



Submission to the Independent Communications Authority of
South Africa

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

Published 26 March 2021 (Government Gazette Vol. 669, No. 44337)

1. INTRODUCTION

- 1.1. The Independent Communications Authority of South Africa (“**ICASA**” or “**the Authority**”) published the Draft Mobile Broadband Services Regulations (“**Draft Regulations**”) and the Findings Document on Mobile Broadband Services Inquiry (“**Findings Document**”) on 26 March 2021.¹ These are part of the Mobile Broadband Services Inquiry (“**MBSI**”). The Authority has invited written submissions on the Draft Regulations.
- 1.2. Telkom welcomes the Authority’s invitation to comment on the Draft Regulations. It is difficult to exaggerate the importance of the Draft Regulations.
 - 1.2.1. They have been published soon after the “call to action” in the recommendations of the Data Services Market Inquiry (“**DSMI**”)² – which addressed competition problems in mobile broadband and how spectrum licensing can be used to address them³;
 - 1.2.2. They have also been published in the midst of an extremely important and long-anticipated spectrum licensing process; and
 - 1.2.3. The broader backdrop against which these Draft Regulations has been formulated is that the 5G era is commencing, and demand for quality, extensively available and affordable mobile broadband has never been higher or more widespread.
- 1.3. Telkom’s submission is structured as follows:
 - 1.3.1. The next section contains a high-level summary of Telkom’s submission.
 - 1.3.2. Sections three to seven thereafter contain the details of Telkom’s submission.
 - 1.3.3. The final section concludes.

¹ Government Gazette, Vol. 669, No. 44337, 26 March 2021.

² Competition Commission (2019). “Data Services Market Inquiry Final Report.” 02 December 2019.

³ During and after the DSMI, the Commission made submissions to ICASA on the MBSI and the spectrum licensing processes. These submissions typically align to or advance the views and recommendations the Commission adopted in the DSMI.

2. HIGH LEVEL SUMMARY

- 2.1. As a foundational point, Telkom believes that ICASA's approach to the MBSI, particularly the relationship between the MBSI and the spectrum licensing process, is entirely flawed. ICASA proceeded with the Invitation to Apply ("ITA") for spectrum at auction (the "**auction ITA**")⁴ before completing the MBSI, whereas the rational and correct approach would have been to conduct the MBSI thoroughly and unconstrained by what had been decided with respect to the design of the spectrum auction. The High Court has recently echoed Telkom's concerns in this regard and the auction ITA is the subject of ongoing litigation. Consequently, it is subject to potential change. Any reliance by ICASA on supposedly pro-competitive aspects of the auction ITA to address competition problems identified in the Findings Document thus rests on unsupported, and indeed dubious, foundations.
- 2.2. In addition to the basic error of process and approach identified above, Telkom also believes that the "pro-competitive terms and conditions" in the Draft Regulations⁵ ("**pro-competitive remedies**" or "**proposed remedies**") are wholly inadequate. They will have no appreciable pro-competitive impact. ICASA's Findings Document diagnoses ineffective competition in the retail market and two wholesale markets; finds Vodacom and MTN to be dominant in those markets; and finds that current conditions are unlikely to change significantly in the next three years.⁶ These diagnoses and findings warrant strong pro-competitive measures. Nevertheless, the proposed remedies in the Draft Regulations shy away from such measures and ICASA instead suggests that the auction ITA design will provide sufficient pro-competitive impetus so as to eliminate the need for any additional regulatory remedies. In doing so ICASA has clearly failed to illustrate how any of its proposed remedies will address the market failure. In short, ICASA only pays lip service to the concept of pro-competitive remedies.
- 2.3. Telkom believes that the auction ITA design, in its current form, will not improve competition but may further entrench the dominance of Vodacom and MTN. In September 2020, ICASA itself stated that the spectrum licensing process was not intended to remedy competition problems, but only to avoid worsening them. It repeated this view in December 2020, in the "**ITA Reasons Document**" for the auction ITA.⁷ This means stronger pro-competitive remedies are required in order

⁴ ICASA published two ITAs on 02 October 2020. One ITA was to license the wireless open access network ("**WOAN**") and grant it spectrum (the "**WOAN ITA**"); the other ITA was to auction additional spectrum to other market participants (the "**auction ITA**"). The auction ITA was published in Government Gazette Vol. 664, No. 43768, 2 October 2020. The WOAN ITA was published in Government Gazette Vol. 664, No. 43767, 2 October 2020.

