Discussion Document represents an opportune moment to reflect on the broader regulatory dispensation regarding infrastructure sharing which includes the leasing of electronic communications facilities.

Appropriate policy context

National Broadband Policy

Vodacom notes that the Authority has viewed the current inquiry as being intricately linked to creating the appropriate regulatory dispensation that is supportive of attaining the objectives of *South Africa Connect*.[2] Indeed, South Africa Connect inherently recognises the importance of infrastructure sharing in relation to network deployment in underserved areas and the importance of these initiatives in reducing network deployment costs in these areas.[3] The National Integrated ICT Policy Green Paper also set-out the policy context within which infrastructure sharing ought to be understood.[4] In this regard, the policy trade-off between, on the one hand the pursuit of infrastructure-based competition and on the other hand services-based competition is important, and the appropriate balance required to be maintained is crucial. Lastly, the National Integrated ICT Policy Discussion Paper aptly contextualised this trade-off and the policy choices that are required to be made for purposes of promoting effective competition.[5]

Development of a rapid deployment policy for electronic communications infrastructure

On 10 August 2015, Analysys Mason, under the auspices of the Department of Telecommunications and Postal Services ("**DTPS**") published a Discussion Paper entitled *Development of a Rapid Deployment Policy for Electronic Communications infrastructure* ("**Analysys Mason Discussion Paper**"). The overall objective of the Analysys Mason Discussion Paper entailed soliciting views from interested parties on the implementation of the regulatory dispensation envisaged in Chapter 4 of the Act

[1] Government Gazette No. 39208 of 15 September 2015.
[2] *South Africa Connect: Creating Opportunities, Ensuring Inclusion*, Government Gazette No. 37119 of 6 December 2013.
[3] Ibid, at 35.
[4] *National Integrated ICT Policy Green Paper*, Government Gazette No. 37261 of 24 January 2014.
[5] *National Integrated ICT Policy Discussion Paper*, 14 November 2014.

concerning the rapid deployment of electronic communications networks and electronic communications facilities. The Analysys Mason Discussion Paper appropriately identifies infrastructure leasing as an important consideration in the policy formulation process envisaged under Chapter 4 of the Act.

The interrelationship between optimal enforcement of an infrastructure sharing regulatory regime and the need for policy and regulatory intervention for rapid deployment of infrastructure is alluded to in the Analysys Mason Discussion Paper.[6] Here, optimal enforcement of the existing infrastructure sharing regulatory regime is identified as an issue requiring specific attention. So too, is the importance of a *forward-looking* regulatory dispensation which recognises the need for rapidly deployed new infrastructure to be constructed such that prospective sharing is possible.

Succinctly stated, the interrelationship of these issues is reflected as follows:

> *"**ICASA must increase its enforcement of facilities-leasing regulation:** The legal framework for facilities leasing already exists – the only shortfall currently lies in the enforcement of this framework. Stakeholders believe that ICASA needs to take a more active role in enforcing the Facilities-Leasing Regulations, and operators should submit complaints in this regard.*
>
> ***Enforce sharing of infrastructure**: Some stakeholders have indicated that they would like to see the Rapid Deployment Policy further requiring operators to share infrastructure. In particular, this would include mandated sharing of duct infrastructure and mandating that all newly constructed towers be capable of co-locating up to three operators' equipment."*[7]

The adverse consequences of not effectively addressing these two issues in a coordinated manner is reflected as follows:

> *"…the lack of enforcement of facilities sharing is allowing operators to create mini-geographic monopolies by having exclusive access to duct or access to fibre, resulting in higher prices for the consumer. Moreover, licensees' inability to share infrastructure is a major frustration for land authorities who, in response, enforce stringent requirements for future infrastructure deployments. Many of the issues surrounding rapid deployment can be addressed by an effective facilities-leasing regime."* (Own emphasis)

[6] Paragraph 5.2.1, at 54.
[7] Ibid.

We shall elaborate further on the additional adverse consequences arising from the sub-optimal enforcement of the existing infrastructure sharing dispensation in our subsequent discussion of proposed solutions to enhance the current regime.

Although the development of the policy contemplated in section 21 of the Act is underway, and that that process is self-contained in Chapter 4 of the Act, it is important that the complementarity between Chapters 4 and 8 of the Act are born-out in the regulation-making processes envisaged under both Chapters so as to sustain the logical linkages. In this regard, the processes and procedures in the regulatory dispensation that is to be promulgated to promote the rapid deployment of infrastructure must also be sufficiently flexible and forward-looking so as to promote the efficient and optimal usage of *newly deployed* electronic communications facilities and promote further infrastructure investment. This would be consistent with the implicit aspirations of Chapter 8 of the Act, which seeks to promote the efficient and optimal usage of *existing* electronic communications facilities.

Section 4B of the ICASA Act

Vodacom is particularly heartened that the Authority has elected to undertake an inquiry as contemplated in section 4B of the ICASA Act. A section 4B inquiry affords the Authority with the necessary flexibility to thoroughly interrogate matters at hand, albeit within the parameters of a well-structured and robust *inquisitorial* framework. An inquiry of this nature also affords interested parties the requisite degree of regulatory certainty regarding the operative scope of the inquiry, and the timeframe within which the expected outcomes are to materialise.[8] Lastly, section 4C of the ICASA Act sets-out the operative procedure for undertaking a section 4B inquiry, and this guidance reinforces the robustness of such an inquisitorial inquiry.

Although the Authority has not explicitly referenced the specific provision under section 4B pursuant to which the inquiry is being undertaken, Vodacom believes that the outcomes of the inquiry ought to at least guide the review of the Electronic Communications Facilities Leasing Regulations, 2010 ("**the**

[8] Section 4C(6) of the ICASA Act imposes an obligation on the Authority to gazette the findings of the inquiry within 90 days of having undertaken same. This provision reads as follows:

> *"The Authority must, within 90 days from the date of conclusion of the inquiry—*
> *(a) make a finding on the subject matter of the inquiry; and*
> *(b) publish in the Gazette—*
> *(i) a summary of its finding; and*
> *(ii) the details of the place where and the time when the finding and the reasons for the finding can be obtained by the public."*

Regulations").[9] This is premised on the sensibility of contextualising the section 4B inquiry as being undertaken in accordance with section 4B(b) of the ICASA Act which reads as follows:

> *"(1) The Authority may conduct an inquiry into any matter with regard to—*
>
> *(a) The achievement of the objects of the Act or the underlying statutes;*
> *(b) Regulations and guidelines made in terms of this Act or the underlying statutes;*
> *(c) Compliance by applicable persons with this Act and the underlying statutes;*
> *(d) Compliance with the terms and conditions of any licence by the holder of such licence pursuant to the underlying statutes; and*
> (e) *The exercise and performance of its powers, functions and duties in terms of this Act or the underlying statutes."* (Own emphasis)

Vodacom also believes that since the promulgation of the Regulations in 2010, there have been significant market developments regarding the modes of network infrastructure deployment. Further, the Electronic Communications Amendment Act, 2014 introduced a substantially different test for determining "economic feasibility" under Chapter 7 of the Electronic Communications Act, 2005 ("**the Act**"), and this has the consequence of requiring that the current test set-out in the Regulations be reviewed.[10]

Appropriate policy context

- Vodacom concurs with the Authority regarding the importance of infrastructure sharing regulatory dispensation to the overall attainment of the South Africa Connect objectives;
- We also view infrastructure sharing as being complementary to the rapid deployment of infrastructure;
- Lastly, Vodacom commends the Authority for undertaking a section 4B inquiry which provides a structured and equally flexible mechanism to interrogate the complexities of the matters under consideration.

[9] Government Gazette No. 33252 of 31 May 2010.

[10] Section 22 of the Electronic Communications Amendment Act, 2014 effectively substituted the test of "financial feasibility" with that of "economic feasibility". The current formulation of the Regulations set-out the operative test of "financial feasibility", and it is our considered view that this test is fundamentally different to one of "economic feasibility" and that the Authority ought to as a matter of urgency review and amendment the Regulations for purposes of inter alia setting-out the operative contours of the "economic feasibility" test.

