



**MTN'S RESPONSE TO THE ICASA DISCUSSION DOCUMENT ON THE MARKET  
INQUIRY INTO MOBILE BROADBAND SERVICES IN SOUTH AFRICA**

**27 FEBRUARY 2020**

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## 1. INTRODUCTION AND EXECUTIVE SUMMARY

- 1.1 On 2 December 2019, the Independent Communications Authority of South Africa (“ICASA”) issued a notice of intention to identify one retail and four upstream markets in respect of an inquiry into mobile broadband services offered by mobile network operators (“MNOs”) in South Africa<sup>1</sup> (“the Discussion Document”).
- 1.2 Mobile Telephone Networks Proprietary Limited (“MTN”) would like to thank ICASA for the opportunity to comment on the Discussion Document, as we believe continued engagement with ICASA on the definitions of the relevant markets within the electronic communications industry, provides for a transparent and structured consultation process, which is essential for supporting a well-functioning communications sector.
- 1.3 At the outset, MTN would like to support ICASA’s focus on upstream markets and the recognition that it is important to ensure that any “bottlenecks” at the upstream level are removed before considering whether regulation and action at the retail level are required. This principle ensures that regulation is minimised and focused where it is more effective in promoting sustainable competitive markets.
- 1.4 MTN welcomes ICASA’s recognition of an accepted market definition principle such as the SSNIP test but believes consideration of both demand side and supply side substitution is required in dynamic technology industries like electronic communication markets. MTN submits that it is recognised international best practice to consider how the potential behaviour of competing suppliers can constrain the prices of the products in a candidate product and/or geographic market, especially where suppliers can react quickly without incurring significant costs or risks.
- 1.5 In assessing whether demand side substitution would be capable of constraining a hypothetical monopolist, it is necessary to determine what degree of switching would be sufficient for such a constraint to exist. Whilst ICASA recognises this principle, ICASA uses the term in different instances in the Discussion Document without a precise understanding of what degree of substitution would be sufficient. MTN notes that a minority of consumers willing and able to switch might well be

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<sup>1</sup> ICASA, Notice 1560 of 2019 published in Government Gazette No. 42878

sufficient to constrain a hypothetical monopolist.

- 1.6 Regarding ICASA's assessment of Significant Market Power ("SMP"), MTN believes that it is not possible to determine whether an operator has a position of SMP before all relevant factors are considered. MTN notes that ICASA concludes that MTN and certain mobile operators have SMP exclusively on the basis of an assessment of market shares. However, without a finding of ineffective competition, the question as to which licensee exercises SMP in that market does not arise. Accordingly, MTN submits that ICASA should undertake a detailed analysis of the degree of competition in the relevant markets as an obligatory step before reaching any conclusions on ineffective competition.
- 1.7 MTN believes that it is insufficient, as a matter of economics, to determine a market failure on the basis of market shares alone. Overall, MTN submits that ICASA has not based its conclusions on market definition, SMP and ineffective competition on sufficient evidence and notes that ICASA relies in many instances on opinion as opposed to factual evidence.
- 1.8 Accordingly, MTN respectfully submits that ICASA should only regulate a market where such regulation is justified by properly substantiated analysis and it has properly assessed and evidenced market failure. This is both because regulation comes at a cost (including compliance costs for the industry and administrative costs for ICASA) and because competition, rather than regulation, is more likely to achieve efficient outcomes, increase consumer welfare, and maximise incentives for investment, innovation and job creation. In particular, regulatory interventions should only be imposed after a rigorous assessment which determines that the likely benefits outweigh the potential adverse and perhaps unintended consequences of such regulation. The identification of substantial harm to competition is a requirement to justify regulatory intervention.
- 1.9 ICASA's inquiry into mobile broadband services is conducted in terms of section 67 of the Electronic Communications Act, 2005 ("the ECA"). This section contemplates the making of regulations that have four related aspects. These aspects must frame ICASA's analysis.
- 1.9.1 *First:* the relevant wholesale and retail markets or market segments are to

be defined (s 67(4)(a)).

- 1.9.2 *Second:* ICASA must determine whether there is effective competition in those markets (or market segments) (s 67(4)(b)). In making this determination, ICASA must consider all relevant factors,<sup>2</sup> including (i) non-transitory entry barriers and (ii) “*the dynamic character and functioning*” of the markets (or market segments), including an assessment of relative market shares of the various licensees and “*a forward-looking assessment of the relevant market power*” of the licensees in the markets (or market segments) (s 67(4A)).
- 1.9.3 *Third:* ICASA must determine which, if any, licensees have SMP “*in those markets and market segments where there is ineffective competition*” (s 67(4)(c)). It bears emphasis that the question as to whether or not licensees have SMP (i.e. are dominant) in a market is distinct from the antecedent question as to whether or not there is ineffective competition in that market. Without a finding of ineffective competition – based on a consideration of all relevant factors – the question as to which licensees exercise SMP in that market does not arise.
- 1.9.4 *Fourth:* the regulations must impose appropriate pro-competitive licence conditions “*on those licensees having significant market power*” in order to remedy the market failure (s 67(4)(d)). It is apparent that the licence conditions envisaged in section 67 are applicable only to those licensees with SMP in the particular market,<sup>3</sup> and that the conditions must be “*appropriate*” (i.e. fair and reasonable) and proportionate (s 67(4)(d) and s 67(8)(c)).
- 1.10 In addition, ICASA’s decision-making is required to comply with the requirements of administrative law, including having regard to all relevant considerations and ignoring irrelevant ones, ensuring that decisions are rationally related to the information before ICASA, that they are based on correct facts, and that they are reasonable.

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<sup>2</sup> See the phrase “*must consider, amongst other things*” in s 67(4A) of the ECA.

<sup>3</sup> See also s 67(8)(b) of the ECA, which provides that, if ICASA, pursuant to a subsequent review, determines that a licensee to whom pro-competitive conditions apply no longer possess “*market power in that market or market segment, the Authority must revoke the applicable pro-competitive conditions applied to that licensee*”.

- 1.11 Market definition, and the identification of operators with market shares over a certain threshold is only a starting point to test the existence of effective competition in a relevant market. However, it is necessary to conduct a further analysis, beyond a calculation of market shares, in order to establish whether the firm has the ability to control prices, or exclude competition or behave to an appreciable extent independently of its competitors, customers, or suppliers and that there is market failure, which is a necessary requirement which must be evidenced before the proposal of regulatory intervention.
- 1.12 MTN's response to the Discussion Document will present some observations and submissions in regard to the analyses contained in the Discussion Document. MTN's response is set out at follows:
- 1.12.1 In section 2, we outline the economic framework for approaching market definition. The assessment of dominance/market power and the assessment of effective competition. MTN will illustrate why supply side substitutability is fundamental to product and geographic market definition. Further MTN illustrates why market shares and the measure of concentration are insufficient to inform determinations on the effectiveness of competition and SMP in the electronic communications market.
- 1.12.2 Section 3 then applies these frameworks to the retail market. MTN finds that on application of the economic framework the retail market is national in scope and reflects a number of pro-competitive outcomes.
- 1.12.3 Section 4 applies the frameworks to the upstream markets identified by ICASA. Here we also deal with ICASA's recommendations. MTN finds that when the economic framework is correctly applied, all the identified upstream markets are national in scope and that MTN is not dominant, nor has SMP in any of the upstream markets. In respect of the particular markets for:
- 1.12.3.1 spectrum, MTN commends ICASA's finding that spectrum should be released as soon as possible and in a pro-competitive manner;
- 1.12.3.2 site access, MTN respectfully submits that there is no market for site access and that rather, this upstream market reflects an activity

involving access to property by MNOs to construct passive infrastructure. However, MTN engages with ICASA's assertions on the basis that ICASA is referring to facilities leasing activities. In this regard, MTN submits that "number of sites" is an inappropriate metric to calculate market shares. Further ICASA should take into account free-riding effects when contemplating any further regulation into this market. In respect of the recommendations, MTN submits that many of the outcomes sought by ICASA are already legislated in chapter 8 of the ECA, as well as the Electronic Communications Facilities Leasing Regulations (the "Regulations") promulgated in terms thereof;

1.12.3.3 roaming, MTN agrees that the national roaming market is separate to the provision of MVNO services. In respect of the recommendations, MTN submits that there is no justification provided by ICASA to regulate roaming agreements and such regulatory intervention could have unintended adverse effects; and

1.12.3.4 MVNO/APN services, MTN submits that ICASA should still define the market for the provision of MVNO services, and in particular needs to consider the various business models that comprise MVNOs in order to understand market dynamics and correct the misconception that Cell C is the only MNO which wholesales to MVNOs.

1.12.4 Finally, section 5 provides short answers to the questions set out in the Discussion Document.

1.13 This submission does not exhaustively cover each of ICASA's findings or allegations, but this must not be misconstrued as MTN agreeing with those points that are not addressed in this response.

## 2. ECONOMIC FRAMEWORK

### 2.1 Market definition

#### 2.1.1 Product and geographic markets

2.1.1.1 As ICASA explains in the Discussion Document, the SSNIP test (or hypothetical monopolist test) is a well-established approach to defining the scope of relevant markets within competition policy and regulatory assessments. This approach has been extensively adopted by competition authorities in the UK, EU, US and South Africa.

2.1.1.2 The SSNIP test is commonly used to define each of a product and geographic dimension of a relevant market. The SSNIP test takes a candidate market and asks whether, if a hypothetical monopolist controlled all supplies in that candidate market (i.e. all supplies of a particular product in a particular geographic area), but, importantly, did not control the supplies of other products, outside this candidate market, it would be able to profitably impose a small but significant non-transitory increase in price above competitive levels (a “SSNIP”), typically in the order of 5–10%.<sup>4</sup>

2.1.1.3 If the constraints from products or firms outside of the candidate market are not strong enough to render this price increase unprofitable (i.e. the price increase would be profitable), this would indicate that the candidate market is, in fact, a relevant market for antitrust purposes, because there would be insufficiently close substitutes available, whether other products or similar products from other areas. In contrast, if a 5–10% price increase would be unprofitable, then the candidate market should be widened to include additional products and/or geographies that were previous excluded. The test is then repeated iteratively until a price increase would be profitable, at which point the product and geographic dimensions of the candidate market over which the price increase has been

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

evaluated would be a relevant market for anti-trust purposes.

2.1.1.4 One key implication of the SSNIP framework is that a potential substitute product does not need to be a perfect substitute to the products in the candidate market in order to be considered part of that same market. Even if the potential substitute is not an alternative from the perspective of all consumers, it may still fall within the same relevant market if enough customers would switch towards it in order to render a SSNIP unprofitable.

2.1.1.5 Similarly, as explained in European Commission’s guidelines on market analysis and the assessment of significant market power, the definition of the relevant geographic market does not require the conditions of supply and competition in different areas to be perfectly homogenous for them to be considered to be part of the same relevant geographic market.<sup>5</sup> Rather, the key economic question for the SSNIP test is whether competitors from other geographic areas impose sufficiently strong competitive constraints on the candidate market in question, so as to prevent the hypothetical monopolist in that candidate market from profitably raising prices in a specific area.<sup>6</sup> This is supported by the EC notice, which explains the following:<sup>7</sup>

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*“[T]he Commission will identify possible obstacles and barriers isolating companies located in a given area from the competitive pressure of companies located outside that area, so as to determine the precise degree of market interpenetration at [different levels].”*

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## 2.1.2 Demand side and supply side substitution

2.1.2.1 The competitive constraints that might prevent a 5–10% increase in prices from being profitable for the hypothetical monopolist can come

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<sup>5</sup> European Commission guidelines on market analysis and the assessment of significant market power under the community regulatory framework for electronic communications and services, para 55

<sup>6</sup> Azevedo, J (undated) Presentation on Geographic market definition in EC merger control.

<sup>7</sup> European Commission notice on the definition of relevant market for the purposes of Community competition law, para 30.

in two forms, namely demand side and supply side substitutes (i.e. reactions from consumers and reactions from suppliers, respectively).

#### 2.1.2.2

Demand side substitutes are alternative products to which customers may turn in the face of a relative increase in the price of the product(s) included within the candidate market of 5–10%.<sup>8</sup> These may take the form of products in the same geographic area that have similar functionality and sufficiently similar prices. They may also take the form of products in other geographies to which enough customers would be willing to switch, such that a SSNIP would be rendered unprofitable.

#### 2.1.2.3

In contrast, supply side substitutes are products for which the conditions of supply are sufficiently similar to those of the activity in question such that, were a hypothetical monopolist to attempt to implement a SSNIP over the candidate products in question, producers of these alternatives would deploy their existing production and supply and begin to engage in that activity, thus rendering the 5-10% increase in relative prices unprofitable.<sup>9</sup> It is typically said that, in order for a firm to constitute a supply side substitute, it must be able to redeploy its supply and capacity rapidly without incurring significant additional costs and/or risks.<sup>10</sup> Once again, supply side substitutes may take the form of firms/products in the same geography as the candidate product(s) in question, but may also take the form of products/firms currently offered in other geographies that can rapidly begin offering sufficiently substitutable products or services in the geography in question.

#### 2.1.2.4

Demand side substitutes are often considered to be the primary disciplinary force on suppliers of a given product. According to the EC notice, this is because *“a firm or group of firms cannot have a*

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<sup>8</sup> See Bishop, S. & Walker, M. (2010) *The Economics of EC Competition Law*, pp 118–119.

<sup>9</sup> See Bishop, S. & Walker, M. (2010) *The Economics of EC Competition Law*, pp 119–123.

<sup>10</sup> See, for example, the EC notice on the definition of the relevant market for the purposes of Community competition law, para 14, as well as the UK guidelines on the assessment of market power.