⁵ Draft Regulations, section 7.

⁶ The Findings Document focuses on the next three years only, stating that another review will commence in three years' time. There does not appear to be any basis for the three-year time-frame and, as explained in the main body of this submission, the Draft Regulations do not require this (see section 8 of the Draft Regulations).

⁷ ICASA (2020). "Reasons Document Relating to the Invitation to Apply on the Licensing Process for International Mobile Telecommunications in Respect of the Provision of Mobile Broadband Wireless Access Services for Urban and Rural Areas using the Complimentary Bands, IMT700, IMT800,

to address ineffective competition in the identified mobile broadband services markets. Even if the auction ITA design was made to be more pro-competitive, stronger pro-competitive remedies in the Draft Regulations would still be required. The reason being that spectrum licensing alone cannot address all competition problems, and the current proposed remedies in the Draft Regulations will have no appreciable pro-competitive impacts at all. By failing to strengthen competition, ICASA may end up worsening the current situation and fail to execute on its critical mandate of ensuring effective competition in the market.

- 2.4. The above notwithstanding, ICASA has factored the auction ITA design into the Findings Document. In so doing, ICASA has also factored in some of the analysis it conducted to design the auction ITA, i.e., the analysis in the ITA Reasons Document.⁸ In the auction ITA and the ITA Reasons Document, ICASA simply ignored the network and spectrum sharing arrangements (the “**sharing arrangements**”) between Vodacom and MTN, on the one hand, and Rain, Liquid Telecom (“**Liquid**”), and Cell C, on the other. It also ignored the questions arising from Cell C’s changed status and competitive significance since entering into a sharing arrangement with MTN.
- 2.5. ICASA now suggests, in the Findings Document, that the various sharing arrangements between operators are pro-competitive in their nature and impacts. As we discuss below, however, ICASA’s conclusions in this regard are based on flawed reasoning and inadequate consideration of the relevant facts. Telkom is also concerned with the reliance ICASA has placed on the UK’s Ofcom in justifying its conclusions on the sharing arrangements.
- 2.6. With respect to the sharing arrangements:
 - 2.6.1. There is a live proceeding before the Competition Tribunal (“**Tribunal**”) with respect to the Vodacom-Rain arrangement. ICASA was named as a respondent in that proceeding but has not participated in it. It is thus arguable that ICASA has implicitly given up on the fact that it has a strong and clear view on the impact of the sharing arrangements and is relying on the Competition Authorities, rather than having confidence in its own assessment.
 - 2.6.2. It is unclear whether ICASA has reviewed the suite of agreements and other facts that have been disclosed in that proceeding. It is also the case that the Tribunal has directed the Competition Commission (“**Commission**”) to investigate whether the arrangement has given rise to a change of control. The Commission is currently busy with that investigation. To the extent that ICASA has not availed itself of the full set

IMT2600 and IMT 3500.” Government Gazette Vol. 666, No. 43970, 4 December 2020. This submission refers to this document as the “**ITA Reasons Document**”.

⁸ The ITA Reasons Document contained an assessment of competition, which was conducted separately from the MBSI and without public consultation. This submission refers to it as the “**ITA Competition Assessment**”.

of facts or reviewed the analyses presented by parties in the proceeding, it is highly likely that its views on this arrangement are based on incomplete information and any conclusions it reaches are premature.