Context of the Discussion Document

Efficient utilisation of infrastructure

Vodacom notes that the Authority had notified licensees of its intention to undertake an informal information gathering exercise in relation to the efficient utilisation of network infrastructure.[11] In this regard, the Authority's correspondence of 30 June 2015 stated the following regarding the purpose of this informal information gathering exercise:

> *"The Independent Communications Authority of South Africa (the "Authority") is conducting a Regulatory Impact Assessment ("RIA") on possible open access regulation in South Africa, with the goal of promoting efficient use of infrastructure.*
>
> *The Authority seeks your input/participation in a small sample survey in order to gauge the industry's views of how electronic communications infrastructure is currently used in South Africa."*

Further, the Authority proceeded to pose several normative questions which broadly related to *inter alia* the current and envisaged usage of Vodacom's electronic communications network and facilities. Prior to Vodacom responding to the Authority's letter of 30 June 2015, a meeting was convened on 30 July 2015 with the Authority and KPMG (Pty) Limited, purportedly the consultant appointed by the Authority to render assistance throughout the course of undertaking the exercise. While the meeting proved to be useful in the Authority contextualising the purpose of the exercise, Vodacom remained uncertain as to the Authority's expectations regarding the precise nature, scope and purpose of this exercise. To this end, on 31 July 2015 Vodacom sent a letter to the Authority seeking *inter alia* clarification on the scope of the exercise and intended outcomes. While Vodacom consider the issues raised in our correspondence as important, a response from the Authority addressing the issues raised in our letter remains outstanding. Notwithstanding not having received a response from the Authority regarding our letter of 31 July 2015, on 10 September 2015 Vodacom proceeded to give treatment to the questions raised in the Authority's correspondence of 30 June 2015.

It is clear that the questions posed in the Authority's informal information gathering exercise substantially overlap with those posed in the Discussion Document. Plainly, the two exercises concern the same subject manner, namely, infrastructure sharing. Indeed, Vodacom had initially presumed that

[11] Letter from the Authority to Vodacom of 30 June 2015.

the Discussion Document had been formulated on the basis of the inputs which the Authority had received from its informal information gathering exercise. However, curiously, the Discussion Document makes no mention, either directly or indirectly, of the informal information gathering exercise, nor are there any indications that the Authority considers these two exercises to be related. Given that this confusion and uncertainty continues to prevail, Vodacom respectfully requests the Authority to render the necessary clarification.

Fixed local access network unbundling

It would appear that the Authority has limited the scope of the Discussion Document to be exclusive of any discussion on infrastructure sharing as it pertains to unbundling the fixed local access network. This regulatory intervention, commonly referred to as "Local Loop Unbundling" ushers in a *sui generis* dispensation aimed at promoting the more efficient utilisation of existing fixed local access network infrastructure through induced sharing. This induced sharing is ordinarily set-out in very specific terms for purposes of ensuring that access to network infrastructure is rendered expeditiously, and that services-based competition for broadband services ensues. Given the importance of increasing broadband adoption, uptake and usage in lieu of the targets set-out in *South Africa Connect*, the consideration of Local Loop Unbundling as part of this inquiry is indispensable.

Mandated spectrum sharing and mandated provisioning of electronic communications network services

The Discussion Document appears to implicitly suggest that the Authority may consider expanding the scope of potential regulatory intervention for infrastructure sharing to include instances where some degree of infrastructure sharing is incidental to other arrangements. In particular, infrastructure sharing for purposes of spectrum sharing appears to be contemplated by the Authority as being within the scope of this Discussion Document. Similarly, the mandated provisioning of electronic communications network services appears to be implicitly contemplated by the Authority.

These matters are clearly beyond the scope of Chapter 8 of the Act – the empowering provisions for their contemplated regulation exists in other Chapters of the Act – and the Authority would risk unnecessarily conflating them with the crisper infrastructure sharing issues requiring urgent and immediate consideration. In the circumstances, Vodacom is of the considered view that these matters ought **not** to be given any treatment within the context of the Discussion Document.

Summary

Our introductory comments have sought to contextualise Vodacom's understanding of the scope and purpose of the Discussion Document, while placing it within our appreciation of other related matters which are integral in any review exercise aimed at optimising the existing infrastructure sharing regulatory dispensation. In this regard, we have understood the issues which the Discussion Document intends addressing as being primarily concerned with:

- Regulatory support for the implementation of *South Africa Connect*; and
- A more optimised regulatory dispensation for infrastructure sharing.

We have also understood the Discussion Document as **not** being concerned with the following matters:

- The sharing of radio frequency spectrum; and
- The mandated rendering of electronic communications network services and electronic communications services.

Lastly, for purposes of giving comprehensive treatment to all the related issues that are impacted by infrastructure sharing in general, Vodacom believes that the current inquiry would yield better outcomes were it to be inclusive of considering the following issues:

- Fixed local access network unbundling; and
- Interrelationship between infrastructure sharing and rapid deployment of infrastructure policy.

In the proceeding parts of our written representation, we set-out our views on the following:

- General comments; and
- Specific comments.

GENERAL COMMENTS

Regulatory dispensation for infrastructure sharing

General obligation to lease electronic communications facilities

The general sharing of infrastructure constituting telecommunications network elements is mandated in accordance with the regulatory dispensation created under the Electronic Communications Act, 2005 ("**the Act**"). Section 43(1) of the Act, which imposes this obligation for electronic communications network service licensees to lease electronic communications facilities, reads as follows:

> *"Subject to section 44(5) and (6), an electronic communications network service licensee must, on request, lease electronic communications facilities to any other person licensed in terms of this Act and persons providing services pursuant to a licence exemption in accordance with the terms and conditions of an electronic communications facilities leasing agreement entered into between the parties, unless such request is unreasonable."*

The regulatory dispensation is also elaborated upon and given further effect in the form of the Electronic Communications Facilities Leasing Regulations, 2010 ("**the Regulations**").[12] These Regulations set-out *inter alia* the operative mechanism for the exercise of rights and the compliance with obligations by *access seekers* and *access providers*, respectively. The manner in which licensees are to exercise their rights and equally comply with obligations arising from section 43(1) of the Act and the Regulations is contemplated to be governed by an Electronic Communications Facilities Leasing Agreement ("**the Agreement**") which both the *access seeker* and *access provider* are required to negotiate, conclude and submit for review with the Authority for approval. These Regulations also prescribe the minimum terms and conditions which such agreements must contain. Lastly, both the Act and the Regulations provide for a mechanism for the review of the agreements so as to determine the extent to which these comply with the requirements of the Act and the Regulations. This review is undertaken by the Authority, and the Agreement may not take effect prior to the Authority rendering approval of the agreements' compliance with the Act and the Regulations.

Scope of obligation to lease electronic communications facilities

Though section 43(1) of the Act imposes the general obligation to lease electronic communications facilities, the category of infrastructure to which the obligation pertains to is set-out elsewhere in the Act. In this regard, section 1 of the Act sets-out the operative scope of the infrastructure defined as

[12] Government Gazette No. 33252 of 31 May 2010.

electronic communications facilities and to which the obligation to lease is applicable.[13] Here, the definition of electronic communication facility reads as follows:

> *"'**electronic communications facility**' includes but is not limited to any—*
>
> *(a) wire, including wiring in multi-tenant buildings;*
> *(b) cable (including undersea and land-based fibre optic cables);*
> *(c) antenna;*
> *(d) mast;*
> *(e) satellite transponder;*
> *(f) circuit;*
> *(g) cable landing station;*
> *(h) international gateway;*
> *(i) earth station;*
> *(j) radio apparatus;*
> *(k) exchange buildings;*
> *(l) data centres; and*
> *(m) carrier neutral hotels,*
>
> *or other thing, which can be used for, or in connection with, electronic communications, including where applicable—*
>
> *(i) collocation space;*
> *(ii) monitoring equipment;*
> *(iii) space on or within poles, ducts, cable trays, manholes, hand holds and conduits; and*
>
> *associated support systems, sub-systems and services, ancillary to such electronic communications facilities or otherwise necessary for controlling connectivity of the various electronic communications facilities for proper functionality, control, integration and utilisation of such electronic communications facilities."*

So, where a person has constructed an electronic communications network (of which electronic communications facilities constitutes elements thereof) and is licensed accordingly, the obligation set-

[13] Although the Act is clear in its imposition of the obligation to lease electronic communications facilities on electronic communications network service licensees, in the event that a person is in possession of an electronic communications facility, due to them not being a licensee, this obligation would not ordinarily apply to them. However, in the event that such a person has constructed an electronic communications network such that elements of the electronic communications network constitute electronic communications facilities, such a person would be in violation of the Act for operating an electronic communications network without the requisite authorization.

out in section 43(1) of the Act becomes applicable and such person is obliged to lease their facilities upon request by another licensee.