*significant impact on the conditions of sale, such as prices, if customers are in a position to switch easily to substitute products or suppliers located elsewhere”.*<sup>11</sup>

#### 2.1.2.5

However, competition authorities around the world also recognise the importance of supply side substitutability for market definition. For instance, after the European Court of Justice rejected the European Commission’s market definition in *Continental Can* (on the basis that the European Commission had not properly considered substitutes on the supply side), the European Commission explicitly introduced supply side considerations in its notice on the definition of the relevant market.<sup>12</sup> In particular, the EC notice explains that supply side substitution is particularly relevant in the following situations:<sup>13</sup>

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*“[W]hen companies market a wide range of qualities or grades of one product; even if for a given final customer or group of customers, the different qualities are not substitutable, the different qualities will be grouped into one product market provided that most of the suppliers are able to sell the various qualities under the conditions of immediacy and absence of a significant increase in [costs]. In such cases, the relevant product market will encompass all products in demand and supply, and the current sales of those products will be aggregated so as to give the total value or volume in the market. The same reasoning may lead to group different geographic areas.”*

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#### 2.1.2.6

Likewise, the ACCC merger guidelines specifically state that the ACCC will consider supply side substitutes in defining both the product and geographic dimensions of a market.<sup>14</sup> Specifically, the guidelines explain that a product will be treated as a supply side substitute when almost all the capacity for producing that product could quickly be

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<sup>11</sup> European Commission notice on the definition of relevant market for the purposes of Community competition law, para 13.

<sup>12</sup> See Padilla, A. J. (2001), *The Role of Supply-side Substitution in the definition of the Relevant Market in Merger Control*, p 32.

<sup>13</sup> European Commission notice on the definition of relevant market for the purposes of Community competition law, para 21.

<sup>14</sup> ACCC 2008 merger guidelines, para 4.23.

redeployed without the firm in question incurring significant costs or investments. Where only a portion of a rival firm's supply capacity could be readily redeployed, the ACCC explains that such a firm would be considered a potential entrant, rather than a supply side substitute.<sup>15</sup>

2.1.2.7 This is also mirrored in the UK merger assessment guidelines, where it is stated that, in addition to considering demand side factors for the purposes of product and geographic market definition, the Authority may consider the capabilities and reactions of suppliers in the short term.<sup>16</sup> In respect of geographic market definition in particular, the UK merger assessment guidelines explain that the authorities may aggregate several narrow relevant geographic markets into a single, broader geographic market on the basis of suppliers' expected reactions to a change in prices.<sup>17</sup>

2.1.2.8 In a similar vein, the UK guidelines on the abuse of a dominant position explain that the potential behaviour of competing suppliers can constrain the prices of the products in a candidate product and/or geographic market, especially where suppliers can react quickly without incurring significant costs or risks.<sup>18</sup>

2.1.2.9 In fact, this principle was used by the South African Competition Tribunal in the *Caxton*<sup>19</sup> case where it stated that the correct time to utilise supply side substitution is when entry into the relevant market will be likely and timely, such that entry imposes an effective constraint. The Competition Tribunal, in this case, went on to state that the Commission's failure to correctly utilise supply side substitutability led to it inappropriately excluding a relevant segment from the market.

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<sup>15</sup> ACCC 2008 merger guidelines, paras 4.24–4.25.

<sup>16</sup> UK merger assessment guidelines, paras 5.2.6, 5.2.17, and 5.2.24.

<sup>17</sup> UK merger assessment guidelines, para 5.2.24.

<sup>18</sup> UK guidelines on the abuse of a dominant position, paras 4.7–4.8.

<sup>19</sup> See the Tribunal's discussion of supply-side substitution in its decision in the case of *Caxton & CTP Publishes and Printers Ltd v Competition Commission and Others* in case number 13XFeb11, paras 52 - 61.

2.1.2.10 It is therefore clear that the role of supply side substitution should not be ignored in a market definition exercise and that a failure to do so constitutes an irregularity.

2.1.2.11 Whether a potential supply side competitive constraint is labelled as “supply side substitution” (i.e. forming part of market definition) or “potential entry” (and hence forming part of the assessment whether or not a firm in question possesses significant market power, or there is significant harm to competition in a given market) should not matter for the overall competitive assessment, as long as all relevant supply side constraints are ultimately accounted for.<sup>20</sup> This is reflected in the UK merger assessment guidelines, where it is stated that the authorities will gather information on supply side reactions “to the extent that these have not already been taken into account in market definition, for example because they would not occur quickly enough to affect the market definition”.<sup>21</sup> It is also reflected in the ACCC merger guidelines, which explain that:<sup>22</sup>

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*“While a distinction is made between supply-side substitution and new entry for market definition purposes, the relevant consideration in establishing a substantial lessening of competition is the degree of competitive constraint imposed ... by either firms in the market or new entrants.”*

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### 2.1.3 Chains of substitution

2.1.3.1 When undertaking a market definition exercise, it is also often necessary and relevant to consider potential “chains of substitution”.<sup>23</sup>

2.1.3.2 In the context of a product market definition assessment, a chain of substitution refers to a situation where, even if two products do not

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<sup>20</sup> UK market definition guidelines, p 14.

<sup>21</sup> UK merger assessment guidelines, para 5.8.12.

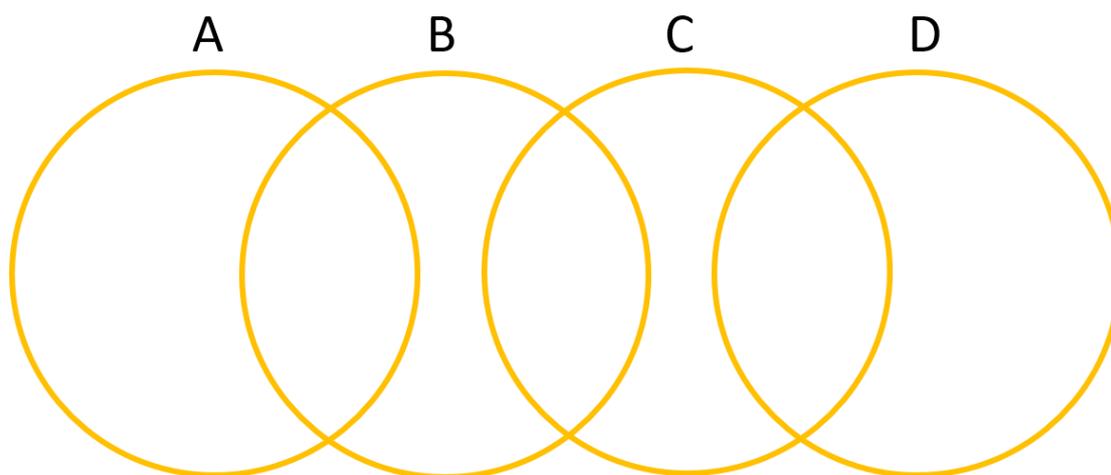
<sup>22</sup> ACCC merger guidelines, para 4.26.

<sup>23</sup> See Gore, D., Lewis, S., Lofaro, A. & Dethmers, F. (2013) *The Economic Assessment of Mergers under European Competition Law*, pp 41-42.

exert a direct competitive constraint on each other (in the sense that customers would not switch between these products following a SSNIP), they may impose an indirect competitive constraint on each other due to the presence of intermediate products that do constrain them.<sup>24</sup>

2.1.3.3 Gore *et al.* (2013) provide the following hypothetical example to demonstrate a chain of substitution in a product market:<sup>25</sup>

2.1.3.3.1 Consider four products, A, B, C and D. These four products overlap in functionality such that the functionality of A overlaps with B, and the functionality of B overlaps with C, but the functionality of A does not overlap with C (and so on). This is illustrated in the figure below.



Source: Adapted from Gore, D., Lewis, S., Lofaro, A, & Dethmers, F. (2013) *The Economic Assessment of Mergers under European Competition Law*, p 42.

2.1.3.3.2 In this scenario, products A and B are likely to be part of the same product market, since a small but significant increase in the price of A would likely result in at least some customers

<sup>24</sup> See Gore, D., Lewis, S., Lofaro, A, & Dethmers, F. (2013) *The Economic Assessment of Mergers under European Competition Law*, pp 41-42.

<sup>25</sup> See Gore, D., Lewis, S., Lofaro, A, & Dethmers, F. (2013) *The Economic Assessment of Mergers under European Competition Law*, pp 41-42.

switching to product B (and vice versa). By the same token, products B and C are likely to form part of the same relevant product market.

2.1.3.3.3 As such, if the price of product B is directly constrained by the price of product A, and is also directly constrained by the price of product C, it is likely that the price of product A will indirectly constrain the price of product C.

2.1.3.3.4 If this is the case, then it would be appropriate to also include products C and D in the relevant market comprised of A and B, because all these products are linked via a chain of substitution.

2.1.3.4 To illustrate this concept further, note that while a small hatchback car may not compete directly with a luxury car, it may compete directly with a mid-size car, which may compete directly with a station wagon, which may in turn compete directly with a luxury car. All cars may form part of the same relevant product market.<sup>26</sup> The Discussion Document similarly explains how a chain of substitution can imply the existence of a broad product market that is comprised of data bundles of all sizes. Specifically, the Discussion Document states that *“although 10MB of data and 100MB of data may not seem like direct substitutes, both are likely to compete with 50MB of data to some extent and hence may constrain each other indirectly”*, and that *“[t]here is likely a chain of substitution that joins the various bundles sizes together in one market”*.<sup>27</sup>

2.1.3.5 Chains of substitution can also imply the existence of broad geographic markets. Bishop & Walker (2010) explain chains of substitution in the context of geographic market definition using the following example:<sup>28 29</sup>

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<sup>26</sup> Bishop, S., & Walker, M. (2010) *The Economics of EC Competition Law: Concepts, Application and Measurement*, p 146.

<sup>27</sup> Discussion Document, pp 19 and 27.

<sup>28</sup> Bishop, S., & Walker, M. (2010) *The Economics of EC Competition Law: Concepts, Application and Measurement*, p 145.

<sup>29</sup> Also see Parker J., & Mujumdar, A. (2011) *UK Merger Control*, p 388.

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*“[O]utput from Plant A competes with output from Plant B because they are relatively close to each other; output from Plant B competes with output from Plant C because they are relatively close to each other; therefore Plant A and Plant C are in the same relevant geographic market because the price of output from Plant A constrains the price of output from Plant B, which in turn constrains the price of output from Plant C.”*

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- 2.1.3.6 Competition authorities have long been aware of the implications of chains of substitution for market definition. By way of an example, the EC notice explains that:<sup>30</sup>

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*“In certain cases, the existence of chains of substitution might lead to the definition of a relevant market where products or areas at the extreme of a market are not directly substitutable.”*

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#### 2.1.4 **Summary**

- 2.1.4.1 In summary, both the product and geographic dimensions of a relevant market are to be defined with reference to both demand side and supply side substitutes. By way of a set of hypothetical examples, consider the market(s) for different types of golf clubs:

- 2.1.4.1.1 Demand side substitutes: If the price of one brand of golf putter increased, it is likely that at least some consumers would be willing to switch to another brand of golf putter. As such, from a demand side perspective, one might define a product market that is comprised of all golf putters. If other putter brands were only available in certain geographic areas, then one would define the relevant geographic market, from a demand side perspective, to include all the areas to which customers would be willing to travel in order to purchase those other putter brands.

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<sup>30</sup> European Commission notice on the definition of relevant market for the purposes of Community competition law, para 57.

2.1.4.1.2 Supply side substitutes: If the price of golf putters increased, it is unlikely that customers could easily switch to using golf drivers for the same purpose. As such, from a demand side perspective, it is unlikely that one would define a relevant product market that includes both putters and drivers. However, it may be the case that manufacturers of drivers (and other golf clubs) are well positioned to rapidly and easily redeploy their existing manufacturing capabilities to begin producing and supplying putters. As such, from a supply side perspective, one might define a broad product market that includes all types of golf clubs. Then, in terms of the geographic dimension of the relevant market, if golf club manufacturers in other areas were well positioned to expand their operations into the area in which the putter price increase is experienced, then one might define the relevant geographic market to include all those areas.<sup>31</sup>

2.1.4.1.3 As such, based on demand and supply side substitution, one might define a product market for all golf clubs, and a geographic market that includes a number of different areas.

2.1.4.2 The indirect competitive constraints imposed by chains of substitution may serve to broaden the relevant product or geographic markets.

## 2.2 **Dominance and market power**

2.2.1 Market power is defined in the ECA as having the same meaning as the term is defined by the Competition Act, No.89 of 1998, as amended (the “Competition Act”). Accordingly, market power is defined as the ability of a firm to act independently of its customers and rivals, and raise prices above the level that would prevail under competitive conditions.

2.2.2 This definition has been adopted by many competition authorities around

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<sup>31</sup> There may of course be both a supply side and a demand side reaction. For example, if the price of putters in area A increased, a driver manufacturer in area B may begin manufacturing and selling putters to (a supply side response). Customers in area A might then be willing to travel to area B to purchase putters (a demand side response).

the world.<sup>32</sup> However, it is widely recognised that evaluating whether a firm has market power is far from a straightforward task.

2.2.3 A simple starting point is the measurement of market shares. For instance, Section 7 of the Competition Act stipulates that a firm is dominant in a market if (a) it has at least 45% of that market; (b) it has least 35%, but less than 45%, unless it can show that it does not have market power; or (c) it has less than 35% of the market, but has market power. Market shares can provide an indication of how concentrated a market is.