- 2.6.3. ICASA also overstates the pro-competitive impact of the sharing arrangements in enabling entry by Liquid and Rain, and sustaining the presence of Cell C, in retail and wholesale markets. It also understates the competition problems associated with dominant firms having access to additional spectrum, particularly if (as it seems) this additional spectrum does not count towards the “cap” imposed on overall spectrum holdings in the auction ITA. ICASA effectively has increased the “caps” applicable to Vodacom and MTN and left them unchanged for all other licensees.
- 2.6.4. ICASA also elides over the distinction between the efficiencies to operators from sharing networks and the effects of network sharing on consumers. It is easy to imagine situations in which the former is positive and the latter negative.
- 2.7. With respect to Cell C, public evidence and industry analyses suggest that Cell C is now little different from a mobile virtual network operator (“**MVNO**”). At a minimum, Cell C is no longer a vertically-integrated infrastructure-based operator and can therefore not exert the same competitive constraint—upstream or downstream— as would be expected from a vertically integrated competitor. Cell C cannot be the same sort of competitor as Vodacom, MTN and Telkom if, as Cell C has stated, its operating model now relies on buying wholesale network services at scale from MTN and Vodacom (these include roaming services and managed network services under active RAN sharing arrangements). This has significant implications for the analysis of Cell C’s current and prospective spectrum holdings and market position, and thus for the future of competition in the mobile broadband sector. ICASA’s analysis of Cell C’s status is flawed and its “do nothing” approach may miss a significant opportunity to promote greater competition.
- 2.8. With reference to the site access market, the ITA Reasons Document contained no analysis of the proposed reference offer condition in the auction ITA. It merely asserted that this condition would solve all competition problems in the site access market. The reference offer condition will not address the core competition problem in this market, which is exclusionary discrimination by vertically integrated dominant operators. In the MBSI public hearings on 26 and 27 October 2020 (the “**public hearings**”), Telkom recommended that ICASA adopt an “equivalence of inputs” approach to site access regulation, which would enable competition by making it more difficult for dominant operators to favour their own retail operations over third-party rivals. ICASA cannot rely on the reference offer condition to conclude in the Findings Document and Draft Regulations that no further pro-competitive remedies are required.
- 2.9. The Findings Document contains other problematic analyses and conclusions. In addition to the above, this submission addresses the following:

- 2.9.1. The Draft Regulations rest on dominance findings in the Findings Document that are unjustifiably limited in scope. ICASA has found Vodacom or MTN to be dominant in the retail market and the wholesale market for site access only in a limited number of regions or municipalities across the country. This is due to ICASA's approach to geographic markets, and ICASA's decision to strictly adhere to the 45% market share test for dominance. The latter is not strictly required by the Electronic Communications Act, and the former, i.e., the approach to geographic markets, is highly debatable (as unpacked later in this submission). The overall outcome has been favourable to Vodacom and MTN, without, in Telkom's view, appropriate justification.
- 2.9.2. ICASA has relied on Ofcom in taking the view that competing operators do not need matching spectrum portfolios to be able to compete effectively. In particular, that Telkom may not need low band spectrum (i.e., in the 700 MHz and 800 MHz bands) to compete effectively, because EE in the UK has very little low band spectrum but is nevertheless an effective competitor. This is an invalid comparison of two very different market contexts. In any event, ICASA has stated in its Findings Document that the licensing of additional low-band spectrum (in the 700 MHz and 800 MHz bands) at auction will have limited pro-competitive impacts in the next three years because the digital migration is not complete. This statement contradicts ICASA's contention (made in the context of the ITA) that licensees could effectively use the low-band spectrum even while the digital migration had not been completed, because any interference problem with the broadcasters could be effectively managed.
- 2.9.3. ICASA has also taken the view that the licensing of all additional high demand spectrum will have limited market impacts in the next three years.⁹ Telkom fundamentally disagrees that no market or competition impacts will follow in the short term from MTN and Vodacom adding approximately 100 MHz each to their spectrum portfolios. Most of this will be mid-band spectrum ideal for LTE, and the quality of the LTE services provided by MTN and Vodacom will increase significantly in the short term. This may benefit Vodacom and MTN customers, but it will also significantly extend their lead over later entrants including Telkom.
- 2.9.4. ICASA has taken the view that 5G will have limited market impacts in the next three years and is therefore irrelevant to the current process. Telkom firmly believes that access to additional spectrum and site sharing will be more important than ever for 5G, and that now is the time to establish an effective regulatory regime: considering that Vodacom and MTN have already launched 5G services.

⁹ This is despite ICASA's assertion in other processes that the release of additional spectrum is urgent.