Exceptions from the obligation to lease electronic communications facilities

Notwithstanding the general obligation set-out in section 43(1) of the Act, section 43(4) of the Act provide for the grounds upon which an *access provider* may rely upon in objectively justifying their non-compliance with the obligation. Correspondingly, this provision sets-out the grounds upon which the Authority determines the reasonableness of a request. In this regard, section 43(4) of the Act read as follows:

> *"(4) For purposes of subsection (1), a request is reasonable where the Authority determines that the requested lease of electronic communications facilities—*
>
> *(a) is technically and economically feasible; and*
> *(b) will promote the efficient use of electronic communications networks and services."*

Unreasonable request to lease: technical feasibility and economic feasibility

Although Chapter 8 of the Act does not set-out an interpretation of technical and economic feasibility in relation to the reasonableness of a request, Regulations 4 and 5 provide some guidance in this respect, albeit minimal.

Here, Regulations 4 and 5 read as follows:

> ***"4. Financial feasibility***
>
> *(1) For purposes of section 43(4) of the Act, a request is financially feasible where there are no material adverse financial consequences.*
>
> *(2) Any dispute of financial feasibility will be determined by the Authority on a case by case basis.*
>
> ***5. Technical feasibility***
>
> *(1) For purposes of section 43(4) of the Act a request is technically feasible where it meets the following minimum requirements:*
>
> *(a) the network does in fact meet the technical parameters of the requesting party's network at the time that the request is made; and*

(b) offering facilities to the electronic communications facilities seeker will not have a material negative effect on the facilities provider.

(2) Any dispute on technical feasibility will be determined by the Authority on a case by case basis."

The rationale for the operation of section 43(4) read in conjunction with Regulations 4 and 5 lies in ensuring that *access providers* are not unreasonably prejudiced and that requests which operate to materially disadvantage *access providers* are considered to be unreasonable.

So, all in all, it is important to note that the obligation set-out in section 43(1) of the Act is not absolute and that objective grounds exist which may be relied upon to justify non-compliance with the obligation. Further, the onus for objectively justifying non-compliance with the obligation rests with the *access provider*, and the Authority or the Complaints and Compliance Committee determines (on a balance of probabilities) whether the reasons advanced are reasonable given the factual, technical and economic circumstances pertaining to the request.

Operative scope of the obligation set-out in section 43(1) of the Act

While it is common cause that section 43(1) of the Act imposes the obligation to lease electronic communications facilities on electronic communications network service licensees, it is also widely accepted that unlicensed persons have acquired ownership and/or control, either directly or indirectly, of electronic communications facilities. In this regard, and on a plain interpretation of the Act, the obligation set-out in section 43(1) of the Act to lease these electronic communications facilities would consequently be avoided by these persons.[14]

This statutory absurdity has directly contributed to the *regulatory arbitrage* that exists regarding the obligation to lease electronic communications facilities. These unlicensed persons operating beyond the Authority's jurisdictional competence have the incentive to materially distort the competitive dynamics of the broader infrastructure sharing market, and consequently signal to current licensees the perceived benefits of operating beyond regulatory supervision. The elimination of this regulatory arbitrage is critical to ensure a fair, equitable and well-functioning infrastructure sharing market, and Vodacom implores the Authority to consider invoking section 3(9) of the Act so as to make recommendations to the Honourable Minister for policy interventions, including statutory amendments if necessary to address this issue.

[14] Vodacom professes no view as to whether these electronic communications facilities, cumulatively viewed as a pool of assets, may be considered to collectively constitute an electronic communications network, the operation of which requires a person to be in possession of an electronic communications network service licence. This would invariably amount to a factual inquiry.

Vodacom also proposes that these policy recommendations also address instances where electronic communications facilities whose ownership and/or control, either directly or indirectly vests in unlicensed Local and District Municipalities and State Owned Companies within the meaning of the Companies Act, 2008. These juristic persons ought to be deemed to be subject to section 43(1) of the Act. In this regard, Vodacom is of the considered view there is significant incremental value to be derived in making these public assets available so as to be leased to licensees to rendering electronic communications network services.

Regulatory dispensation for infrastructure sharing

- Section 43(1) of the Act sets-out the obligation to lease electronic communications facilities, which are defined as such in section 1 of the Act;
- The obligation in section 43(1) of the Act is not absolute and is subject to section 43(4) of the Act read with Regulations 4 and 5 of the Regulation;
- The reasonableness of a request is to be determined by the Authority on a case by case basis;
- The operation of the regulatory dispensation has also created *regulatory arbitrage* wherein electronic communications facilities owned and/or controlled by unlicensed persons are not subject to section 43(1) of the Act;
- This *regulatory arbitrage* distorts the competitive dynamics of the infrastructure leasing market, while also signally the perceived benefits of operating beyond the Authority's jurisdictional competence;
- Vodacom proposed that the Authority make recommendations to the Honourable Minister in terms of section(9) of the Act to address the adverse consequences of this regulatory arbitrage;
- The section 3(9) recommendations ought to also propose the deeming of electronic communications facilities owned and/or controlled by Local and District Municipalities and State Owned Companies as being subject to section 43(1) of the Act.

The utility of sharing fixed passive infrastructure in ineffectively competitive markets

Vodacom believes that the benefits of infrastructure-based competition, in the long-run, exceed those associated with services-based competition. In this regard, policy postures which incentivises investment in network infrastructure so as to foster infrastructure-based competition have typically yielded more welfare-enhancing market outcomes.

However, there are clear instances where there exists ineffective competition which has persisted over a prolonged time horizon. Here, regulatory intervention presents an option in alleviating the adverse effects of this type of market structure. The determination of the juncture at which regulatory intervention is necessary so as to correct for the ineffective competition is described by the GSMA as follows:

> *"Regulators face the challenging task of correctly distinguishing cases where dominant firms act to harm competition from situations where nondominant firms act so as to meet competition. Whereas the former may provide grounds for intervention, the latter is necessary for the existence of a healthy competitive market...imposing regulatory mandates for shared access to an incumbent's assets and facilities will tend to increase competition in the short term. However, it will reduce competition in the long term as it decreases incentives for network roll-out hence decreasing the likelihood for two or more competing networks viable in the long term."*[15] (Own emphasis)

In instances where it is also clear that the relative costs associated in infrastructure duplication in an ineffectively competitive market far exceed the benefits of infrastructure sharing, the latter ought to the preferred regulatory instrument for intervention. Here, there are several economic models used to estimate the approximate costs of infrastructure duplication as an alternative to infrastructure sharing. These models also give treatment to the implications on the degree of competition, or the cost of competition. In this regard, an analysis commissioned by Ofcom and undertaken by CSMG purports to estimate these costs for purposes of informing the appropriate policy and regulatory posture that ought to be adopted in relation to mandated infrastructure sharing in ineffectively competitive markets.[16]

Here, the assessment presents scenarios wherein, in the absence of infrastructure sharing, the costs accruing from infrastructure duplication are consequently reflected in the price or charge of the services rendered. These charges are compared to those that would prevail in instances where infrastructure sharing exists, and the costs of infrastructure duplication are consequently avoided as a result of the sharing arrangement. A comparative analysis is then presented between the charges for services that prevail under both conditions: infrastructure duplication and infrastructure sharing.

Analysys Mason has made similar observations regarding the comparative costs of infrastructure duplications *vis-à-vis* the efficiency of infrastructure sharing in ineffectively competitive markets:

> *"Although the cost of bandwidth in the active layer has reduced significantly in recent years, and continues to fall, the cost of the civil works – such as digging and trenching – represents a major barrier for operators to deploy NGA infrastructure. Previous studies have shown that the civil work can account for up to 80% of the total cost of the infrastructure being deployed. Therefore, infrastructure re-use will be an important input to the economic deployment of NGA, making access to existing infrastructure (such as unused space in underground ducts) an important*

[15] GSMA, *Mobile Infrastructure Sharing* (2010), at 21.
[16] CSMG Report prepared for Ofcom, *Economics of Shared Infrastructure Access* (18 February 2010).

policy issue."[17]

All in all, there are compelling reasons for the Authority to seriously consider augmenting the infrastructure sharing regulatory dispensation in ineffectively competitive markets given the overall welfare-enhancing characteristics of such a regime.