2.2.4 There also exists several more sophisticated approaches to measuring the level of concentration in a market, one of the most common being the Herfindahl-Hirschman Index (“HHI”). The HHI of a given market is equal to the sum of the squared market shares, where a higher HHI is indicative of a higher level of concentration (the primary difference between the HHI and a simple market share calculation is that the HHI places more weight on large market shares).<sup>33</sup>

2.2.5 However, it is widely recognised among competition authorities that high market share concentration measures are generally not a sufficient condition to draw conclusions about whether firms possess market power.<sup>34</sup> Indeed, while many jurisdictions have a market share threshold above which dominance may be presumed, the assessment of whether or not a firm is likely to possess substantial market power, or if the market is characterised by ineffective competition, requires more than market definition and the simple calculation of market shares. This more detailed assessment is required to be evidenced before the proposal of regulatory intervention. Additionally, and as discussed further below, the process of considering regulatory interventions must include the identification of potential adverse, unintended consequences of any proposed regulation, which may harm competition and consumers.

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<sup>32</sup> Bishop, S., & Walker, M. (2010) *The Economics of EC Competition Law: Concepts, Application and Measurement*, p 52.

<sup>33</sup> Bishop, S., & Walker, M. (2010) *The Economics of EC Competition Law: Concepts, Application and Measurement*, p 68.

<sup>34</sup> Hausman, J. A. & Sidak, J. G. (2007) Evaluating market power using competitive benchmark prices instead of the Herfindahl-Hirschman index. *Antitrust LJ*, 74, p 388.

- 2.2.6 Whether or not this assessment is done at the stage of dominance assessment (as in some other countries, which do not have a market share threshold for dominance), or at a subsequent stage of assessment when a regulator might consider whether or not regulation is likely to be reasonably justifiable (which might occur in contexts such as South Africa, which has a market share threshold for the definition of “dominance”), should not affect the ultimate conclusion.
- 2.2.7 As explained by Bishop & Walker (2010), while market shares and HHIs are relatively easy to calculate, and have some intuitive appeal, the use of these metrics to assess the level of competition and market power in a market raises several issues. These include:<sup>35</sup>
- 2.2.7.1 First, the structure of a market is sometimes determined endogenously rather than exogenously. For instance, if a firm in a market is more efficient than others, or develops a better product, or offers a better price, then it is logical to expect the firm to gain a relatively large market share, and for the level of concentration to increase in turn. However, it would be incorrect, as a matter of economics, to conclude that this high concentration is indicative of ineffective competition in this instance, since this outcome is the result of strong competitive pressures in the market.
- 2.2.7.2 Second, market shares naturally depend on how the market has been defined, and therefore any analysis of market shares must be preceded by a comprehensive and robust market definition exercise (see sub-section 2.1 above).
- 2.2.7.3 Third, the level of concentration of, and the number of players in, a market does not always provide a good indication of the level of competition in that market. For instance, markets with many players may be subject cartel agreements, in which case the level of concentration would overestimate the true level of competition. In addition, if price competition is vigorous, it may be enough for only two firms to bring about a competitive outcome (since the existence

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<sup>35</sup> Bishop, S., & Walker, M. (2010) *The Economics of EC Competition Law: Concepts, Application and Measurement*, p 70.

of two large players in a market would likely indicate that neither could behave independently of the other). As such, concentration levels usually only serve as an initial screen for the prevailing level of competition in a market.

2.2.7.4 Fourth, there are a number of implicit assumptions underlying concentration indices such as the HHI, which are highly standardised and may not be met in certain markets or industries and are highly unlikely to be met in mobile services, as discussed further in Tirole (1993).<sup>36</sup>

2.2.8 As such, any competition assessment should always involve a host of other considerations, including the characteristics of the industry in question, and the constraints imposed by the bargaining strength of a firm's customers (i.e. the extent of countervailing buyer power).<sup>37</sup> In addition, since competition is inherently a dynamic process, if supply side constraints are not accounted for in the market definition phase of a competitive assessment, it is important that they are accounted for when evaluating dominance/market power or effectiveness of competition.

2.2.9 This approach is consistent with the requirement in section 67(4A)(b) of the ECA that ICASA, in determining whether there is effective competition within a market, must consider, amongst others, "*the dynamic character and functioning*" of the market, including "*a forward looking assessment of the relative market powers of the licensees*" in the relevant market.

2.2.10 That being the case, an assessment of dominance should not only account for constraints imposed by existing players in a market, but it should also consider the competitive constraints imposed by the credible threat of expansion by existing rivals, as well as the threat of entry from potential rivals.<sup>38</sup> For instance, a firm may be deterred from increasing its prices, or

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<sup>36</sup> Tirole, J. (1993) *The Theory of Industrial Organization*, p 222.

<sup>37</sup> European Commission guidelines on Article 82 (abuse of dominance), para 12.

<sup>38</sup> European Commission guidelines on Article 82 (abuse of dominance), paras 12 and 16. Also see the UK guidelines on the assessment of market power, para 3.3.

decreasing its quality, if expansion from rivals is likely, timely, and efficient, such that the firm in question would simply lose customers if it were to attempt to exert any form of “market power”.<sup>39</sup> In such circumstance, the US horizontal merger guidelines in fact propose that market shares should be calculated on the basis of capacities or reserves, as these metrics may provide a better indication of future competitive significance.<sup>40</sup>

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<sup>39</sup> European Commission guidelines on Article 82 (abuse of dominance), paras 16.

<sup>40</sup> US horizontal merger guidelines, sub-section 5.2.

### 3. APPLICATION TO THE RETAIL MARKET

#### 3.1 Market definition

3.1.1 ICASA finds that there is a broad product market at the retail level, comprised of mobile voice, SMS, and data services. This appears to be based on ICASA's observation that the competitive dynamics are similar for these products, since they all require the same inputs such as radio frequency spectrum and high points, or access via roaming or MVNO/APN services.<sup>41</sup> We agree with ICASA's finding that there is a broad product market that consists of mobile voice, SMS, and data services. However, since there is unlikely to be a significant degree of demand side substitutability between these products, we note that this finding must therefore imply sufficient supply side substitutability between voice, SMS, and data services. Indeed, ICASA cites similar supply side inputs as the primary reason for defining a broad product market.

3.1.2 In respect of data services, as mentioned above, ICASA states that different sized data bundles are likely to fall within the same relevant market, as they are likely to be linked by a chain of substitution on the demand side.<sup>42</sup> We also agree with ICASA's findings in this regard, and we additionally note as an aside that different sized data bundles are also perfect supply substitutes, in that exactly the same data connectivity that could be provided as part of a 10 MB bundle, could also be provided to the identical customer, as part of a 100MB bundle.

3.1.3 In contrast, ICASA defines narrow geographic retail markets, specifically at the municipal level. ICASA alleges that this is because there is a significant variability in prices (by which we understand that ICASA is referring to realised average effective consumer prices), usage and costs between different geographic areas, which, according to ICASA, indicates that competitive dynamics vary significantly across geographies.<sup>43</sup>

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<sup>41</sup> Discussion Document, paras 26–27.

<sup>42</sup> Discussion Document, para 28.

<sup>43</sup> Discussion Document, para 35.

- 3.1.4 It is MTN's view that ICASA has not consistently applied the concepts of supply side substitutability and chains of substitution in defining the geographic scope of the relevant market. In particular, it is not clear why ICASA's reasoning regarding similar supply side inputs and chains of substitution would not equally result in the definition of a national geographic market for mobile services.
- 3.1.5 In the first instance, the very nature of mobile services, which are, by definition, provided to a single consumer as he or she moves across different regions, and which connect that consumer either to consumers in other regions, or to access information located in other regions appears to fly in the face of such a local geographic market definition.
- 3.1.6 Moreover, the bases on which ICASA has justified its conclusion are not reliable. ICASA claims that there is significant variation in prices, costs, and usage across geographic areas, and that this constitutes evidence that the competitive dynamics vary across municipalities. First, ICASA has provided no evidence of this alleged variation. At most, ICASA has used Statistics South Africa data to demonstrate that annual household income and the proportion of the population living in a formal residential area differs across municipalities.<sup>44</sup> While it may be the case that these metrics are correlated with factors such as data use, ICASA has not provided sufficient evidence to draw such a conclusion.
- 3.1.7 Second, it is unclear why these two metrics would necessarily reflect the costs and prices of data services. MTN is aware that the effective (i.e. realised) prices enjoyed by different customers in different regions vary. However, these differences are a result of differences in the mixes of customers, and the different ways in which customers make use MTN's services. In other words, the average effective rate in area A might be different to the average effective rate in area B because some customers in area A purchase a different mix of products compared to area B (e.g. hourly bundles that provide a lower per MB than a monthly bundle).
- 3.1.8 In addition, these differences exist between every single consumer in South

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<sup>44</sup> See the Discussion Document, figures 2 and 3.

Africa, even within the same local area. Two customers located in the same building but purchasing different data products from the same operator (e.g. an hourly bundle or a monthly bundle), may pay substantially different prices. However, it would not be rational to define those two customers, living in the same building, using the same operator, and the same network equipment, at the same time, as constituting two separate markets. The same user might even experience different effective prices if he or she accesses a zero rated app, or takes advantage of a free data allowance as part of a promotional package. It would again be irrational to define the two instances of connection by that same consumer as two separate markets.

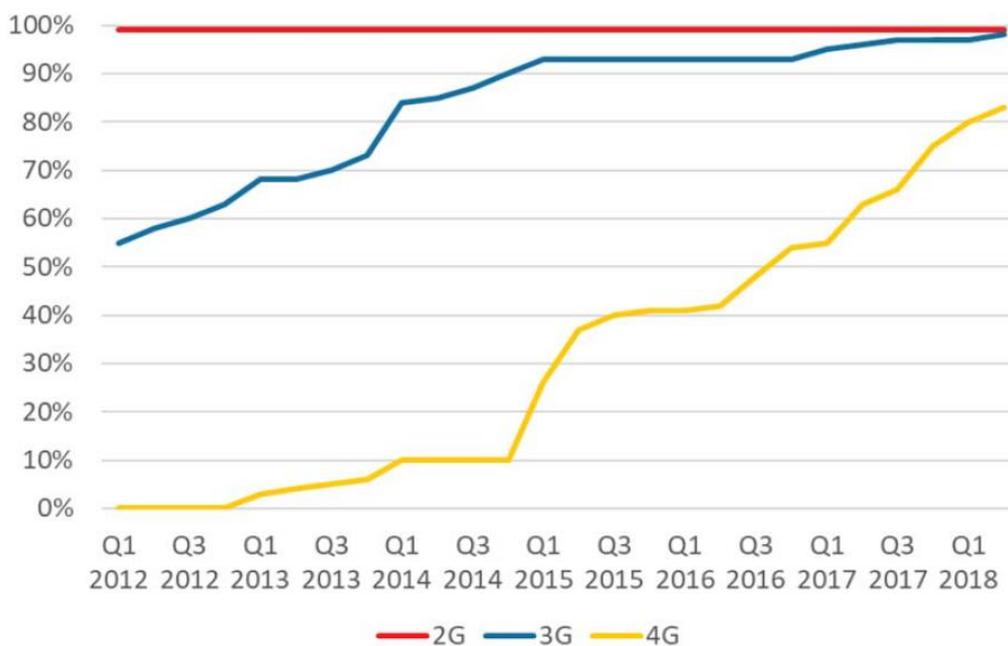
- 3.1.9 Separately, and as explained in MTN's response to the Commission's provisional report on the data services market inquiry, the differences in effective rates that occur across connection episodes, and across consumers, are borne out of pro-competitive price discrimination, which typically allows poorer consumers to pay a lower effective rate than wealthier consumers.
- 3.1.10 It would be incorrect, as a matter of economics, to conclude that different usage patterns and effective prices are indicative of narrow geographic markets, in particular given that the same inputs are used to provide data services across the whole country, as well as the fact that networks of Vodacom and MTN provide national data coverage.
- 3.1.11 More fundamentally, such narrow geographic markets are fundamentally inconsistent with the way in which competition takes place between mobile service providers. Infrastructure competition is a critical component of both network coverage and quality, and each of MTN and Vodacom have continuously made massive investments in their infrastructure over time, across the country, to improve their coverage and introduce better, more efficient, and faster technologies each year.<sup>45</sup>
- 3.1.12 Vodacom and MTN both have virtually national 3G coverage, and 4G coverage of more than 80%. This is illustrated in the two figures below. MTN has long achieved over 98% coverage of the population with its 2G

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<sup>45</sup> To illustrate, the capital expenditure of each of Vodacom and MTN ranged from more than R8 billion per year to more than R11bn per year, over the period 2015 to 2017.

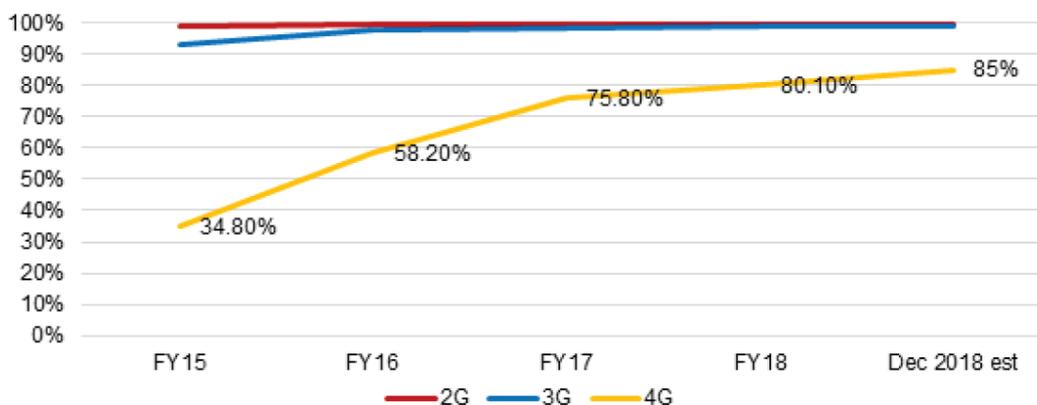
technology layer. Moreover, MTN's 3G coverage has increased rapidly over time, starting at just 6% in 2007, but reaching over 98% in 2018. MTN's 4G coverage has also expanded quickly, growing to approximately 95% of the population. Vodacom's coverage is similarly expansive, since, as at the end of 2018, almost 100% of the population fell within Vodacom's 2G and 3G coverage, and its 4G coverage was estimated to be at approximately 85%. Moreover, while Cell C and Telkom do not have national coverage on their own networks, they are able to achieve national coverage by roaming on the networks of either Vodacom or MTN (as noted by ICASA in the Discussion Document).