- 2.10. Telkom also notes that the Commission, in the DSMI and in submissions to ICASA on the MBSI and the spectrum licensing process, called for stronger *ex ante* interventions from ICASA than ICASA is now proposing in the Draft Regulations. ICASA suggests in the Findings Document that it did not “strengthen” its “assessments” by taking into account the DSMI report, because ICASA only had access to the non-confidential version thereof. This is disappointing mainly because the redactions in the non-confidential version of the DSMI report do not materially affect a reader’s ability to appreciate the confidential evidence upon which the DSMI relied in reaching its conclusions and recommendations. Telkom also notes that the Commission agrees that the auction ITA design is unlikely to promote more effective competition, but in fact is likely to contribute to a need for strong pro-competitive remedies in the MBSI, a view it expressed at the public hearings.
- 2.11. Overall, Telkom is concerned that ICASA has not used the MBSI process to devise stronger regulatory measures to combat the lack of competition that ICASA itself diagnoses in the Findings Document. Telkom would have this concern even if the ITAs are made to be far more pro-competitive in their intent, designs, and ultimate impacts. Telkom is concerned that ICASA effectively arrived at certain conclusions and decided its plans for competition in mobile broadband when it published the auction ITA and, by doing so, neutered the MBSI. On major issues like the sharing arrangements and Cell C’s future role, the Findings Document appears to be retrofitting justifications for positions ICASA took when it published the auction ITA.
- 2.12. Telkom is mindful that the MBSI and the spectrum licensing process – two regulatory processes with major implications for competition – are both long overdue. Cell C may have faced fewer barriers to expansion had ICASA introduced effective termination rate regulation significantly earlier than it eventually did. It is well known that smaller competitors or later entrants have faced and continue to face considerable uphill battles trying to compete effectively against Vodacom and MTN. Cell C’s decision to exit the industry as an infrastructure-based competitor is an alarming indication of the extent and severity of the challenges later entrants face, and of the potential impacts of delaying for too long the introduction of suitable pro-competitive regulation.
- 2.13. In addition, the DSMI has required Vodacom and MTN to reduce retail prices without providing the necessary tools for later entrant smaller operators to compete on an equal footing, thus eroding one of the main competitive advantages that later entrants have. The less they can rely on charging lower prices, the more they must match MTN and Vodacom on coverage and quality. ICASA’s decisions in the MBSI and the spectrum licensing process are, so far, providing no assistance to later entrants to meet these challenges.
- 2.14. In Telkom’s view, it is critical to the mobile sector and the economy of South Africa as a whole that meaningful pro-competitive *ex ante* regulations are introduced now to ensure effective competition as we move into the 5G era. ICASA needs to

ensure that it introduces suitable regulations to address the lack of competition in the identified markets, rather than adopting a wait and see approach by increasing the reporting requirements of Vodacom and MTN for a period of three years. Over this period, the status quo will have become further entrenched.

2.15. Specifically, Telkom believes ICASA can make the following findings and propose the following remedies, based on the evidence in the Findings Document, and encourages ICASA to do so. The following is limited to issues affecting the Draft Regulations; it does not include issues relating to spectrum policy and the ITAs, even though, as this submission explains, Telkom believes ICASA needs to alter its views on several of the spectrum-related issues it discusses in the Findings Document.

2.15.1. ICASA's approach to geographic market definition in the site access market allows it to find a national market and it should make this finding. This would allow remedies to apply everywhere. This is essential because it is not the case that later entrants face difficulties accessing the sites of Vodacom and MTN only in a limited number of municipalities located mostly in rural areas. This problem applies to sites located all over South Africa including in major urban areas.

2.15.2. ICASA's decision to include indoor and DAS sites in the site access market it has defined must be revisited. Indoor and DAS sites are not substitutes for rooftop or macro sites, neither on the demand side nor on the supply side. Indoor and DAS sites are also strategically important from a competition perspective. ICASA should define a separate site access market for indoor and DAS sites. It should also ensure that the remedies applied to this market are appropriate.

2.15.3. ICASA should propose stronger remedies in site access in order to address the core problem in this market: exclusionary discrimination by vertically-integrated dominant incumbents. The reference offer condition in the ITA will not address this problem. Telkom believes that an "equivalence of inputs" approach to site access regulation is possible and warranted by the evidence ICASA has presented on market failure in this market, and regulation based on this approach should be implemented on a national basis as soon as possible. As mentioned above, this approach should be tailored for the specific challenges associated with access to indoor and DAS sites.

2.15.4. ICASA must be pro-active on a site access regulatory regime for 5G sites now, not later. ICASA has provided very limited reasons for its view that 5G will essentially have no market impacts in the next three years. Telkom submits that this assumption is incorrect and notes that, if ICASA truly believed this, it would not insist on auctioning 3500 MHz spectrum on an urgent basis. Telkom believes ICASA can take a different view on 5G and should focus on 5G site access accordingly.