Demand for access to fixed passive infrastructure

Broadly, the demand for access to fixed passive infrastructure is largely driven by the increased demand for fixed broadband services, particularly within the enterprise market though increasing in the residential market too. The Passive Access Group[18] in the United Kingdom highlighted Ofcom's endeavours to introduce more robust forms of regulated access to fixed passive infrastructure through the development of a regulatory remedy described as Physical Infrastructure Access ("**PIA**") in 2010.[19] The imposition of the PIA remedy is also consistent with our observations above regarding the rationality for regulatory intervention in ineffectively competitive market, particularly in the fixed broadband market. Similar observations are also made by the PAG in the following manner:

> *"PIA was introduced because Ofcom recognised that passive access could provide a better and more flexible form of network access: one that would let rivals invest in their own fibre links, opening up more aspects of service to direct competition for the first time, with a view to putting BT's competitors on a similar footing to BT."*[20]

While the Authority has alluded to the broader benefits of infrastructure sharing, the welfare-enhancing benefits for mandated sharing of passive fixed infrastructure in ineffectively competitive markets are described by the PAG as follows:

- *"…greater opportunities for innovation and product differentiation – for example, by making it easier to deploy bespoke business connectivity services designed for particular customers' needs;*

- *stimulating cost efficiencies and lowering prices for consumers – for example, by facilitating shared deployments in areas such as business parks where existing leased lines are too expensive but existing consumer-level products are inadequate; and*

- *allowing a long-term shift in regulation towards upstream inputs – allowing more levels of*

[17] Analysys Mason Report for Ofcom, *Operational models for shared duct access* (1 April 2010), at 8.
[18] The PAG membership consists of Vodafone plc, Three plc, TalkTalk Group plc, Colt Communications plc, Sky plc and EE plc.
[19] Ofcom, *Review of the Wholesale Local Access Market* (7 October 2010).
[20] *Implementing passive access in the UK*, A report prepared for the Passive Access Group (19 January 2015).

the value chain to enjoy the benefits of full competition and a market structure defined by customer demand rather than regulation."[21]

In Vodacom's instance, particularly with regards to our commercial endeavours to provide super-fast fibre-to-the-home and fibre-to-the-business, access to existing fixed passive infrastructure has become indispensable in meeting the increasing demand for fixed broadband services and other related services. The need for the Authority to enforce access to fixed passive electronic communications facilities has become increasingly important, and the future growth of broadband adoption very much rests on the existence of a robust regulatory dispensation capable of guaranteeing equitable, fair and non-discriminatory access to electronic communications facilities.

Conversely, sub-optimal enforcement and a deficient design of the regulatory dispensation risks perpetuating the real foreclosure incentives that current fixed passive infrastructure owners currently possess. In this regard, in the instance where a competitor licensee is unduly and unreasonably denied access to fixed passive electronic communications facilities, that competitor licensee is effectively foreclosed from competing directly with the electronic communications facilities owner in the provisioning of services, particularly fixed broadband services. The incentives to engage in this type of exclusionary conduct are well understood by regulatory authorities, including competition authorities under the competitor foreclosure theory of harm. Therefore, *ex ante* mandated access to regulated fixed passive infrastructure is intended to alleviate the propensity for the anti-competitive harm inherent in competitor foreclosure from ensuing. However, this harm may only be alleviated where effective and timeous enforcement exists, and regulatory intervention is robust and proportionate in balancing the rights *vis-à-vis* obligations of licensees to infrastructure sharing arrangements.

The utility of sharing fixed passive infrastructure in ineffectively competitive markets

Benefits of long-run infrastructure-based competition exceed benefits from services-based competition and Vodacom support the promotion of infrastructure-based competition;

However, regulatory intervention is a crucial instrument is alleviating adverse effects of ineffective competition, and mandated infrastructure sharing of fixed passive infrastructure becomes appropriate in those circumstances;

Welfare-enhancing benefits of mandated sharing of fixed passive infrastructure include innovation and product differentiation, cost efficiencies and lower prices for consumers;

Stronger and more robust regulatory enforcement of mandated sharing of fixed passive infrastructure is important in increasing fixed broadband adoption, uptake and usage.

[21] *Implementing passive access in the UK*, A report prepared for the Passive Access Group, at 8.

We proceed to set-out our views on the manner in which more optimal enforcement may be put in place in the form of regulatory reforms that are not far-reaching, and have become absolutely necessary.

Optimization of the Electronic Communications Facilities Leasing Regulations, 2010

Expanded role and function for optimal enforcement for the Authority

The Authority promulgated the Electronic Communications Facilities Leasing Regulations on 31 May 2010. While the Analysys Mason Discussion Paper states that the enforcement activities undertaken by the Authority in relation to the Regulations has been negligible, Vodacom is equally unaware of other instances wherein the Authority had adjudicated over a dispute lodged with it in terms of section 43(5) of the Act read with Regulation 14 of the Regulations. In summarizing comments received from stakeholders regarding enforcement activities pertaining to the Regulations, the Analysys Mason Discussion Paper proceeds to make recommendations aimed at encouraging licensees to lodge more complaints with the Authority for resolution.

The Act clearly empowers the Authority to resolve disputes and complaints lodged with it, and the Authority has given further effect to these powers in Regulation 14 of the Regulations. However, Vodacom is not aware of any instances wherein the Authority has exercised these powers to resolve a dispute. Instead, we are acutely aware of the propensity for the Authority to refer these disputes to the CCC in terms of section 43(5)(c) of the Act for adjudication. These referrals to the CCC are also not made expeditiously and the administrative delay unduly prejudices licensees.

While Vodacom is not aware of the total number of disputes lodged with the Authority, we believe that the structure and operation of the Regulations ought to be reviewed for purposes of rendering the enforcement thereof more robust, efficient and time-sensitive. In this regard, it is clear that the Authority's role in relation to the enforcement of the Regulations, as currently conceived in the Regulations, is one of *ex post* intervention, particularly where the Authority is seized with a dispute lodged in terms of section 43(5) of the Act.

Absent such a dispute being lodged with the Authority, the Regulations have not been formulated in a manner which enables the Authority to pre-emptively anticipate the eminence of negotiation impasse which may ultimately eventuate in a dispute being lodged by an aggrieved licensee. Nor do the Regulations contemplate a role for the Authority in either the process immediately leading to the negotiation of an Agreement or indeed throughout the course of such negotiations. Typically, negotiation impasses are occasioned at both instances wherein parties attempt to constructively reach consensus on the terms and conditions of the Agreement.

We also believe that the Authority's role ought to be broadened to entail qualified mediation in instances where there are negotiation impasses. In this regard, Vodacom is aware that the timelines set-out in the Regulations pertaining to when negotiations for an agreement must commence, and the time period within which such negotiations must be concluded are routinely not met. There are instances wherein these timelines are either expressly or implicitly extended by the parties to the negotiations, while Vodacom is aware of other instances wherein mala fide and potentially anti-competitive intent belies the violation of these timelines. In many instances wherein access to electronic communications facilities is required, time is invariably of the essence. Therefore, it is important that the Authority's role is expanded to also include the pro-active monitoring of compliance with the timelines set-out in the Regulations.

Vodacom believes that the Authority's involvement would provide the appropriate level of incentives to all parties to negotiate in *good faith* while being mindful that any unreasonable or undue delay may attract a sanction from the Authority.

This role may be given effect to in the following manner:

- Where a licensee exercises their rights in terms of Regulation 3(1), such licensee ought to be obliged to simultaneously notify the Authority of same;

- Similarly, where a licensee is required to furnish a response in terms of Regulation 3(2), such response must also be simultaneously notified with the Authority;

- In the event that the Authority deduces an impasse between licensees at this stage of the commencement of the negotiations, the Authority ought to be in a position to pro-actively mediate between the licensees in order for the negotiations to proceed.