**Figure 2: MTN population coverage by technology layer, 2012-2018**



*Source: MTN response to the Competition Commission's provisional report on the data services market inquiry*

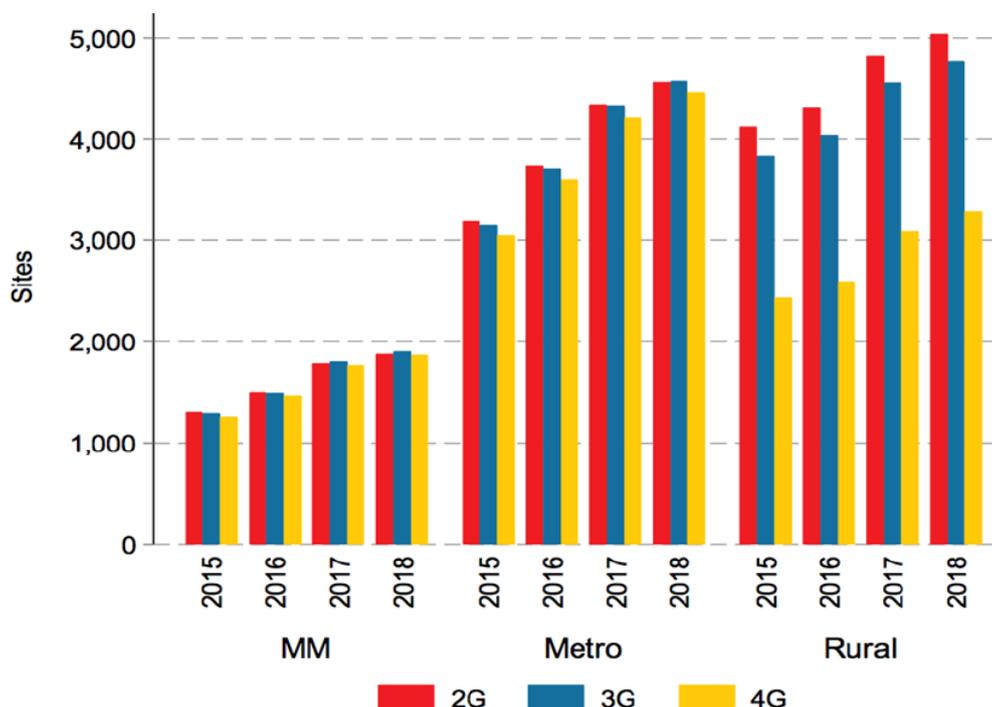
**Figure 3: Vodacom population coverage by technology layer, 2015-2018**



*Source: Data services market inquiry provisional report, p 24*

- 3.1.13 In addition, the figure below shows a clear year-on-year increase in the number of properties upon which MTN has constructed infrastructure, particularly in the more remote rural areas. Over the period 2015 to 2018, the number of 4G enabled infrastructure in rural areas grew by approximately 30% (from around 2,500 to 3,300), and the number of 3G enabled infrastructure grew by approximately 25% (from around 3,800 to 4,800).

**Figure 4: Number of properties upon which MTN has constructed infrastructure, 2015-2018**



*Source: MTN response to the Competition Commission's provisional report on the data market inquiry*

3.1.14 The result is that the competitive offering of MTN, and the other MNOs, is geographically contiguous. A significant aspect of MTN's competitive offering is that subscribers are able to access mobile services across the country, where that access is delivered via the same underlying network infrastructure, regardless of where a subscriber chooses to make a telephone call, send an SMS, or connect to the internet.

3.1.15 As discussed above in sub-section 2.1.1, the key economic question when defining the geographic scope of a market is whether a firm in a certain area is isolated from the competitive pressures exerted by firms outside of that area. If the answer to this question is "no", it is reasonable and appropriate to broaden the scope of the geographic market. In the case at hand, clearly if MTN were (hypothetically) the only operator in any given municipality in South Africa, and sought to increase prices in that municipality, Vodacom would be well-placed to rapidly expand its operations into that municipality to defeat that price increase and render it unprofitable for MTN. Indeed, while the Discussion Document points to various potential barriers that a

new entrant into the market might face, it is relatively silent on barriers to expansion, stating only that “[b]arriers to expansion may be different to barriers to entry since it may be easier for an existing rival to expand capacity into new product ranges than for a new firm to enter the market”.<sup>46</sup>

3.1.16 Many of the elements necessary for the provision of mobile services to consumers in one area, at one given point in time, are shared across the provision of mobile services to other consumers, in other areas. By way of example, much of the national network of backhaul, and linkages between distributed RAN equipment, the core network, and the connections between MTN’s network, and not only the networks of other operators in South Africa, but also other global operators, and the global internet more generally, are clearly shared. It would be artificial and arbitrary to consider that MTN is engaged in the provision of mobile services in one municipality, when such an offering would simply never exist on a standalone basis in practice.

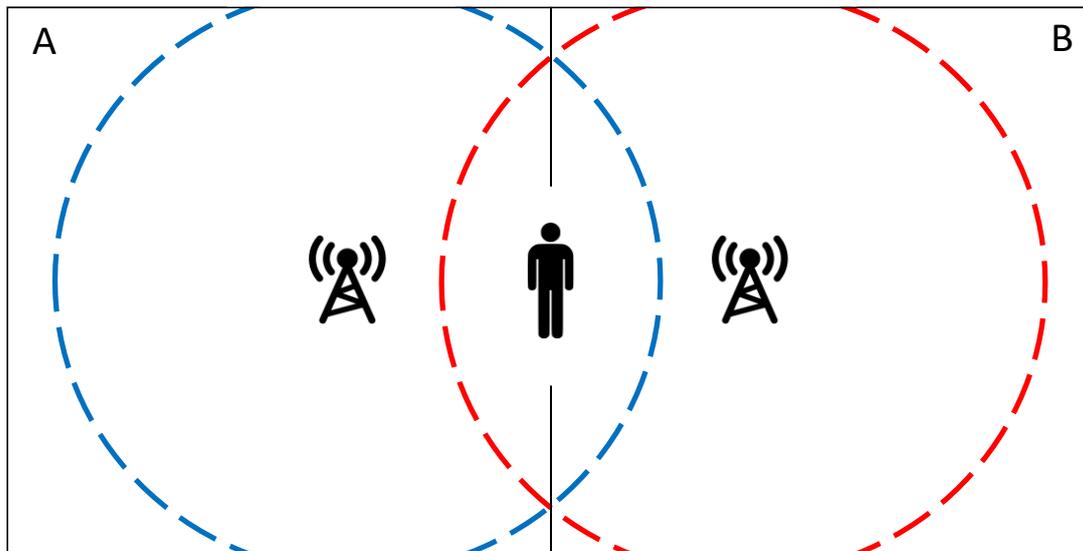
3.1.17 As such, MTN does not consider that it is isolated from the competitive pressures external to any of the municipalities in which it is active. This suggests that the geographic market for data services is in fact national in scope.

3.1.18 In addition, ICASA does not consistently apply the logic of chains of substitution to the geographic market definition. In the first instance, there are clear links between consumers which use mobile services in adjacent regions. A consumer on the border of region A, which has a RAN tower to the West, and region B, which has a RAN tower to the East, might be served by towers in either region. This is illustrated below.

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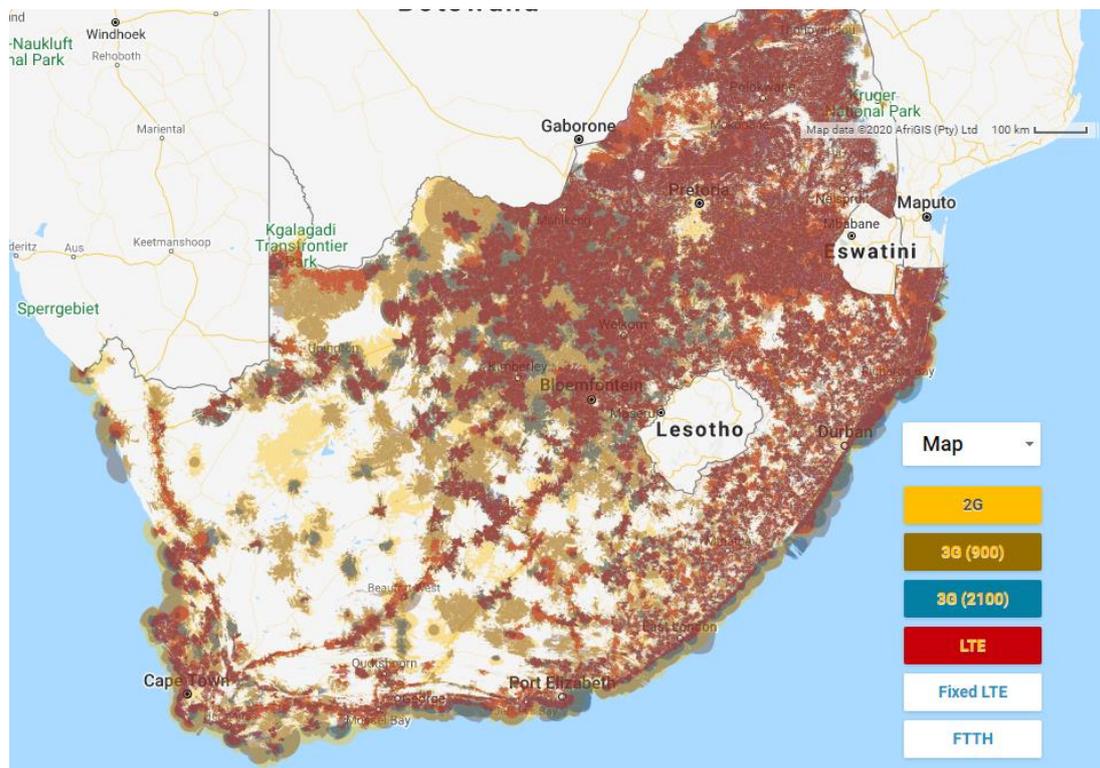
<sup>46</sup> Discussion Document, para 12.

Figure 5: Chain of substitution – RAN towers



- 3.1.19 Indeed, mobile services from these two towers, to the West and the East of this consumer, may be direct and perfect demand substitutes. Moreover, an operator that owns both RAN towers might choose to serve this consumer by using one tower in one set of circumstances, and another tower in another set of circumstances (e.g. when the one tower is too busy). Accordingly, the services provided in these two regions might be perfect supply substitutes. As mobile services are typically provided across a large number of overlapping areas, these areas are then linked by a chain of substitution, on both the demand and supply sides – as illustrated in MTN’s coverage map below. This dynamic therefore indicates only a national market for mobile services.

**Figure 6: MTN coverage map**



Source: [https://www.mtn.co.za/Pages/Coverage\\_Map.aspx](https://www.mtn.co.za/Pages/Coverage_Map.aspx), accessed 12 February 2020

- 3.1.20 In short, therefore, it is MTN's view that there is a national market for mobile services. If the economic framework set out above is correctly applied, ICASA's submitted geographic definition is not possible. However, as discussed above in sub-section 2.1.2, even if the supply side competitive constraints experienced by MTN do not imply a broad national market, they should nonetheless be properly considered when assessing whether the market is characterised by effective competition. The latter is discussed in more detail in the sub-section below.

### 3.2 Dominance and effective competition assessments

- 3.2.1 ICASA finds that the market for data services, at the national level, is highly concentrated, with an HHI of more than 3,000 (where market shares are measured based on the number of subscribers).<sup>47</sup> It finds that MTN had a

<sup>47</sup> Discussion Document, paras 41–42.

national market share of approximately 30.3% in 2018.<sup>48</sup> However, following on from its narrow geographic market definition at the municipal level, ICASA alleges that many municipalities are subject to ineffective competition (based on the HHI), and that MTN has a market share of more than 45% in 82 out of 234 municipalities.<sup>49</sup>

### 3.2.2 National market

3.2.2.1 In the first instance, MTN respectfully submits that it is incorrect for ICASA to measure market shares (and in turn assess dominance) on a municipal level, because, in MTN's view, the relevant market for data services is national in scope. This is for the reasons set out in subsection 3.1 above.

3.2.2.2 In this regard, it is notable that MTN's 2018 subscriber market share is nearly 5 percentage points below the dominance threshold stipulated in Section 7 of the Competition Act, as per ICASA analysis. Moreover, MTN's subscriber market share has been declining over time, moving from approximately 42% in 2011 to approximately 30% in 2018 – a decrease of nearly 30% in the space of 7 years. This contrasts with the market shares of Vodacom, which have remained relatively stable over time (hovering between roughly 42% and 45% since 2011), as well as the market shares of Cell C and Telkom, which have both increased dramatically over time (by around 80% since 2011 in the case of Cell C, and by nearly 150% since 2011 in the case of Telkom). The table below summarises these observations, which contrasts ICASA's claim that there is a lack of dynamisms in national market shares.<sup>50</sup>

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<sup>48</sup> Discussion Document, figure 4.