- 2.15.5. Telkom is concerned that the information that ICASA intends to gather from MTN and Vodacom under the pro-competitive remedies it has proposed in the Draft Regulations will not enable it to effectively monitor costs and prices in the manner and for the purpose ICASA has stated. This is specifically with reference to the reporting requirements proposed for Vodacom and MTN in respect of site access and national roaming. Telkom is in support of the proposal contained in the MBSI Discussion Document which was to implement accounting separation. Telkom remains of the view that this is the only robust mechanism which will allow ICASA to effectively monitor the site access and national roaming. Telkom further submits that ICASA is incorrect to view accounting separation as an unjustifiable burden. ICASA has found serious competition problems in the site access and national roaming markets and has found Vodacom and MTN to be dominant in them. ICASA would therefore be justified to impose at least accounting separation – it is a proportionate and appropriate remedy to impose given these findings.
- 2.15.6. With respect to market definition, ICASA should have defined the retail market as national, based on the evidence it has presented in the Findings Document. For example, ICASA notes that Vodacom and MTN have the incentive and ability to foreclose access to their sites because they are vertically integrated and have market power at the retail level. This is true everywhere in the country, not only in certain sub-provincial regions, as suggested by ICASA's retail market findings. The issue of vertical integration and the competition problems it causes in the context of the skewed retail market structure we have in South Africa is one clear reason why a national retail market – and a finding that Vodacom and MTN are dominant in it – is so necessary. Vodacom and MTN have strong incentives to protect their retail market power everywhere across the country, not only in regions where later entrants are less prominent at the retail level.
- 2.15.7. The main reason for the retail market being national in scope is that every mobile operator in South Africa – vertically integrated or not – competes, or tries to compete, in the retail market on a national basis. No operator or retail market participant, that we are aware of, focuses on specific regions only. The most reasonable interpretation to apply to the observation that there are regional variations in competitive conditions is that these merely reflect how difficult it is for later entrants to build a ubiquitous national presence, and not that retail market competition plays out on a regional basis. Telkom also notes that the Commission found a national retail market in the DSMI, and that internationally the UK's Competition and Markets Authority did so in merger reviews, despite observing local variations in competitive conditions (see for example their decision in the BT-EE merger, referenced in this submission).

3. THE RELATIONSHIP BETWEEN THE MBSI AND THE AUCTION ITA IS FUNDAMENTALLY FLAWED

- 3.1. ICASA published the auction ITA in October 2020, before completing the MBSI. The auction ITA was informed by the ITA Competition Assessment, which was conducted separately from the MBSI and not subjected to public consultation. Telkom's High Court challenge of the ITAs was partly predicated on Telkom's concerns with this approach. Telkom was concerned that the ITA Competition Assessment would constrain ICASA's ability to use the MBSI to assess competition problems – and their potential remedies – holistically, including concerns and potential remedies related to spectrum.
- 3.2. Telkom notes that the High Court agreed with Telkom's concern. A judgment released before ICASA published the Findings Document and Draft Regulations said that, "*ICASA is currently concluding a Chapter 10 inquiry into Mobile Broadband Services (MBSI). This is intended to ensure that the assignment of spectrum post-auction should not have a negative impact on competition. The inquiry is supposed to inform ICASA on "the state of competition in the mobile market" (sic) It is therefore unreasonable and irrational to publish the auction ITA prior to the completion of the inquiry. A review on this ground alone has very good prospects of success and it affords the applicants a prima facie right to apply for an interdict.*"¹⁰
- 3.3. Telkom's concern has been realised. ICASA has now decided that the Findings Document and Draft Regulations ought to take account of the auction ITA. The Findings Document states that, "*The impact of some of the aspects of the spectrum ITA will be taken into account in the forward-looking analysis in relevant sections of the Authority's findings*"¹¹ and that, "*... The conditions attached to the spectrum ITA process as well as the invitation to apply for the WOAN [are] changes [that] need to be accounted for in the analysis of competition.*"¹²
- 3.4. The "aspects" of the auction ITA to which ICASA refers are the coverage obligations; the spectrum caps and floors; the reference offer licence condition related to the site access market; open access obligations in respect of MVNOs; and an obligation to purchase capacity from the to-be-licensed WOAN.¹³ ICASA believes these "aspects" will have pro-competitive impacts. This is seen in comments made in the context of the site access market and the wholesale MVNO services market.¹⁴

¹⁰ Decision of Baqwa, J. in High Court Case Number 66778/2020, para. 44.