Lastly, it is important to note that the Act already empowers the Authority to impose terms and conditions on licensees in instances were a dispute is incapable of being resolved, or where a licensee in unable or unwilling to lease electronic communications facilities.[22] The exercise of this power is envisaged to be invoked by the Authority in instances where it is clear that there exists an asymmetry of negotiating incentives between licensees and the impasse is unlikely to be resolved *inter partes*. Although Vodacom is not aware of any instance wherein the Authority has invoked these powers, the proposals above are intended to ensure that the Authority is not required to exercise this power, and instead parties are able to conclude the negotiation of these Agreements within the time period set-out in the Regulations.

[22] Section 43(5)(a) of the Act.

Optimization of the Electronic Communications Facilities Leasing Regulations, 2010

- Vodacom recommends that the Authority pre-emptively anticipate the eminence of negotiation impasses between licensees prior to these becoming disputes;
- Vodacom also recommends that the Authority expand its role to entail qualified mediation where negotiation impasses are likely to arise;
- Expanded role is intended to alter the parties' incentives to negotiate *in good faith* with the knowledge that any unreasonable or undue may attract a sanction from the Authority;
- Expanded role entails the Authority being notified simultaneously by an *access seeker* when requesting the lease of electronic communications facilities, and by the *access provider* in responding to same, and by either party in the event that there is a negotiation impasse;
- For purposes of ensuring the progression of negotiations, the Authority ought to be empowered to render interlocutory orders where there are negotiation impasses.

Requirement to develop technical product descriptions for access to electronic communications facilities

Enhanced operational procedures

The obligation set-out in section 43(1) of the Act is relatively well understood, though the operative scope thereof has remained ambiguous with sufficient dexterity to render it capable of being interpreted in many different ways. Ordinarily, licensees presuppose that the ordinary meaning of a word used as a term of art within the ICT sector to describe an electronic communications facility ought to suffice in formulating a request to access same to another licensee. For instance, infrastructure elements which cumulatively constitute a cable landing station, an earth station, a mast, a duct (and space therein) or an antenna are commonly understood within the context of how these infrastructures are referred to in the ICT sector. Here, the descriptive scope of those facilities to which the section 43(1) obligation pertains to ought to be similarly well understood.

The importance of clearly defining the scope of infrastructure subject to mandatory leasing is also emphasised by Analysys Mason in a report undertaken for Ofcom in respect of defining the operational models for shared access to passive infrastructure, in particular ducts and poles.[23] After having undertaken a review of the relevant wholesale local access market and determining that BT possesses significant market power in the wholesale local access market, Ofcom subsequently imposed a

[23] Analysys Mason Report for Ofcom, *Operational models for shared duct access* (1 April 2010).

mandated access remedy and set-out to define the operative contours of this remedy.[24] The recommendations set-out in the Analysys Mason report were intended to provide Ofcom with several options for the implementation of the mandated access remedy for BT's ducts and poles.

In formulating the operational model for mandated access, Analysys Mason made the following observations:

> *"...in other countries where pole/duct access is available, a key element to the success of a duct and pole offer is the definition of a comprehensive operational model that specifies each step in obtaining access to existing ducts and/or poles."*[25] (Own emphasis)

The importance of the steps in obtaining access to infrastructure is generally a matter of regulatory design in respect of the framework for mandated access to infrastructure. Typically, the regulatory framework would operate to confer specific rights while imposing corresponding obligations by the regulatory authority. With regards to the Regulations, these rights and obligations are clearly set-out, though Vodacom considers that the *operationalization* of these could be strengthen for purposes of rendering the entirety of the framework more robust.

A key feature of the recommendations made by Analysys Mason, and which Vodacom considers important for the Authority to consider in their reform of the Regulations, is the articulation of the operational process for obtaining access to infrastructure that is subject to mandated access. In this regard, these recommendations go beyond that which is currently set-out in the Regulations and operate to contextualise the nature of the rights conferred to *access seekers* and the expectation of how these rights are to be met by the corresponding obligations imposed on *access providers*.

Here, we provide a summary of the Analysys Mason recommendations while proposing their adoption as a means of strengthening the operation of the reformed Regulations:

- **Framework to record infrastructure access requests**. The format with which requests are made in order for them to constitute valid requests is important. As such, a prescribed template required to be populated by the *access seeker* and the procedure for processing same by the *access provider* within a stipulated time period is an important feature of a mandated infrastructure access regime. Increasingly, procedures for access requests and responding to same are automated wherein both the *access seeker* and the *access provider* effectively communicate through a central automated portal that entails minimal or no human intervention to operate. There are clear and obvious transparency and efficiency reasons for the adoption of

[24] Ofcom, Review of the wholesale local access market (March 2010).

[25] Analysys Mason Report for Ofcom, *Operational models for shared duct access*, at 7.

an automated central portal.

In relation to the Regulations, Regulation 3 of the Regulations sets-out the broad procedure for *access seekers* to initiate requests for access to electronic communications facilities and requires the request to stipulate the nature of the facilities requested, the date of the request and the physical characteristics and parameters of the facilities. However, other than requiring the request to be written, the Regulations do not prescribe the format or manner in which the request is to be made.

- **Mechanism for providing infrastructure plans**. There are benefits in having a reliable and overall perspective of infrastructure capacity availability. This would allow *access seekers* to have better information of infrastructure capacity availability and enable more optimal planning of their network deployment.

  The current absence of an overall perspective of infrastructure capacity availability that is capable of objective verification renders the Regulations almost incapable of achieving its objectives. Currently, an *access seeker* has little or no information regarding the availability of infrastructure capacity that is capable of being shared. In the absence of this information, an *access seeker* is almost required to submit speculative requests for access to infrastructure. Further, the current formulation of the Regulations also does not clearly articulate a procedure to objectively determine the availability of infrastructure capacity capable of being shared. Instead, it is open for an *access provider* to simply allege that it is either technical or economically unfeasible to allow shared access to its infrastructure without this assertion being objectively verified. This is clearly undesirable and avails perverse incentives for *access providers* wishing to avoid having to share their infrastructure with *access seekers*. In the circumstances, Vodacom strongly recommends that the reformulation of the Regulations include provisions which require *access providers* to avail their infrastructure capacity availability to *access seekers* in an objectively verifiable manner, and that the Authority's role be expanded accordingly.

- **Approaches to determine available space and survey procedures**. This is perhaps the most contentious and potentially time-consuming and costly exercise required to be undertaken by both parties. At the broadest level, this exercise aims to accurately identify **unoccupied space** that is immediately available for purposes of sharing where it is technically and practically possible. At the same time, there may exist **available space** which may *prima facie* be unoccupied but is nonetheless used for maintenance purposes of existing infrastructure.

Further, space may become better usable and be transformed to unoccupied space in the event that better installation methods and more efficient engineering techniques are adopted to transform **usable space** into **unoccupied space**. The exercise of identifying **available space** and **usable space** requires procedures to be adopted for undertaking inspections *in loco*.

Inherent in determining space availability is having to undertake periodic site surveys, and Analysys Mason identifies some practical challenges that may arise from defining the scope of site surveys, the frequency thereof, involvement of third parties and other related operational issues. Although this exercise may be time-intensive while requiring elaborate procedures to be developed, Vodacom is of the considered view that the transaction costs associated with undertaking this exercise and ensuring that it operates optimally are far outweighed by the welfare-enhancing benefits of having these procedures in place.

- **Approaches to and engineering principles for allocating space in ducts**. The engineering principles and rules for the optimal usage of infrastructure will largely depend on the overall design and architecture of the existing infrastructure to be shared. These principles and rules are intended to optimise the use of existing **unoccupied space**, while allowing for **usable space** to be configured such that more space becomes available. While it is beyond the scope of our comments to articulate the nature of these engineering principles and rules, an important consideration in their application (once developed and mutually agreed upon) is the reservation of unoccupied space for the *access provider* for prospective usage relative to the immediate requirements for this space by *access seekers*. In this regard, space reservation ought to be treated in a fair and objective manner and similar to other requests for unoccupied space, and specific time periods ought to be imposed for which the reservation shall be applicable and beyond which the reserved space shall revert to the residual available unoccupied space.

- **Procedures for cable deployments in shared infrastructure**. These procedures will invariably be influenced by the applicable engineering principles and rules, while the responsibility for the actual deployment of network elements within the infrastructure may be agreed upon between the *access provider*, *access seeker* in conjunction with an independent infrastructure deployment professional.