<sup>49</sup> Discussion Document, para 71.

<sup>50</sup> See the Discussion Document, para 45.

**Table 1: Changes in subscriber market shares over time, 2011-2018**

Operator	2011 (%)	2015 (%)	2018 (%)	Percentage change (2011-2015)	Percentage change (2015-2018)	Percentage change (2011-2018)
Vodacom	45	42	43.4	-6.67%	+3.33%	-3.56%
MTN	42	36	30.3	-14.29%	-15.83%	-27.86%
Cell C	9	15	16.5	+66.67%	+10.00%	+83.33%
Telkom	4	7	9.8	+75.00%	+40.00%	+145.00%

*Source: Calculations based on figure 4 of the Discussion Document*

3.2.2.3 Even based on a simple initial screen of market share estimates, these observations are highly inconsistent with the notion that MTN is in a position of significant market power, and rather suggest that MTN is in fact subject to significant competitive pressures. Indeed, looking past a simple analysis of relative market shares, there are several pro-competitive outcomes that suggest that the market is subject to effective competition. These are more fully set out in MTN's response to the Competition Commission's provisional findings on the data services market inquiry, but for convenience we summarise them below:<sup>51</sup>

3.2.2.3.1 MNOs have made very significant infrastructure investments, on a continuous basis, over a very long period of time;

3.2.2.3.2 MNOs (in particular MTN and Vodacom) provide national coverage for mobile data services;

3.2.2.3.3 Over time, MNO's have offered faster and faster connection speeds (with MTN in particular ranked as the best network in

<sup>51</sup> See MTN's response to the Competition Commission's provisional reports on the data services market inquiry, pp 30–39, June 2019.

Africa according to P3);

3.2.2.3.4 Data volumes have increased exponentially over time. MTN's data traffic increased by 31 times over the period 2011 to 2018 (with the expected growth accelerating), and despite this effective data prices have fallen drastically over time; and

3.2.2.3.5 Data prices are pro-poor in nature, as those subscribers who pay the least for mobile services end up paying the lowest effective data prices, on average.<sup>52</sup>

3.2.2.4 MTN notes that ICASA has sought to take a step further in evaluating the level of competition in the market by calculating the HHI. However, for the reasons set out above in sub-section 2.2, concentration indices such as the HHI are not often a good measure of the true intensity of competition in a market. Moreover, the HHI is not well suited to the mobile industry. It can be a particularly misleading indicator of competitive intensity in markets that are characterised by large capital investments and limited resources, which may in fact be more efficiently served by only a handful of players. For instance, Diallo & Tomek (2015) explain that when a mobile market...<sup>53</sup>

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*"...is regulated and has limited resources (the frequencies used to provide mobile service are not infinite, which implies the limitation on the number of firms in the segment), its result can be misleading. In a market segment, where the two previously mentioned conditions are met, the interpretation of an HHI output value is almost known in advance. According to the current interpretation of an HHI output value, no mobile market in the world is highly competitive, which elicits some questions."*

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3.2.2.5 By way of another example, in 2004 the Irish telecommunications regulator, ComReg, found that the HHI of the Irish mobile market was

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<sup>52</sup> See MTN's response to the Competition Commission's provisional reports on the data services market inquiry, pp 16–28, June 2019.

<sup>53</sup> Diallo, A. & Tomek, G. (2015) The interpretation of HH-Index output value when used as mobile market competitiveness indicator. *International Journal of Business and Management*, 10(12), p 48.

4,682, and that Vodafone and O2 were jointly dominant with a combined market share of 92%. The regulator also concluded that Vodafone and O2 were exercising significant market power.<sup>54</sup> However, when comparing the prices of mobile services in Ireland and the UK, where regulators had found the UK mobile market to be “effectively competitive” and subject to similar conditions to Ireland, Hausman & Sidek (2007) found that prices in Ireland were in fact *lower* than prices in the UK.<sup>55</sup> This once again demonstrates how the use of the HHI can provide a misleading view of actual competitive dynamics in the mobile industry.

3.2.2.6 A proper competitive assessment should always go beyond a simple concentration analysis and should account for the actual competitive pressures that players in the market are subject to, and the specific competitive outcomes in the market in question. A failure to consider these relevant factors would be irregular both as a matter of administrative law and in terms of section 67(4A). On this basis, it is clear that the current level of competition has been sufficient to produce a wide range of pro-competitive outcomes for end-consumers of data products.

### 3.2.3 **Municipal markets**

3.2.3.1 MTN remains of the view that the relevant market is national in scope based on its arguments above. However, in circumstances where ICASA has sought to define municipal markets, MTN submits that it is then necessary for ICASA to perform a comprehensive assessment of the supply side competitive constraints that might limit the extent to which an operator might be able to exert market power in those municipal markets.

3.2.3.2 In this regard, ICASA’s conclusions regarding dominance in the

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<sup>54</sup> Hausman, J. A. & Sidak, J. G. (2007) Evaluating market power using competitive benchmark prices instead of the Herfindahl-Hirschman index. *Antitrust LJ*, 74, p 389.

<sup>55</sup> Hausman, J. A. & Sidak, J. G. (2007) Evaluating market power using competitive benchmark prices instead of the Herfindahl-Hirschman index. *Antitrust LJ*, 74, p 389.

municipal markets for mobile services once again appear to be based solely on market shares and HHIs.<sup>56</sup> Specifically, seemingly on the basis of municipal HHI calculations only, ICASA concludes that “*there are a number of geographic areas characterised by ineffective competition*”.<sup>57</sup> By the same token, ICASA alleges that MTN and Vodacom are “dominant” and “have significant market power” in certain municipalities, based solely on market share measurements.<sup>58</sup>

### 3.2.3.3

In the first instance, market shares and HHIs seldom provide accurate or complete measures of the true intensity of competition in any market, but particularly mobile markets (for the reasons set out above). These simplistic calculations clearly fall short of a comprehensive assessment of market power, which should necessarily involve further considerations of the competitive constraints exerted by the threat of rivals’ expansion, for example. Indeed, while ICASA plays down the role of supply-side substitution for the purposes of geographic market definition, it has not adequately considered the ease at which, to use the example referred to above, Vodacom could expand its current operations to suppress any hypothetical exertion of MTN’s “market power” in any given municipality (see the discussion above in sub-section 3.1). A failure to consider these relevant factors would be irregular both as a matter of administrative law and in terms of section 67(4A).

### 3.2.3.4

In any event, ICASA’s findings regarding municipal market concentration seem to show that it is the more remote rural areas of the country that are the most concentrated. If anything, this is likely to mostly reflect pro-competitive outcomes at the national level. Specifically, as discussed above, vigorous infrastructure competition between Vodacom and MTN has led these operators to build out their networks into rural areas, which is a positive outcome for consumers, even if it is the case that some municipalities are served by only one

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<sup>56</sup> See the Discussion document, paras 43–45 and 71.

<sup>57</sup> Discussion Document, para 45.

<sup>58</sup> Discussion Document, para 71. As an aside, we note that the Discussion Document does not explain upon what metric these market share calculations are based.

operator.

3.2.3.5 Finally, given that ICASA has defined municipal markets, MTN considers that it is inconsistent for ICASA to then seek to effectively “aggregate” MTN and Vodacom’s alleged “dominance” by counting the number of individual municipalities in which these operators have a market share of more than 45%. This seems a misleading way to communicate the extent of “market power” at a national level, since if ICASA considers it relevant to look at the market nationally, municipal markets should not even be defined in the first instance. It is more appropriate to consider national market shares, which, as mentioned above, indicate that MTN is not in a position of significant market power.

#### 3.2.4 **International comparisons**

3.2.4.1 MTN supports ICASA’s acknowledgment that international comparisons cannot focus solely on headline prices and need to consider other factors that drive data pricing, such as quality of service, coverage, spectrum assignments and other characteristics on price.

3.2.4.2 Notwithstanding the aforementioned, MTN submits that an international benchmarking exercise is not a relevant or appropriate measure of the state of competition in a particular market, in that, international benchmarking exercises are extremely difficult to carry out accurately such that any reliable inferences can be drawn, as there are many confounding factors that vary substantially from country to country<sup>59</sup>.

3.2.4.3 MTN notes that ICASA’s conclusion from its international comparison analysis, states that South African mobile data prices are neither extremely high or very low when compared to other African countries or countries which are similar to South Africa in terms of size and level of development. Moreover, ICASA states that with regard to data speeds and LTE coverage, it is clear that South African customers are “*benefiting*

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<sup>59</sup> See MTN’s response to the Competition Commission provisional reports on the data services market inquiry, Annexure B, June 2019

*from much higher quality of access than those in other African countries”.* Furthermore, with regard to the ITU’s “Advanced” countries, South Africa performs reasonably well and its performance (in terms of price and quality) is similar to a number of countries that would be considered its peers<sup>60</sup>. These statements do not support a finding of ineffective competition or possible market failure.

3.2.4.4 MTN further notes that ICASA has stated that spectrum assignment is critical to achieving affordable, high quality mobile broadband.<sup>61</sup> In addition, it states that South Africa has relatively low spectrum assignments for mobile use when compared to international benchmarks.<sup>62</sup> In particular, ICASA states that the spectrum assignments of the BRICS and ITU “Advanced” countries illustrates that China’s superior performance in terms of speed and price are contextualised when *“seen alongside the fact that it has assigned nearly twice the spectrum that South Africa has”.*<sup>63</sup>

3.2.4.5 Based on the above submission by ICASA, it is surprising that ICASA then relies on China’s performance, (i.e. an inappropriate peer country), to conclude that there is some degree of possible market failure in South Africa.<sup>64</sup> This conclusion is in fact incongruent with the statements made by ICASA in its preceding paragraphs, as demonstrated herein above, and therefore this conclusion is not supported by ICASA’s previous statements.

3.2.4.6 In summary, MTN submits that ICASA’s international comparison is not an appropriate measure of the effectiveness of competition in South Africa, and that its findings in this regard do not support its conclusion that there is some degree of possible market failure.

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<sup>60</sup> Discussion Document, para 67

<sup>61</sup> Discussion Document, para 62

<sup>62</sup> Discussion Document, para 63

<sup>63</sup> Discussion Document, para 64

<sup>64</sup> Discussion Document, para 67

#### 4. APPLICATION TO THE UPSTREAM MARKETS

4.1 When considering the regulation of upstream mobile markets, it is important to balance the potential for pro-competitive effects in the short term (such as increasing access and lowering barriers to entry) against the potential for anti-competitive effects, or other adverse effects, in the longer term (such as reducing incentives for ongoing investment, and harming infrastructure competition in the market). In order to do this, ICASA should:

4.1.1 Distinguish cases where firms (in particular dominant firms) act to harm competition from situations where they engage in normal competition on the merits or act so as to meet the competitive initiatives of their rivals. In this regard, it can be helpful to consider also the retail level of the supply chain, and not only the wholesale level. Where there is effective competition at the retail level, then this is usually a strong indicator that it is not necessary to regulate wholesale markets.

4.1.2 Determine the relevant timeframe. Regulatory measures aiming to foster competition in the short term may harm it in the longer term. For example, imposing shared access mandates on an incumbent's facilities will tend to increase competition in the short term but decrease long-term incentives for network rollout and the likelihood of two or more viable competing networks in the long term.

4.2 As a general principle in economic regulation, regulators should seek to implement interventions and tools in the least burdensome way, based on the established best practice for implementing regulation. This means imposing requirements only where necessary, considering alternatives to regulation and minimising the risk of unintended consequences.

#### 4.3 **Upstream market 1: Spectrum**

4.3.1 MTN would like to commend ICASA's recognition of the fact that access to additional spectrum may lead to significant cost reductions, dependent on the cost of spectrum and the cost of fulfilling licencing conditions, and to positive impacts on service quality. As ICASA is aware, a lack of sufficient spectrum means that, in order to meet consumer demand and keep up with

global developing technologies, licensees must densify their networks which raises costs and, indirectly barriers to entry. MTN therefore recognizes and commends ICASA's efforts in making simultaneous award of various spectrum frequencies in terms of its published Consultation Document in Government Gazette No. 42820 (Volume 653) (the "Consultation Document") in relation to the award of radio frequency spectrum licences within the International Mobile Telecommunications (IMT) bands.

4.3.2 As mentioned in MTN's response to the Consultation Document, the pro-competitive and simultaneous award of spectrum as envisaged by ICASA reduces uncertainty for licensees in respect of the future availability of spectrum, thus simplifying network planning and spectrum valuation tasks. The simultaneous award also reduces the complexity of developing and executing an auction bidding strategy thereby supporting ICASA's public policy goals.

4.3.3 It is necessary for ICASA to keep in mind that ensuring efficient and pro-competitive allocation of spectrum means that spectrum should be assigned to those that value it most highly. Accordingly, it is vital that the electronic communications sector accurately value the spectrum.

#### 4.3.4 **Market definition**

4.3.4.1 In respect of the relevant market for spectrum, ICASA submits that there are no substitutes for spectrum in the provision of mobile network services and that competitive dynamics across the spectrum bands are sufficiently similar such that narrower markets of spectrum, across the different bands, need not be defined.

4.3.4.2 ICASA goes on to define the geographic market for spectrum as national due to the fact that spectrum is assigned on a national basis.

4.3.4.3 MTN does not, at this point, dispute the findings of the spectrum product market. Further, MTN agrees that the manner in which spectrum is allocated and offered in the market, as well as how spectrum is regulated is an appropriate measure for determining the geographic market for spectrum. Accordingly, MTN commends

ICASA's finding that the geographic market for spectrum is national and recommends that ICASA use similar and consistent measures to determine geographic markets across the broadband services sub-markets.