¹¹ Findings Document, para. 38. Note that ICASA's term "spectrum ITA" is equivalent to the term "auction ITA" Telkom uses in this submission.

¹² Findings Document, para. 37.

¹³ Findings Document, para. 37 including sub-paras. Telkom notes that the Findings Document does not spell out how ICASA sees these impacts unfolding.

¹⁴ In the next section, this submission labels and describes the markets ICASA defined and analysed in the Findings Document.

- 3.4.1. ICASA states that the site access reference offer condition in the auction ITA removes the need to introduce any other remedies for the site access market.¹⁵ Potential remedies that were proposed in the MBSI Discussion Document¹⁶, such as accounting separation, are no longer required. Stronger regulations can be considered in the next review if needs be.¹⁷
- 3.4.2. In respect of the need for remedies in the wholesale MVNO services market, ICASA explains that in its view there is evidence of recent improvements to competition, but also states that, “... *the ITA for high demand spectrum requires that MVNO offers be provided. This is likely going to have a significant impact on the market for MVNO services.*”¹⁸
- 3.5. Telkom notes that the ITAs are subject to ongoing litigation and are therefore subject to change. ICASA has, however, crafted the Draft Regulations on the assumption that certain aspects of the auction ITA design will remain as they are currently and will be pro-competitive in their effects on the market in the next three years. Telkom believes that ICASA’s views on the Draft Regulations should not rely on assumed impacts from the auction ITA design. There are several reasons for this. These are explained in the sections that follow, but the most obvious challenge and risk is that the auction ITA design is subject to change.
- 3.6. Overall, Telkom believes that ICASA ought to have completed the MBSI before deciding on how to license high demand spectrum, and the MBSI should have informed that licensing process including the competition-related aspects of the design of the ITAs. Telkom fundamentally disagrees with the approach ICASA has adopted, i.e., to commence the ITA process before completing the MBSI, and to then adapt the outcomes of the MBSI to accommodate what ICASA perceives will be pro-competitive impacts of the design of the auction ITA. ICASA has apparently put a commitment to the auction design (revealed in the auction ITA) ahead of the opportunity to devise an integrated and holistic package of pro-competitive regulatory and spectrum-related and other measures that enhance competition.
- 3.7. The remainder of this submission covers the following:
- It explains the disconnect between ICASA’s own competition findings and the pro-competitive remedies it has proposed.
 - It then addresses the auction ITA design and explains why, in Telkom’s view, the auction (as proposed) is unlikely to promote competition and may even worsen it, thus accentuating the need for stronger Draft Regulations rather than weaker ones that take the auction ITA design as an input.

¹⁵ Findings Document, para. 166.

¹⁶ ICASA (2019). “Discussion document on the Market Inquiry into Mobile Broadband Services in South Africa.” 29 November 2019 (no Gazette number).

¹⁷ Findings Document, para. 168.

¹⁸ Findings Document, para. 218.

- It then explains the shortcomings in ICASA's analysis of market definition and dominance, and how this flawed analysis has informed ICASA's relatively minimal package of proposed remedies.
- Lastly, Telkom explains why it is concerned with ICASA's views on 5G.

4. ICASA'S PROPOSED REMEDIES DO NOT FOLLOW FROM ITS COMPETITION FINDINGS

- 4.1. This section summarises ICASA's competition findings in the Findings Document and the pro-competitive remedies in the Draft Regulations. As this section makes clear, the pro-competitive remedies in the Draft Regulations fall far short of what one would expect a regulator to propose in the context of the competition findings ICASA has made in the Findings Document.
- 4.2. This section also summarises ICASA's reasons for having proposed a relatively minimalist (and in Telkom's view, weak) set of pro-competitive remedies in the Draft Regulations.
- 4.3. If maintained, certain of the findings discussed below would, at the conclusion of the process, be open to challenge on, amongst other bases, that they are irrational or unreasonable.