- **Procedure to update infrastructure plans**. This function is inherent in the overall requirements for the mechanism for providing infrastructure plans and the approaches to determine available space and survey procedures.

- **Framework to monitor timelines**. The time periods within which all the procedures contemplated above ought to be satisfied is an integral requirement for optimal enforcement and setting-out tangible expectations regarding the exercise of rights and compliance with the corresponding obligations. We have already proposed that the Authority have an expanded role in the monitoring of the time periods stipulated for parties to comply with.

The Analysys Mason recommendations summarised above largely resonates with the infrastructure sharing regulatory dispensation adopted by the Australian Competition and Consumer Commission ("**ACCC**") for mandated access to specific fixed passive network infrastructure in terms of Part 5 of Schedule 1 of the Telecommunications Act 1997.[26] In this regard, the broad purpose of the Code is described by the ACCC as follows:

> *"Part 5 of Schedule 1 of the Telecommunications Act 1997 (Part 5) provides for Carriers to provide other Carriers with access to telecommunications transmission towers, the sites of telecommunications transmission towers and eligible underground facilities.*
>
> *The Code is designed to encourage the co-location of facilities, where reasonably practicable, and promote competition by facilitating the entry of new mobile and fixed line operators."* (Own emphasis)

The Code is rather elaborate and comprehensively gives treatment to precisely the same issues which Analysys Mason elaborates upon in its recommendations. In this regard, the following prescriptions are set-out in some elaborate detail:

- **Mandatory conditions of access**
  - Confidential information - All Carriers
  - Non-discriminatory access to facilities
  - Queuing policy
  - Dispute resolution - the giving of access
  - Dispute resolution - implementation of access

- **Applying for facilities access**
  - Information Package
  - Other information requirements
  - Proper Officer
  - Facilities Access Applications

[26] Australian Competition and Consumer Commission, *A Code of Access to Telecommunications Transmission Towers, Sites of Towers and Underground Facilities*, (October 1999) ("**the Code**").

- **Negotiating facilities access**
  - General
  - Master Access Agreement
  - Financial matters
  - Performing Make Ready Work
  - Co-location Consultation Process

- **Implementing facilities access**
  - Maintenance of Eligible Facility and Equipment
  - Emergency work
  - Replacement of Equipment
  - Interference with Equipment
  - Indemnity against property damage
  - Third Party User Equipment
  - Suspension of access
  - Termination of access

Overall, both the Analysys Mason and the ACCC Code aptly demonstrate the cogency of the principles and recommendations made by Vodacom, and the desirability of the reform of the Regulations to seriously consider the incorporation of these as part of this section 4B inquiry.

Consequences of absence of enhanced operational procedures for infrastructure access

Vodacom is aware of instances wherein due to differences in interpretative context, licensees deliberately obfuscate the precise meaning and understanding of the constituent elements of infrastructure that are defined as an electronic communications facility. The purpose of this obfuscation is rather obvious: if infrastructure is incapable of being categorized as falling within the definition of an electronic communications facility, by implication, the obligation to lease this infrastructure in terms of section 43(1) of the Act may be conveniently avoided. In these instances, a dispute is occasioned on the basis of the differences in the interpretive context which licensees assign in their own understanding of the operative scope of the facilities required to be leased. To avoid this potential eventuality, the adoption of the recommendations set-out in the Analysys Mason report discussed immediately above would be desirable.

This point is aptly illustrated in Neotel (Pty) Limited v Telkom SA SOC Limited wherein in dispute was Neotel (Pty) Limited's ("**Neotel**") contention that section 43(1) of the Act conferred upon it rights to request access to the portion of Telkom SA SOC Limited's ("**Telkom**") electronic communications network referred to as the local loop.[27] In this regard, the Complaints and Compliance Committee ("**CCC**") phrased the issue at hand in the following manner:

[27] The CCC summaries the essence of Neotel's request in the following manner:
"Neotel relies on the provisions of section 43(1) of the ECA and the Regulations in seeking to have Telkom compelled to provide it with local loop facilities."

"The legal question to be decided by the CCC is whether Neotel's request for a formal lease in respect of the last copper mile is covered by chapter 8 of the ECA and the Electronic communications Facilities Leasing Regulations."[28]

In this regard, Telkom's principal contention had been summarised by the CCC as follows:

"Telkom submits that the issue which arises from Neotel's complaint is whether its request for access to Telkom's local loop in an unbundled state can be given effect to at this stage and whether the Regulations are the appropriate instrument to rely upon in determining the practical implementation of local loop unbundling."[29]

Having considered arguments from both parties, on the legal issue which required determination, the CCC ruled as follows:

"[23] The Authority re-emphasises its position that access to local loop at a non-discriminatory price is mandated by the ECA. The fact that the Authority decided to seek inputs from stakeholders on a number of questions it had, does not, in my view, take away the right of entities like Neotel to apply for access to local loop.

[24] Neotel already has these rights under section 43(1) of the ECA read with the Regulations and section 3.3.1 of the Discussion Paper is concerned with facilitating access to these rights. The Authority does not, through the Discussion Paper and Findings note seek to frustrate the rights which Neotel already has."[30] (Own emphasis)

Here, the CCC's decision reflects two salient aspects that aptly demonstrate the current deficiencies in the Regulations which our recommendations above are intended to alleviate:

- First, notwithstanding the CCC finding that the local loop constitutes an electronic communications facility within the meaning of the Act, and that section 43(1) of the Act finds operation, it was open for Telkom to contend otherwise. The contestation as to the interpretative scope of both the definition of an electronic communications facility in section 1 of the Act and the extent of the obligation set-out in section 43(1) of the Act underlies the very essence of the dispute between Neotel and Telkom.

- Second, the CCC notes that the initial request formulated by Neotel was on 23 November 2011 while a complaint was formally lodged with the Authority on 23 March 2011. The dispute was subsequently referred to the CCC by the Authority on 11 August 2011, more

[28] Neotel (Pty) Limited v Telkom SA SOC Limited (Case No. 59/2011), at para 7.
[29] At para 31.
[30] At paras 23 and 24.

than four (4) months after the Authority had been seized with the notification of the dispute. This amounts to an inordinate period for the resolution of disputes of this nature which are inherently time-sensitive and require the utmost urgency in their resolution. It also ought to be born in mind that once the CCC had been seized with the matter on 11 August 2011, it only rendered its final decision on 24 August 2012, more than twelve (12) months after having been seized with the matter.[31]

Cumulatively viewed, from the date that Neotel purported to exercise the rights which it viewed as having been conferred upon it in section 43(1) of the Act to the time that the CCC positively affirmed the conferment of these rights, a period of almost two (2) years passed. Plainly, this amounts to a disproportionately long period that a regulatory authority ought to take in the clarification of rights and obligations seemingly conferred and imposed by statute. To date, Vodacom understands that Telkom has initiated administrative judicial review proceedings in the South Gauteng High Court seeking to have the CCC's order set-aside under the Promotion of Administrative Justice Act, 2000, and to this end, Neotel's endeavours to access Telkom's local loop remains frustrated.[32]

Summary

The passive non-interventionist position adopted by the Authority in the CCC dispute between Neotel and Telkom aptly demonstrate need for the Authority's role to be expanded accordingly. In this regard, Vodacom recommends that the Authority consider the above recommendations.

[31] Though the CCC rendered what it referred to as an interim order on 18 May 2012 (the last day for which the matter had been set-down), the extent of the operation of the order, including the practical implementation thereof was revealed once the CCC rendered its final written order on 24 August 2012.

[32] Telkom SA SOC Limited v Independent Communications Authority of South Africa, Neotel (Pty) Limited and Complaints and Compliance Committee (Case No. 12/47040).

SPECIFIC COMMENTS

We proceed to provide our responses to the specific questions posed by the Authority in the Discussion Document. Vodacom notes that some of the Authority's questions considerably overlap with one another, and in those instances Vodacom has elected to cross-reference the relevant answer where applicable. Further, at some junctures, the Authority's questions traverse several themes that we have elaborated in sufficient details above as part of our general comments. In those instances, and for the sake of brevity, Vodacom has elected to cross-reference the relevant portions set-out elsewhere in our response.