#### 4.3.5 **Dominance and effectiveness of competition assessments**

4.3.5.1 ICASA correctly submits that barriers to entry into spectrum markets are determined by the licensing process and spectrum assignment.

4.3.5.2 ICASA further states that while the spectrum market does not display anti-competitive effects such as unmatchable competitive advantage or spectrum hoarding, spectrum caps should be considered in future assignments of spectrum to maintain this.

4.3.5.3 To this end, MTN agrees with ICASA. Spectrum caps may be necessary in future assignments of spectrum as disproportionate shares of spectrum amongst industry players could create significant competitive advantage, particularly in South Africa [where the market is characterised by large players who, in the absence of any constraints, could outbid smaller players in order to gain significant competitive advantage].

4.3.5.4 However, MTN would like to re-iterate its response to the Consultation Notice, being that spectrum caps must be determined with care. It will be imperative that ICASA balance the technical efficiencies resulting from access to wide contiguous channel bandwidths and economic efficiencies of allocating spectrum to those best able to invest in same. Should spectrum caps be too tightly set, especially if combined with onerous coverage obligations and high reserve prices for spectrum, the risk that not all spectrum would be assigned increases significantly.

4.3.5.5 In addition, MTN would like to point out that, as stated by ICASA, there is no evidence of excess spectrum capacity leading to market distortions at present, and as such it follows that more spectrum can and should be assigned in order to drive lower costs and greater scale economies in the industry.

4.3.5.6 Finally, ICASA submits that no licensee has a market share over 45% or has significant market power in the market for spectrum. It further states that, as spectrum is not concentrated in the hands of one licensee, vertical integration does not present competition issues.

4.3.5.7 In this regard, MTN would like to re-iterate that market share and vertical integration are insufficient factors in considering whether market players have significant market power. As mentioned at 2.2.1, significant market power is indicated by the ability of a market player to operate independently in the relevant market, unconstrained by its competitors. Bearing this in mind, MTN agrees with ICASA's conclusion that no one licensee has market power in the market for spectrum.

#### 4.3.6 **Recommendations**

4.3.6.1 MTN commends and welcomes ICASA's finding that spectrum should be released as soon as possible and in a pro-competitive manner. MTN believes that licensing of spectrum as envisaged by ICASA in its Consultation Notice and if implemented effectively, as mentioned above, will initiate a broadband revolution to the benefit of all South Africans.

4.3.6.2 Currently, and as correctly recognized by ICASA, existing operators are currently suffering from a spectrum crunch which affects the South African market by the cost to communicate, network quality and ability to provide new technologies in line with global developments. The pro-competitive assignment of spectrum will avoid further cost escalation through duplication and densification of networks.

4.3.6.3 For further information in respect of MTN's views on spectrum, we kindly refer ICASA to MTN's response to the Consultation Notice.

#### 4.4 **Upstream market 2: site access**

##### 4.4.1 **Market definition**

4.4.1.1 MTN respectfully submits that this upstream market is incorrectly

defined. There is no market for “site access” but rather, what is referred to in the Discussion Document is a market definition for access to property in order to construct passive infrastructure.

- 4.4.1.2 This is due to the fact that in order to construct passive infrastructure, an MNO must first access property by entering into a lease agreement with an identified property owner. This means that any property is potentially a space upon which to construct passive infrastructure.
- 4.4.1.3 MTN does not own the property and that which ICASA has defined as a site is actually a result of a lease agreement which can only come into existence where there is a meeting of minds between an MNO and a property owner. Through this lease agreement, the property owner grants the MNO rights to use that property in order to construct passive infrastructure. For the avoidance of doubt, it must be pointed out that the MNO does not own the property/site but rents space on the property to erect passive infrastructure subject to commercial negotiations with the property owner.
- 4.4.1.4 Even co-location on passive infrastructure is subject to the approval of the property owner as co-location is in effect a sub-leasing of that leased space. Moreover, if the property owner does not grant permission to sub-lease, co-location on that passive infrastructure cannot occur without infringing the property owner’s rights. Accordingly, co-location forms part of this market for access to property.
- 4.4.1.5 For the reason stated above, this upstream activity that has been described is one involving access to property.
- 4.4.1.6 Therefore, an MNO is subject to the property rights of property owners when constructing passive infrastructure or when co-locating or granting co-location space upon its passive infrastructure. Should ICASA attempt to regulate this activity it would have an immediate impact on property

rights and possibly impinge the rights of property owners when it comes to their right to grant access to their properties.

- 4.4.1.7 In addition, in paragraph 109, ICASA refers to “site ownership” and again, in paragraph 111 refers to the concept of “owned sites” which means that ICASA has misconstrued the market in that MNO’s do not own the property sites upon which the passive telecommunications infrastructure is constructed.
- 4.4.1.8 ICASA’s attempts to create a site access market is a conflation of “site access” and facilities leasing. MTN considers that this conflation of “site access” with facilities leasing is not correct.
- 4.4.1.9 Should ICASA wish to regulate this activity, which is access to property leased by MNOs in order to construct infrastructure, ICASA should make it known to all property owners that it wishes to declare “access to property” as a separate market which it wishes to regulate, as this regulation will have a fundamental and immediate impact on property rights, which is a far broader issue than telecommunications regulation.
- 4.4.1.10 ICASA concludes that the “site access” market is “probably” local. MTN submits that the relevant activity is in fact the access to property that MNOs lease in order to construct infrastructure.
- 4.4.1.11 While MTN does not agree with the market definition of this upstream market for the reasons stated above, in what follows, MTN makes submissions in respect of ICASA’s assertions in the Discussion Document on the assumption that these arguments relate to facilities leasing. For clarity, MTN’s submissions in this regard are for completeness and not because it agrees with ICASA’s assessment of this upstream market.
- 4.4.1.12 An electronic communications facility is defined in the ECA to include, without limitation, any wire, cable, antenna, mobile mast (i.e. tower), satellite transponder, circuit, cable landing station, international gateway, earth station, and radio apparatus or other thing which can be used, or in connection with, electronic communications such as co-location space, monitoring equipment and space on or within poles, ducts, cable trays

etc. Accordingly, a facilities leasing activity is completely different than access to property by an MNO in order to construct infrastructure.

4.4.1.13 While the Discussion Document does not reach a definitive conclusion on the exact geographic market definition of site access, the analysis of market shares (and as a result the conclusion on dominance) is based on a local market definition. This demonstrates that the Discussion Document has included an indeterminate factor in order to reach a conclusion.

4.4.1.14 MTN is of the view that this conclusion is inaccurate, and that a more appropriate geographic market would be one that is national in scope. MTN agrees that, from the demand side, a tower in one area is not a direct substitute for a tower at a distant location, as stated by ICASA.

4.4.1.15 However, in the first instance, there are likely to be many potential sites that would constitute demand side substitutes within the bounds of a given area. This would include, for example, other high points in the area in question. Moreover, for many areas there will be some degree of demand side substitution between different high points that could reach a target area. The areas that can be covered by any individual tower then overlap substantially with the areas that can be covered by other towers, and so there is likely to be a chain of substitution, on the demand side. This indicates that the relevant geographic market should reasonably be broadened.

4.4.1.16 Secondly, the relevant customer in each case is an MNO, which likely has many areas in which they are considering expanding or upgrading coverage, and if one area is more expensive to expand into, or upgrade, for any reason, including variations in site access charges, then that MNO, as customer, is likely to switch its focus on expansions or upgrades in an adjacent geography.

4.4.1.17 Separately, the focus on individual areas ignores the practical realities of how many site access agreements are structured. As discussed in sub-section 3.1 above, Vodacom and MTN both have national coverage, and compete along a number of dimensions on a national

basis.

4.4.1.18 Even if considered at the retail level of the supply chain, the nature of the market is broader than local. The coverage of an MNO appears to matter to consumers. As the ACCC has recognised, an MNO’s coverage in regional Australia influences demand in metropolitan areas, and competition in metropolitan areas impacts the price of services available to consumers in regional areas due to nationally consistent service offerings.<sup>65</sup>

#### 4.4.2 **Dominance and effectiveness of competition assessments**

4.4.2.1 Following a brief market definition discussion, ICASA assesses concentration at a local level, concluding that “[c]onsidering market shares at the local and metropolitan municipality level, Vodacom, MTN and Telkom are dominant in a number of municipalities”.<sup>66</sup>

4.4.2.2 As mentioned above, MTN submits that the market for “site access” is in fact a market for access to property by MNO in order to construct infrastructure. In such case, all property owners are players within this market and, as such, no player has SMP and the market is characterised by effective competition. However, in what follows below, MTN engages with the submissions of ICASA in its termed “site access” market.

4.4.2.3 As discussed above, a firm is considered to be dominant if it has a market share of 45 % or more. While market shares can act as a first step in determining whether a firm has dominance, market shares alone do not determine the ineffectiveness of competition in a market (i.e. market failure).

4.4.2.4 MTN notes that in respect of the determination of market shares, ICASA has simplistically and incorrectly relied on the “number of sites” as the metric to calculate market shares. This suggests that ICASA has

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<sup>65</sup> ACCC, Domestic mobile roaming declaration inquiry: Final report (October 2017), page 16

<sup>66</sup> Discussion Document, p 69.

mistakenly equated all types of sites as intrinsically equal in value. This is incorrect as, for example tower, deployments vary significantly in value and operational functionality, dependent on the various deployment criteria, including, *inter alia*:

- 4.4.2.4.1 Tower type: towers differ considerably dependent on deployment architectures, e.g. macro tower, roof top tower, small cell, distributed antennae system (DAS) etc.;
- 4.4.2.4.2 Tower height: which differs according to the terrain and environmental typology in order to ensure that the appropriate coverage footprint is achieved;
- 4.4.2.4.3 Technology deployed at a tower or other facility (2G/3G/LTE/5G), which is spectrum dependent; and
- 4.4.2.4.4 Tower functionality: cellular towers perform different functions, for example, microwave hub-towers are key towers that connect several other towers, unlike point-to-point (PTP) microwave links which uses a single hub-tower to create a sector of coverage that can backhaul multiple towers.
- 4.4.2.5 Accordingly, the equal weighting of sites with a “number of sites” metric provides a skewed and inaccurate assessment of market share.
- 4.4.2.6 Irrespective of market share, another indication of whether or not a firm has SMP is whether a firm is charging above competitive prices. There is no evidence that this is the case in the matter at hand. In addition, there is no evidence that firms are earning substantially higher margins in areas where there is only one MNO. For this reason alone, ICASA’s analysis is not an appropriate analysis upon which to rely.

- 4.4.2.7 Current prices can also provide only a static perception of competition, and prices may need to be considered over a longer time period, in order to provide a more robust and dynamic view of market power. For example, while current prices may appear high relative to current costs, those prices may need to cover historical costs, or additional future costs such as refurbishment, maintenance, or further investment.
- 4.4.2.8 Another consideration that is relevant when assessing market power, is the potential for countervailing buyer power. Countervailing power refers to the offsetting power that a buyer might exert in a negotiation, even if that negotiation is with a seller that may account for a substantial share of sales. In this case it is important to also consider smaller licensees' bargaining power.
- 4.4.2.9 Bargaining power is dependent on each parties' relevant outside option(s). An outside option is the opportunity cost for bargaining, or the utility gained by terminating negotiations. This is because your opponent must give you a larger share of the surplus for you to want to stick to the current agreement, rather than pursue the outside option. In the case at hand, smaller licensees' outside options when negotiating with any one MNO for site access include the following:
- 4.4.2.9.1 Establishing their own network: smaller licensees can decide to establish their own sites or network, if the price of leasing and/or the potential profits in an area are high enough to offset the price of building the site or network.
- 4.4.2.9.2 Sharing a competing operator's site: In areas where there is more than one MNO present, smaller licensees can choose which operator provides the best service at the best price.
- 4.4.2.9.3 Not leasing a site or establishing a network at all: ICASA mentions that a possible outside option would be for an operator to establish its own site in an area, however, it fails to

mention that operators also have the option to exit the area altogether if it becomes unprofitable.<sup>67</sup> While this decision would be detrimental to an operator's ability to compete in areas with large numbers of potential subscribers, there are numerous areas with low populations where an operator would be unlikely to pay a high rent in order to only marginally increase population coverage. As ICASA highlights, these areas are more marginal from an investment perspective for a smaller operator, there is no reason why this would not also apply to decision on rental contracts.<sup>68</sup>

- 4.4.2.10 This means that smaller licensees have a combination of all three of these outside options when negotiating with lessors. For instance, smaller licensees can decide to build sites in particular profitable areas, play operators off against each other in areas where there is overlap, and choose not to offer services in some less profitable areas.
- 4.4.2.11 Lessors' outside options are to either rent to a different operator, or to not enter into a contract at all. Leasing available space to another operator provides a direct benefit to the lessor as this helps to share the costs for these sites. As a result, not entering into a rental agreement with any operator comes at a substantial cost to the lessor. Therefore, lessors have a vested interest in establishing favourable terms that would attract access seekers subject to engineering and space limitations.
- 4.4.2.12 Another consideration is the contestability of the provision of site access in each area. Contestability means that operators in each area are constrained by the threat of entry by competing operators. In the presence of contestability, one should be especially wary of placing any reliance on market shares as a measure of local market power.
- 4.4.2.13 In order for a market to be characterised as contestable it must have

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<sup>67</sup> Discussion Document, para 99.1.

<sup>68</sup> Discussion Document, para 113.

the following market features: (i) lumpy contracts, or investment decisions, (ii) essentially homogenous services, with little to no “lock in”, and (iii) low barriers to entry and expansion.<sup>69</sup> These features are present in the market for site access.

#### 4.4.2.14

Contracts for site access are negotiated over long periods of time. The provision of site access is fairly homogeneous in that a given operator would likely freely switch between similar high spaces that provide comparable coverage over a given area. In other words, two operators’ masts in the same area, would both be able to serve the access seeker’s needs fully. In addition, access seekers are able to switch between lessors, and indeed such switching has taken place in the past.

#### 4.4.2.15

As discussed above in sub-section 3.1, since each of Vodacom and MTN have a national network, the barriers to expansion into a new area for either of these operators are relatively low. In addition, we believe that ICASA dismisses the competitive advantage that Telkom imposes via its extensive backhaul infrastructure and access to high spaces, due to its historical fixed line investments which gives it a credible threat of entry in many areas.<sup>70</sup> This means that competitors with lower market shares in a particular area, can exert competitive constraints on rivals that are active in that area, which may be disproportionate to the potential entrant’s share of activity in the given area. Particularly, if an area as small as 30km is being used as a benchmark, ICASA might allege that an operator has a monopoly in an area even if competing operators have masts relatively close by and would be able to expand into this area relatively cheaply and quickly. Local shares of activity only reflect operators’ historical local investments. If an operator were to expand its network and establish a new site in an area, then local shares would change very rapidly, and the new entrant’s share of that new site may even reach 100% (a

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<sup>69</sup> Klemperer, p (2005) *“Competition Policy in Auctions and “Bidding Markets”*”.

<sup>70</sup> Discussion Document, para 116.

monopoly) in a new area.

4.4.2.16 As such, in the presence of contestability, one should be especially wary of placing any reliance on market shares as a measure of the effectiveness of competition.<sup>71</sup>

#### 4.4.3 **Free-riding**

4.4.3.1 Free-riding refers to an economic inefficiency and occurs when one firm is able to capture the benefits of investments that another firm has made without paying for them. This can be inefficient and harmful for competition, when one or more firms are able to free ride on the investments made by another firm to such an extent that the original investors have reduced incentives to continue investments that might be required to maintain, expand or upgrade their original infrastructure.

4.4.3.2 This is a concern in rapidly developing industries that require continued investment, as firms are reluctant to undertake these investments knowing that they will not recoup the full benefit. The provision of mobile services is just such a situation, in which operators need to make continued investment into their networks to introduce new technologies, improve network quality and coverage and meet rapidly growing demand.

4.4.3.3 Without allowing operators to recoup the benefits of their investments in infrastructure, lessees would have a strong incentive to free ride on the incumbent's historical and ongoing investments.

4.4.3.4 Separately, sites in the rural, or less densely populated areas, or those areas where consumers have lower disposable income, are likely to be less profitable for the operators than sites in more urban areas, where population density is higher, and consumers may have higher disposable income. Mandating access in this scenario would directly penalise firms that have chosen to invest in sites in rural areas

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<sup>71</sup> Klemperer, P. (2007) Bidding Markets. *Journal of Competition Law and Economics*, vol. 3(1), pp 1-48.

(typically cross subsidised by their investments in urban sites). Mandating access without considering the likely free-rider effect, would disincentivise all operators from continuing the high levels of investments required to meet demand nationally, and would particularly disincentivise investments in achieving, extending or upgrading rural coverage. Indeed, as discussed above in sub-section 3.2.3, the fact that MNOs have chosen to build out their into the more remote rural areas of the country is indicative of a pro-competitive and beneficial outcome at the national level, and should not be disincentivised.

#### 4.4.4 **Vertical Integration**

4.4.4.1 The Discussion Document states that vertical integration is an issue within the “site access” market. MTN notes, however, that the Discussion Document has not explained what the “issue” is in respect vertical integration. Further, the Discussion Document does not provide any reasons or evidence for stating such “issues” exist.

4.4.4.2 All MNO’s in South Africa exhibit some degree of vertical integration as each MNO owns its network and provides retail services to consumers. Vertical integration therefore indicates merely the nature of the electronic communications market and is not an indication of the effectiveness of competition within that market. The reason that the market has evolved in this manner is because vertical integration provides economic efficiency gains within a market characterised by economies of scale.

4.4.4.3 ICASA mentions that there is a correlation between high levels of concentration at the site access level and high levels of concentration at the retail level. This is not surprising as such correlation may merely illustrate that a greater investment in sites is required to service highly populated areas, which is due to a lack of assigned spectrum, and that in highly populated areas there exists a greater amount of subscribers. ICASA has therefore not evidenced how this correlation illustrates that vertical integration results in ineffective competition in such a site access market.

4.4.4.4 The Discussion Document then goes on to state that there have been complaints that larger operators use their control of sites to disadvantage smaller rivals. This statement is not evidenced in any way, nor have these complaints been investigated and found to be fact. Accordingly, relying on these complaints as evidence of ineffective competition would be irregular.

#### 4.4.5 **Recommendations**

4.4.5.1 The Discussion Document includes the following recommendations in respect of what MTN assumes to be facilities leasing:

4.4.5.1.1 Operators should publish infrastructure sharing opportunities on a centralised database.

4.4.5.1.2 Passive infrastructure sharing obligations could be imposed on operators.

4.4.5.1.3 Redrafting of the facilities leasing regulation to include clear guidelines on when it should be considered technically and economically feasible to enter sharing arrangements, time frames for considerations of requests to share, and the prohibition the indefinite leasing of sites.

4.4.5.1.4 Accounting separation for the provision of sites would assist in providing transparency and lessen the opportunity for dominant operator to disadvantage smaller rivals through the provision of site leasing.

4.4.5.2 Considering the ICASA proposed recommendations relative to the arguments raised above, there are several areas where MTN believes that these recommendations may harm long term incentives for investment, and more generally dynamic competition in the market:

4.4.5.2.1 An electronic communication network service licensee is already obligated to lease electronic communications facilities as per section 43(1) of the ECA. Accordingly, MTN submits that further infrastructure sharing obligations are an unnecessary

duplication and can affect operators' ability to roll out new technologies or make network quality improvements, in particular in the less profitable areas, which may be those covering particularly poor or vulnerable consumers. Additionally, sharing, especially passive sharing, may significantly load the host network site with the equipment installed by the guest operators, which could limit potential future network development such as the installation of new additional modules related to the introduction of new technologies.

#### 4.4.5.2.2

Prohibiting the indefinite reservation of space on masts by the incumbent operators may also be practically difficult to implement and can disincentivise investment. If this is applied to masts built by the operator themselves, then this may decrease operators' incentives to build new masts or may incentivise operators to increase prices in order to recoup the costs of building their masts. It would also be essential to establish if this would simply mean that other operators would have the opportunity to bid on a site after a certain period or if this would restrict the operator from access at this site. This would also have implications on long term network planning; where sites are carefully chosen to optimise the overall network, removing operators' ability to plan a network may reduce the quality of the network and the services the operator would be able to provide in future.

#### 4.4.5.2.3

Accounting separation, as remedy in a market where no market failure has been evidenced is an inappropriate and disproportionate remedy, and is likely to be difficult to apply in a robust way in practice and financially burdensome. In particular, some costs and revenues are likely to be shared across sites, and across other network and operating activities. Accordingly, it is likely to be difficult to meaningfully allocate these costs and revenues across those sites (and therefore any such separation may be entirely arbitrary). Moreover, there

may be interactions between the terms agreed for mutual site sharing that are again difficult to capture in a completely robust manner. While there are acceptable accounting treatments of these issues, some of these allocations are likely to be subject to some degree of arbitrariness, and accordingly the information provided by the accounting separation may not be meaningful for the purposes of regulation. Moreover, MTN submits that accounting separation is unnecessary as section 43(7) of the ECA read with regulation 9 of the Regulations prohibits licensees from charging discriminatory prices to electronic communications facilities seekers. Further, regulation 10(3) of the Regulations states that charges for electronic communications facilities must be sufficiently unbundled so that an electronic communications facilities seeker does not have to pay for anything it does not require for the requested electronic communications facilities.

#### 4.5 **Upstream market 3: roaming**

##### 4.5.1 **Market definition**

4.5.1.1 ICASA concludes the following in respect of the definition of the market(s) for roaming services:

4.5.1.1.1 ICASA disputes that there is a single market for all wholesale services including roaming, MVNO and APN services, but rather that wholesale roaming is a separate market. ICASA considers that while the operators argue that these are supply side substitutes, this is not plausible in practice.

4.5.1.1.2 ICASA finds that the geographic market is at least as narrow as the local and metropolitan municipality level.

4.5.1.1.3 ICASA also finds that there are not sub-markets for different technologies (i.e. 2G, 3G and LTE).

4.5.1.2 In the product dimension, MTN agrees that with ICASA's submission that there is a wholesale national roaming market which is separate to

the provision of wholesale MVNO and APN services.

- 4.5.1.3 However, in the geographic dimension, MTN disagrees that the market for wholesale services should be defined at least as narrowly as the local and metropolitan municipality level. It is once again MTN's opinion that ICASA has not fully considered the level of demand and supply side substitutability in the market.
- 4.5.1.4 The only evidence put forward as to why roaming should be considered to have a local market is that "*national roaming agreements are sought to provide coverage in specific areas in which the seekers do not have coverage*", and that in some instances a distinction is made in the roaming agreements between rural and urban sites and higher prices are charged rural area compared to urban areas.<sup>72</sup>
- 4.5.1.5 In the provision of wholesale services, the difference in prices between rural and urban areas reflects the difference in costs to serve these areas. However, if an operator that previously only served urban areas observes a relative price increase in the provision of wholesale services in rural areas, such that this market becomes more profitable, they are likely to enter this market to take advantage of these higher prices. This is consistent with competition between rural and urban areas and therefore a national market definition, as described above is more appropriate.
- 4.5.1.6 Furthermore, if a difference in price between rural and urban areas in some contracts was sufficient evidence to constitute separate markets, this would still not support a geographic market definition as narrow as each site, as proposed by ICASA. Based on this, at most the narrowest possible sub-market would be separate sub-markets for roaming services in rural versus urban areas. In any case, MTN disagrees with defining a geographic market as narrow as urban or rural based on the arguments advanced above.

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<sup>72</sup> Discussion Document, para 151.

4.5.1.7 We agree with ICASA's finding that sub-markets for different technologies do not exist. However, this finding again highlights an inconsistency in ICASA's approach. The basis for such a finding is presumably that operators can supply substitute between the provision of wholesale access based on different technologies, in response to relative price changes for these wholesale services (as the different technologies require some common inputs, such as spectrum). However, ICASA appears not to have applied a similar appreciation for this supply side substitutability dynamic in regard to the consideration of local geographic areas. This discrepancy in approach is irrational.

4.5.1.8 Moreover, the provision of 2G wholesale services is likely to be more costly than the provision of 4G wholesale services. We agree with ICASA's implicit appreciation that cost differences do not result in the two technologies being in separate markets. This is because such cost differences do not undermine the conclusion that the supply side substitution would still operate between the wholesale provision of these two technologies. However, ICASA has again inconsistently applied this idea, in particular with regard to the consideration of local geographic areas, as set out above. If ICASA applies this principle to the geographic market, the result would indicate a national market for roaming.

#### 4.5.2 **Dominance and effectiveness of competition assessments**

4.5.2.1 ICASA discusses various aspects of the market that could be attributed to an analysis of dominance. These include market shares, prices, and countervailing power.

##### **Market shares**

4.5.2.2 As with site access (and retail markets), ICASA concludes that MTN and Vodacom both have market power based on market shares.

4.5.2.3 Once again, as discussed in sub-section 2.2 above, market shares are not conclusive of market failure and a host of other factors need to be

accounted for. These are discussed in more detail below.

- 4.5.2.4 Furthermore, even if it is found that MTN and Vodacom operate as a “duopoly”, this can still lead to a competitive outcome, especially in a high fixed costs market. As discussed above, in a contestable market, two firms with homogenous products may be enough for perfect competition. There is no reason to automatically draw the conclusion that operators have significant market power purely because there are only two players in a given narrow area.

### **Prices**

- 4.5.2.5 ICASA states that there are evident competition concerns based on an allegation that roaming prices are too high, and that quality is poor. ICASA asserts that this is evidenced by pricing being above “modelled network costs”. However, the full analysis comparing prices to these “modelled costs” has not been provided, so it is not possible for MTN to engage with this analysis. In the spirit of transparency, MTN respectfully requests that ICASA provide these “modelled costs” to MTN for interrogation.
- 4.5.2.6 Finally, ICASA states that historic wholesale prices have been above retail prices without providing any evidence as to how ICASA reached this conclusion. Accordingly, MTN submits that it is not possible to meaningfully engage with this statement without access an understanding of how ICASA has reached this conclusion. In general, the relevant wholesale prices may apply to rural areas, whereas the retail prices in question may be more weighted towards urban areas. Wholesale roaming agreements may have applied to more rural/less heavily populated areas. These areas might involve higher costs to serve due to the need to establish all the supporting infrastructure in the area, and the lower density of towers over which to spread fixed costs. While retail prices are typically set on a national level, subscribers in these rural areas are typically subsidised by revenues generated in urban areas, which enables MNOs to offer lower prices to retail subscribers than what would have been possible if this cross-subsidisation were not possible.

4.5.2.7 Essentially this is the case for wholesale roaming prices. As operators generally only roam in rural areas where costs are high, wholesale roaming prices are likely to be heavily influenced by these higher costs. MNOs are then able to cross subsidise the higher cost of serving subscribers in these areas with revenues earned from subscribers in urban areas in the same way that the larger operators do.

4.5.2.8 Removing operators' ability to account for these higher costs to serve in their wholesale roaming agreements would give the roaming operators an undue competitive advantage, on the back of the incumbents' historic investment. This is likely to significantly reduce operators' incentives to invest, in particular in infrastructure in rural areas.