Question 9.1 "Do you agree that infrastructure sharing will encourage the deployment of networks to rural and sparsely populated areas? If not, please provide the reason(s) for your answer. "

Vodacom agree that the infrastructure sharing may encourage the deployment of networks to rural and sparsely populated areas. Broadly, Vodacom supports a coordinated approach for infrastructure deployment and the consequential sharing of same on commercially negotiated terms and conditions on a fair, non-discriminatory and equitable basis in instances where the costs of infrastructure deployment are prohibitive for a single licensee to incur.

Question 9.2 "In your opinion, how do you think infrastructure sharing will encourage service based competition?"

Although there may be an indirect link between service based competition and infrastructure sharing, it cannot be assume that infrastructure sharing would in all circumstances result in encouraging service based competition. Infrastructure sharing is one of several factors which may contribute towards the level of service based competition, but it should not be the only rational for infrastructure sharing.

Question 9.3 "To what extent do you believe that the objectives of infrastructure sharing are reached? "

It can be stated that some objectives of infrastructure sharing has been reached, if it can be credited to have achieved efficiency gains based on commercial agreements which has led to the provisioning of service in underserviced and rural area. Also, if this credit can be extend to have achieved greater access and choice for more consumers while retaining infrastructure-based competition and the incentive to invest.

Question 9.4 "Do you believe that the Authority should deal with infrastructure sharing matters in one regulation?"

Vodacom view is that Electronic Communications facilities leasing addressed under Chapter 8 of the Act and subsequent regulations, and Interconnection addressed under Chapter 7 of the Act and subsequent regulations, are fundamentally different matters. It would thus not be practical or sensible to deal with these matters in one regulation.

Question 9.5 "Please list other benefits realised as a result of infrastructure sharing."

Kindly refer to Vodacom's answer to Questions 9.1 and 9.2 above.

Question 9.6 "Do you think that it is necessary for the Authority [to] regulate for 'one-build' civil works and mast erections at this time? Please state your reasons?"

Vodacom notes the Authority's recognition of the efficiency in regulating for a 'one-build' civil works regulation to the extent that such regulation facilitates the rapid deployment of infrastructure, and the enhancement of infrastructure competition and investment. However, the regulation of infrastructure deployment, including the means by which such infrastructure is deployed falls beyond the scope of the regulatory framework for the leasing of electronic communications facilities, in terms of Chapter 8.

As alluded to above in our Introductory Remarks, while there are clear interrelations between Chapter 4 and Chapter 8 of the Act, matters concerned with the deployment of electronic communications facilities ought to be given treatment to under Chapter 4 of the Act. In this regard, the Authority will be well aware that the DTPS has commissioned Analysys Mason to undertake a policy and regulatory assessment referred to as "Support towards the development of a National Rapid Deployment Policy and policy direction for South Africa." This policy review initiative is expected to culminate in the Honourable Minister of Telecommunications and Postal Services ("**the Minister**") issuing a policy direction in terms of section 3 of the Act. Amongst others, the issuance of the policy direction ought to have been preceded by the Minister having consulted with the other Ministers envisaged in section 21 of the Act. Lastly, it is on the basis of the policy direction envisaged to be developed under section 21 of the Act and consequently issued under section 3of the Act that the Authority must have regard in prescribing the regulations envisaged on section 21(2) of the Act. These regulations ought to *inter alia* give treatment to matters relating to the regulation of coordinated and harmonised civil engineering and deployment of electronic communications facilities.

Question 9.7 "In your view, what incentives will encourage infrastructure sharing in general?"

There are several commercial incentives for licensees to explore infrastructure sharing arrangements, provided that such sharing is technically and financially feasible. These commercial incentives are predominantly driven by efficiency and viability considerations. Such commercial arrangements should be enhanced and any constraints hindering the conclusion of these agreements amicable addressed.

Question 9.8 "In your view, how can the Authority improve on its intervention in terms of non- discriminatory access to infrastructure?"

Vodacom has set-out our views above regarding the importance of the Authority reviewing the current formulation of the Regulations. We have also made proposals on aspects of the Regulations that may be strengthen so as to render them more effective, robust and optimal.

Question 9.9 "Would you say that the facilities leasing regulations adequately cater for infrastructure sharing needs in South Africa? If not, please state the areas that have not been covered."

Vodacom has set-out our views above regarding the importance of the Authority reviewing the current formulation of the Regulations. We have also made proposals on aspects of the Regulations that may be strengthen so as to render them more effective, robust and optimal.

Question 9.10 "Do you agree with the Authority on the definition of passive infrastructure? If not, please provide an alternative definition."

The rationale for the Authority deriving a definition of *passive infrastructure* within the context of this Discussion Document is not immediately clear to Vodacom. For, the Act and the Regulations do not purport, either directly or indirectly to sustain a distinction between *passive infrastructure* and *active infrastructure*. Here, this distinction is immaterial for purposes of appreciating the scope of the definition of what constitutes an electronic communication facility in section 1 of the Act, nor is the distinction material for purposes of understanding the operative scope of the obligation set-out in section 43(1) of the Act.

Question 9.11 Please state other passive infrastructure that you consider essential for sharing.

Kindly refer to Vodacom's answer to Questions 9.10

Question 9.12 Please state the advantages and disadvantages of passive infrastructure sharing.

Kindly refer to Vodacom's answer to Questions 9.16 below.

Question 9.13 Do you agree with the Authority on the definition of active infrastructure? If not, please provide an alternative definition.

Kindly refer to Vodacom's answer to Questions 9.10 above.

Question 9.14 Please state other active infrastructure that you consider essential for sharing.

Kindly refer to Vodacom's answer to Question 9.10 above.

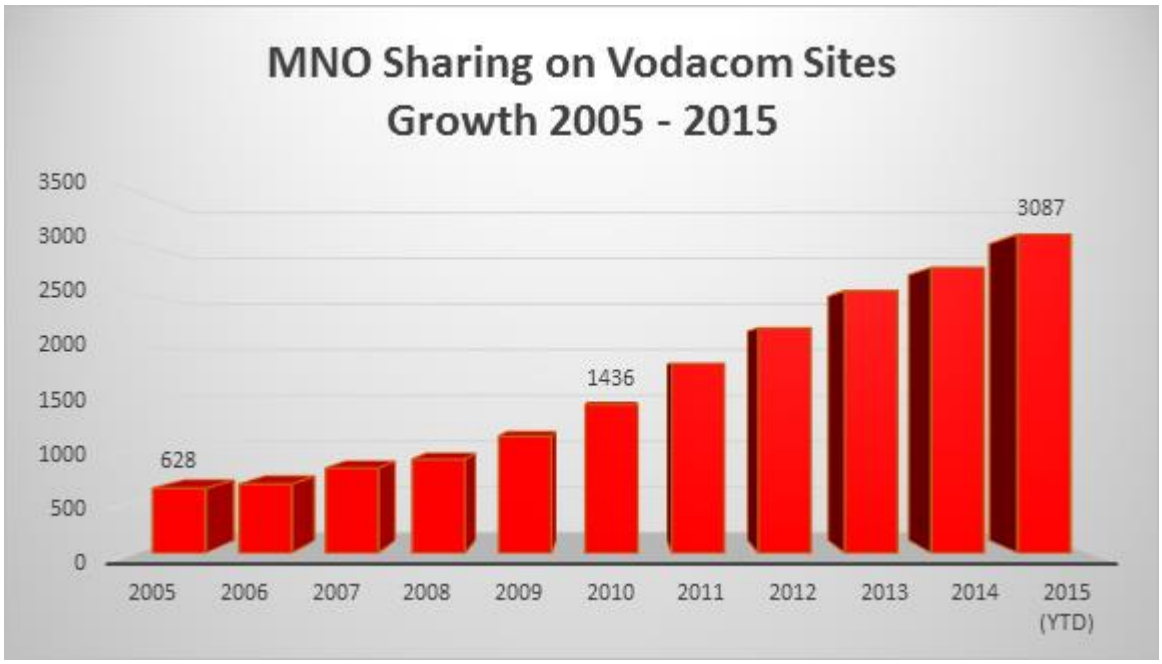
Question 9.15 Please state the advantages and disadvantages of active infrastructure sharing.

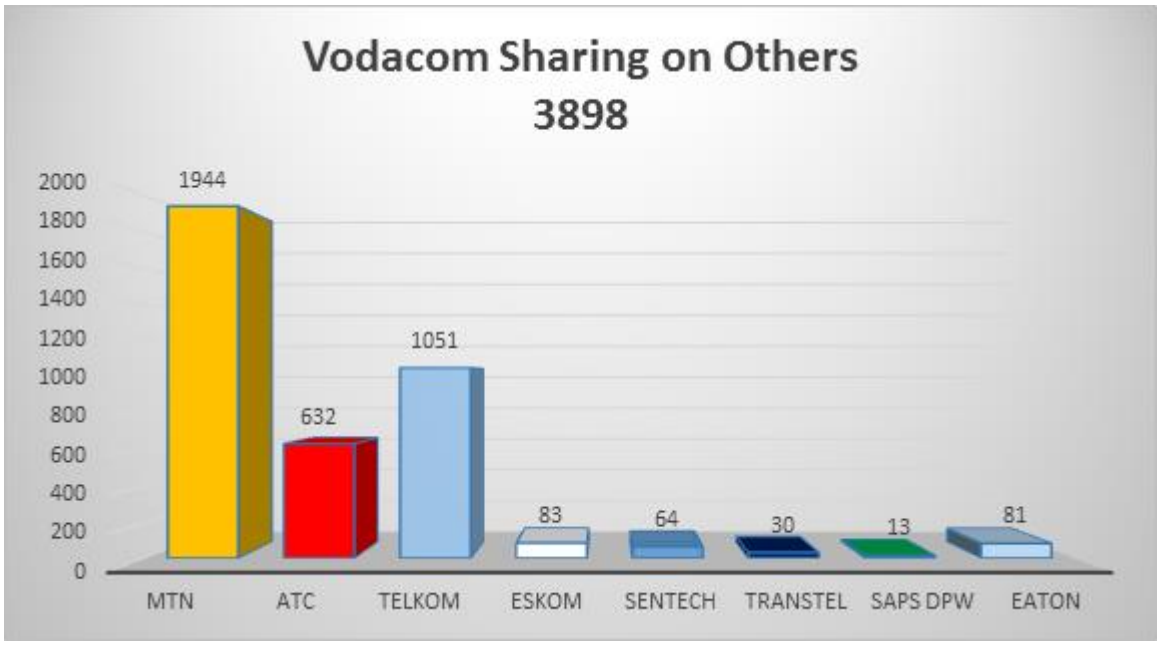
Kindly refer to Vodacom's answer to Questions 9.16 below.

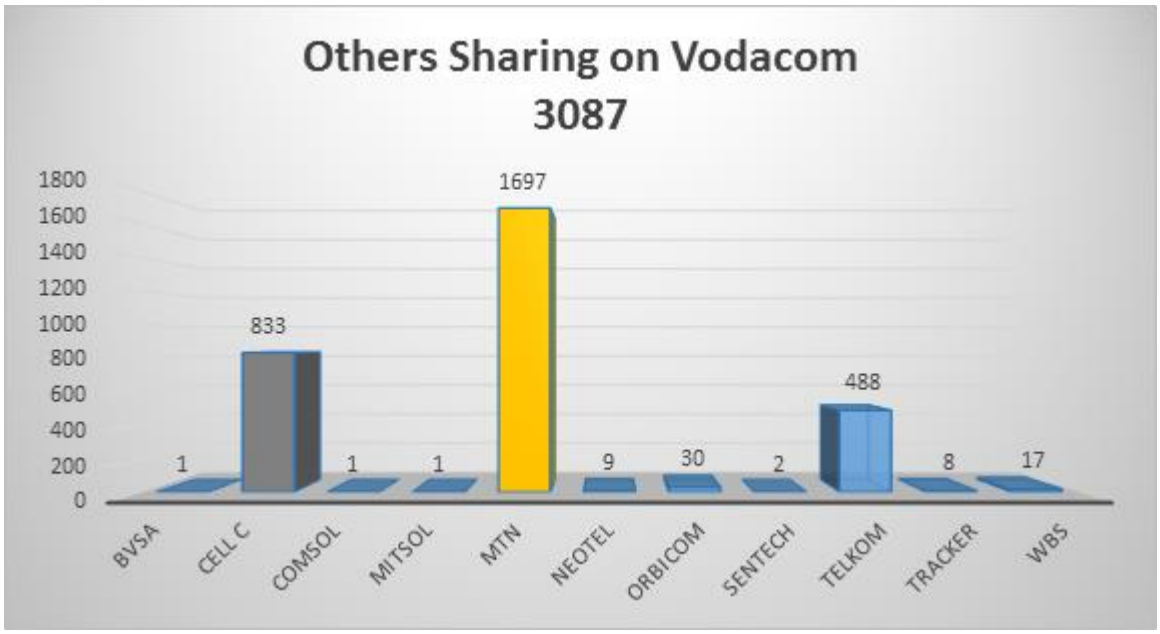
Question 9.16 Please provide examples of how active and passive infrastructure is being shared in South Africa.

Vodacom believes that the Authority would be best placed to have an aggregate perspective on the various infrastructure sharing arrangements that licensees have entered into, either voluntarily or in terms of Chapter 8 of the Act.

Notwithstanding, Vodacom hereunder provide three graphs indicating the extent of sharing between Vodacom and other mobile electronic communications network service licensees for the period 2005 – 2015.


MNO Sharing on Vodacom Sites
Growth 2005 - 2015
3500
3000
2500
2000
1500
1000
500
0
628
1436
3087
2005
2006
2007
2008
2009
2010
2011
2012
2013
2014
2015 (YTD)


Vodacom Sharing on Others
3898
2000
1800
1600
1400
1200
1000
800
600
400
200
0
1944
632
1051
83
64
30
13
81
MTN
ATC
TELKOM
ESKOM
SENTECH
TRANSTEL
SAPS DPW
EATON



Vodacom proposed that the Authority adopt a similar approach towards the evaluation of the extent of infrastructure sharing in the Republic of South Africa to that required of Ofcom under section 134A of the Communications Act, 2003. Under that provision, Ofcom is required to furnish the Secretary of State with a report every three years which serves to provide an overall perspective of the following features of infrastructure provisioning in the United Kingdom:

- The coverage of networks and services, by geography and population;
- The degree of infrastructure sharing and wholesale access on the networks;
- The capacity of the networks and their availability; and
- Plans for resilience in relation to both networks and services.

Since the inception of section 134A of the Communications Act, 2003, Ofcom has formulated two (2) reports, with the latest report having been published in 2014.[33] The reports are also intended to provide a factual perspective of those areas of the broader electronic communications market where policy and regulatory intervention may be necessary.

[33] Ofcom, Infrastructure *Report 2014, Ofcom's second full analysis of the UK's communications infrastructure* (8 December 2014)

Some of the key observations emanating from Ofcom's 2014 report regarding the extent of network sharing and provisioning of wholesale services were as follows:

- **The extent and degree of infrastructure sharing since the 2011 Report**. Ofcom noted that there had been little sharing of passive infrastructure between network operators, notwithstanding the existence of the PIA obligation imposed on BT since 2011.[34] As part of the 2014 Fixed Access Market Review, Ofcom elected to maintain the PIA remedy on BT since it had been imposed on BT for purposes of enabling other operators to install their own optic fibre or copper-based infrastructure in order to compete directly with BT; and

- **Increased sharing of non-telecommunications infrastructure**. This type of *cross-sector infrastructure sharing* has already commenced on a voluntary and commercial basis and largely driven by the efficiency inherent in sharing existing passive infrastructure for the purposes of deploying broadband infrastructure. In recognition of the prevalence of this practice across the European Union and its importance in facilitating greater deployment of broadband infrastructure, the European Union has adopted a Directive aimed at enabling easier access to existing infrastructure while enabling greater civil works coordination in the planning and construction of new infrastructure that may be used by multiple infrastructure providers.[35]

In the context of the Republic of South Africa, Vodacom believes that the Authority may undertake a similar exercise under section 4B of the ICASA Act for purposes of determining the extent to which the infrastructure sharing regulatory dispensation operates, particularly in its promotion of broadband infrastructure deployment in lieu of *South Africa Connect*.

END

[34] Ibid, at 54.
[35] Ibid, at 55.