#### **Countervailing power**

4.5.2.9 As discussed above, countervailing buying power can offset firms' market power, even in highly concentrated markets.

4.5.2.10 Negotiating power is dependent on each parties' relevant outside option. In this case access seekers outside options when negotiating with any one MNO for roaming access includes:

4.5.2.10.1 Roaming on a competing operator's network.

4.5.2.10.2 Establishing their own network.

4.5.2.10.3 Not roaming or establishing a network at all (i.e. only providing services in areas that the operator has an established RAN network).

4.5.2.11 Similar to the site access discussion above, access seekers can apply these outside options in combination as negotiations take place on a national level, or at least as wide as a rural urban level. This is consistent with a national market definition.

### 4.5.3 Recommendations

4.5.3.1 ICASA proposes recommending the following in respect of roaming:

4.5.3.1.1 Mandated roaming offers for parties that are dominant in a particular area.

4.5.3.1.2 Functional accounting separation should be implemented in order to enhance transparency, as well as improve the ability for the regulator to monitor.

4.5.3.1.3 Regulations to facilitate roaming. These would include agreement principles, timeframes and procedures to be followed, and service parameters. It will also include dispute resolution mechanisms.

4.5.3.2 There is no evidence that either of the national operators have either denied any operator a roaming agreement or come to an agreement characterised by anti-competitive terms. As such, there is no clear justification to regulate these agreements. On the contrary, regulatory intervention could have unintended adverse effects.

4.5.3.3 One potential consequence is that mandating these agreements can increase operators' costs. As stated by the ACCC, *"[w]hile declaring roaming may increase choice, consumers could pay more as the costs of accessing roaming in regional areas will likely be passed onto consumers"*.<sup>73</sup>

4.5.3.4 Another potential effect would be that operators may be disincentivised in rolling out network in certain areas that previously would have been profitable but may in fact become unprofitable due to the terms of the mandated agreements. This was also confirmed by the ACCC: *"Declaration could actually harm the interests of consumers by undermining the incentives of mobile operators to make*

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<sup>73</sup> ACCC, Announcement "ACCC proposes to not declare wholesale domestic mobile roaming" (5 May 2017), Available [<https://www.accc.gov.au/media-release/accc-proposes-to-not-declare-wholesale-domestic-mobile-roaming>]

*investments to compete with each other in regional areas”.*<sup>74</sup>

4.5.3.5 ICASA also recommends accounting separation as a means to create greater transparency in the market. Accounting separation is a complex and costly undertaking with considerable practical considerations (as discussed in sub-section 4.4.4 above). This represents a considerable regulatory burden on a firm, and therefore should be considered carefully. This type of regulation would only be justified in markets in which there was a persistent network monopoly enjoying an entrenched competitive advantage and therefore should be considered carefully and can only be applied in markets where there is demonstrable market failure. As discussed above, we do not believe that this is the case in this market.

4.5.3.6 MTN agrees that increasing transparency regarding network coverage and quality in the market is a worthwhile aim, however, there are less invasive methods of achieving these means. As discussed above, accounting separation is subject to a number of essentially arbitrary cost allocations, and by effect the information produced may not be meaningful for the purposes of regulation.

#### 4.6 **Upstream market 4: MVNO and APN services**

4.6.1 MTN notes that ICASA has by its own admission not defined the potential market, nor has it assessed the effectiveness of competition or identified any operator with SMP in a potential upstream market denoted as the “Upstream market 4: MVNO and APN services”.

4.6.2 Accordingly, at this stage MTN has endeavoured to provide comments that we trust may be helpful to ICASA in respect of definitively defining and assessing the market in the future.

#### 4.6.3 **Market definition**

4.6.3.1 MTN notes that ICASA states that the wholesale provision of MVNO

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<sup>74</sup> ACCC, Announcement “ACCC not to declare mobile roaming but identifies measures to improve regional mobile coverage” (23 October 2017), Available [<https://www.accc.gov.au/media-release/accc-not-to-declare-mobile-roaming-but-identifies-measures-to-improve-regional-mobile-coverage>]

services and APN services may be part of the same market but are separate to the national roaming market. MTN agrees with this statement as roaming agreements are entered into by network operators who own their own radio access networks (“RAN”) and who have their own radio frequency spectrum and operate their networks on a build or buy decision basis.

4.6.3.2 ICASA states that MVNO business models can take various forms.<sup>75</sup> MTN agrees with this statement, in that different MVNO business models can be defined by the degree of control that the MVNO has over the product. Or put another way, how far up the value chain the MVNO is.

4.6.3.3 The general understanding of MVNO business models is that it comprises four main business models, according to how much of the mobile value chain they own. There may be further sub-business models as MVNOs may choose a variety of services to be integrated in a variety of ways. However, for simplicity, MTN will deal with the standard four main MVNO business models below.

4.6.3.4 The four main business models that emerge are: Branded Reseller, Light-MVNO, Network Enabler and Full-MVNO.

4.6.3.4.1 **Branded reseller** is the lightest MVNO business model, where the venture just provides its brand and, sometime, its distribution channels. While the mobile network operator (MNO) provides the rest of the business, from access network to the definition of the mobile service offer. This is the model that requires the lowest investment for a new venture, therefore the fastest to implement.

4.6.3.4.2 **Light-MVNO** is an intermediate model between a branded reseller and a full-MVNO. This model allows new ventures to take control of the marketing and sales areas and, in some cases, increase the level of control over the back-office processes and

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<sup>75</sup> Discussion Document, paras 196

valued-added services definition and operations.

- 4.6.3.4.3 **Network enablers**, typically known as Mobile Virtual Network Enablers (MVNE), this is a third-party provider focused on the provision of infrastructure that facilitate the launch of MVNO operations. An MVNE can be positioned between a host MNO and an MVNO venture to provide services ranging from value added services and back office processes to offer definition. MVNEs reduce the entry barriers of MVNO ventures, given that an MVNE aggregates the demand of small players to negotiate better terms and conditions with host MNO. They pass on some of these benefits to their MVNO partners.
- 4.6.3.4.4 **Full-MVNO** is the most complete model for a new venture, where the mobile network operator just provides the access network infrastructure and, sometimes, part of the core network, while the new venture provides the rest of the elements of the value chain. This MVNO business model is typically adopted by telecom players that could gain synergies from their current business operation.
- 4.6.3.5 The traditional mobile value chain can be separated into two main areas. Firstly, the RAN that is exclusively used by spectrum licensed mobile network operators (i.e. MNOs) and secondly the rest of the elements required to deliver the service to the customers which includes the range of MVNO business models.
- 4.6.3.6 The second area of the value chain includes, *inter alia*,: the operation of the core network (e.g. switching, backbone, transportation, etc.), the operation of the value added services (e.g. APN, SMS, voicemail, etc.), the operation of the back office process to support business process (e.g. subscriber registration, handset and SIM logistic, billing, balance check, top-up network, customer care, etc.), the definition of a mobile value offer and the final delivery of the products and services to the client through the distribution channel. It is in this second area of the value chain where the different range of MVNO business models participate by innovating, operating or re-selling mobile wholesale

services.

4.6.3.7 We note that ICASA refers to APN services in this upstream market. An Access Point Name (APN) is the name of a gateway<sup>76</sup> between a GSM, GPRS, 3G or 4G mobile network and another computer network, frequently the public Internet. Therefore, an APN is a value-added service (VAS) offered in connection with either wholesaled or retailed data services and is not a wholesale service in and of itself but merely an enabler to sell mobile data services.

4.6.3.8 Given the various types of MVNO players in the mobile value-chain, we submit that the South African market has more MVNO access seekers in addition to those listed by ICASA.

4.6.3.9 Having regard to the above and the fact that there are various types of MVNO business models, MTN requests that ICASA define the concept of MVNO's and the possible concept of a Virtual Network Operator (VNO). It is only once this assessment is performed by ICASA that MTN will be in a position to meaningfully engage on this topic. In addition, MTN submits that ICASA cannot make any findings or recommendations in respect of this upstream market until such time as these concepts are analysed and the market properly defined. We therefore anticipate and look forward to further engagement with ICASA around defining and assessing this upstream market.

4.6.3.10 From a geographic perspective, we agree that the market for wholesale supply of MVNO services is likely national as these wholesale services are provided on a national basis.

#### 4.6.4 **Dominance and effectiveness of competition assessments**

4.6.4.1 To intervene in an upstream market, ICASA would need to identify that there is no effective competition between the five MNOs (and the existing MVNOs of various business models) at the retail level.

4.6.4.2 MTN submits that the downstream market is producing competitive

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<sup>76</sup> [https://en.wikipedia.org/wiki/Access\\_Point\\_Name-cite\\_note-1](https://en.wikipedia.org/wiki/Access_Point_Name-cite_note-1)

outcomes and, as such, a regulatory intervention in the upstream market to encourage competition in the downstream market would likely result in net costs. In a competitive market such as South Africa's mobile retail market, the number of MVNOs may simply indicate the profitable niches for MVNOs to reach customers that are not already served by the five MNOs.

4.6.4.3 In a dynamic market such as mobile, which requires repeated capital investments, competition should be assessed by examining end-consumer outcomes, rather than just a mechanical measurement of market structure (including the market share and number of MVNOs/MNOs). The number of players is not an indication of competitive outcomes.

4.6.4.4 This is not surprising, as MVNOs serve the purpose of acting as added distribution channels for MNOs. Given the high level of fixed cost investment in mobile, MNOs have an incentive to increase volumes on their networks and therefore seek out wholesale customers. This is something which MTN is engaging in.

4.6.4.5 As such, MTN submits that ICASA has not currently provided a clear definition of what is required to be considered an MVNO and, as such, a number of providers that would commonly be considered as MVNO's are currently classified as resellers. We would request that ICASA define this concept, as it would inform market dynamics and demonstrate that Cell C is not the only MNO which sells mobile data services to MVNOs.

#### 4.6.5 **Recommendations**

4.6.5.1 MTN notes that ICASA states that it does not consider pro-competitive license conditions where MVNO services are concerned since potential competition concerns in this market can be remedied upstream and ICASA will monitor progress in the wholesale supply of MVNO services while these remedies are in force and reassess whether further intervention is needed if upstream remedies are not effective.

4.6.5.2 MTN agrees that there is no need for pro-competitive licensing considerations in the wholesale supply of MVNO services as it is submitted that the number of MVNOs in this market do not indicate the effectiveness of competition.

## 5. RESPONSES TO ICASA'S QUESTIONS

5.1 We have endeavoured to answer ICASA's queries in the discussion above. However, for the sake of completeness and in order to assist ICASA, we provide short and specific answers to ICASA questions below.

5.2 **Question 1:** In your opinion, is the above approach to market definition adopted by the Authority appropriate in defining the relevant markets? Motivate your response by providing reasons and any supporting evidence or data, as far as possible.

*We agree with ICASA's general approach to market definition, insofar as the SSNIP test is a tool that is used world-wide to define relevant product and geographic markets. However, for the reasons set out above, we consider that ICASA has inconsistently applied to concepts of supply side substitution and chains of substitution to the geographic dimension of the market for mobile data services.*

5.3 **Question 2:** Do you agree with the Authority's approach to the evaluation of effective competition? If not, motivate your response by providing comprehensive reasoning thereof.

*While we agree that barriers to entry, market shares, and the existence of market power are important aspects in determining whether a market is subject to effective competition, we consider that ICASA has not properly applied these concepts to the current retail market context. In the first instance, for the reasons set out above, the market for data services should not be assessed at the municipal level, as ICASA has not properly considered that each of Vodacom and MTN have a national presence, and Vodacom would be well positioned to expand its operations into any municipality were MTN to seek to deteriorate its competitive offering. What is more, ICASA appears to have made its municipal dominance conclusions based only on market share thresholds, without properly assessing the actual competitive constraints faced by MNOs, or the specific characteristics of the market.*

5.4 **Question 3:** Are there any factors that the Authority should take into account when determining whether there is effective competition in the identified relevant markets?

*For the reasons set out above, market shares and concentration indices typically*

*only serve as an initial screen of the true level of competition in the market. Any competitive assessment should also include a comprehensive analysis of the specific characteristics of the industry, the nature of the current level of competition, barriers to entry and expansion, and countervailing buyer power.*

- 5.5 **Question 4:** Do you agree with the Authority's approach to aggregate the retail market for mobile services, which includes voice, SMS and data services? If not, motivate your response by providing comprehensive reasoning thereof.

*Yes, we agree with ICASA's approach to defining the relevant product market, as ICASA appears to have taken a pragmatic approach to determining that the conditions of supply are sufficiently similar across these mobile products and has correctly applied the concept of a chain of substitution. However, we are of the view that ICASA has not applied these concepts consistently to the geographic aspect of the market definition.*

- 5.6 **Question 5:** Do you agree with the Authority's preliminary view on the retail mobile service market? Please provide reasons for your response.

*Please refer to section 3 of this submission.*

- 5.7 **Question 6:** Do you agree with the Authority's preliminary view on spectrum market? Please provide reasons for your answer.

*Please refer to sub-section 4.3 of this submission.*

- 5.8 **Question 7:** Do you agree with the Authority's preliminary view on site access market. Please provide reasons for your response.

*Please refer to sub-section 4.4 of this submission.*

- 5.9 **Question 8:** Do you agree with the Authority's preliminary view on roaming market/ Please provide reasons for your answer.

*Please refer to sub-section 4.5 of this submission.*

- 5.10 **Question 9:** Do you agree with the Authority's preliminary view on MVNO and APN services market? Please provide reasons for your answer.

*Please refer to sub-section 4.6 of this submission.*