Summary of ICASA's competition findings

- 4.4. The Findings Document has found ineffective competition in the retail mobile market as well as in three wholesale mobile markets.¹⁹ The latter are the markets for "wholesale site infrastructure access" ("**Upstream Market 1**")²⁰; "wholesale national roaming services for coverage purposes" ("**Upstream Market 2**")²¹; and "wholesale access point name ("**APN**") services (including resellers)" ("**Upstream Market 3b**").^{22, 23}
- 4.5. ICASA found competition in the wholesale MVNO market ("**Upstream Market 3a**") to be effective²⁴, and makes no finding of dominance in this market.²⁵ Cell C has historically been the sole provider of wholesale MVNO services, but ICASA finds it has no market power because entry barriers are low and because, in ICASA's view, market shares for this market should be measured on capacity.²⁶ It makes no findings of ineffective competition because of recent entry by MTN into the

¹⁹ Findings Document, para. 24.

²⁰ Findings Document, para. 24.2.

²¹ Findings Document, para. 24.3. This market is labelled "national roaming for coverage purposes" because ICASA has distinguished between roaming for coverage and "roaming" for capacity. This submission discusses the significance of this distinction later. For now, it is only important to mention that providers of "roaming" for capacity, i.e., Rain, Liquid, and Cell C, are not considered by ICASA to be suppliers active in the market for national roaming for coverage.

²² Findings Document, para. 24.4.

²³ In this submission we use the terms "Upstream Market 1" and the "**market for site access**" or the "**site access market**" interchangeably. We use the terms "Upstream Market 2" and the "**market for national roaming**" or the "**national roaming market**" interchangeably. The same applies to upstream markets 3a and 3b – we use the terms "**market for wholesale MVNO services**" or "**wholesale MVNO market**" interchangeably with "Upstream Market 3a"; and we "**market for wholesale APN services**" or "**wholesale APN market**" interchangeably with "Upstream Market 3b".

²⁴ Findings Document, para. 222.

²⁵ Findings Document, para. 221.

²⁶ Findings Document, para. 218.

wholesale MVNO market and because the auction ITA will mandate more MVNO entry.²⁷

4.6. ICASA's main competition findings include the following:

- 4.6.1. The retail market is highly concentrated in most parts of the country and especially in rural areas. This concentration has been persistent over time²⁸, and is likely to continue to persist in the near future despite the licensing of a WOAN, additional spectrum being assigned, and recent growth of Telkom.²⁹
- 4.6.2. Either MTN or Vodacom is dominant at the retail level – which is defined as having at least a 45% market share – in most regions of the country.³⁰
- 4.6.3. Vodacom and MTN account for a combined share of over 60% of the site access market in 90 municipalities.³¹
- 4.6.4. The market power of Vodacom and MTN in the downstream retail market is partly due to their dominance in the site access market, and the fact of their vertical integration.³²
- 4.6.5. *“While there are potential competitors [in the site access market], Cell C has exited site infrastructure to a large extent or plans to do so soon. Furthermore, while Telkom is rolling out infrastructure, it still does not have extensive coverage at this point.”*³³
- 4.6.6. Many site access seekers, *“... pay considerably more than reasonable cost ranges for sites ...”*³⁴
- 4.6.7. For national roaming, the Findings Document states that, *“In the context of the very high levels of concentration, high prices and substantial barriers to entry, the Authority considers the market for national roaming to be ineffectively competitive within the forecast period.”*³⁵

4.7. ICASA concludes that Vodacom and MTN are dominant (possess significant market power) in three of the four markets in which it found ineffective competition.

²⁷ Findings Document, para. 218.

²⁸ Findings Document, para. 83.

²⁹ Findings Document, para. 92.

³⁰ Findings Document, Table 2. This submission discusses at a later stage the strict application of a 45% market share threshold for finding dominance that ICASA has applied.

³¹ Findings Document, para. 147. Telkom notes that both of these numbers may be higher in reality – this depends on the methodology used and the dominance test applied, as discussed later in this submission.

³² Findings Document, paras. 147, 153, 155.

³³ Findings Document, para. 147.

³⁴ Findings Document, para. 148.

³⁵ Findings Document, para. 191.

These are the retail market, the site access market, and the market for national roaming.³⁶

- 4.7.1. In the **retail market**, ICASA found that either Vodacom or MTN is dominant in certain sub-provincial regions. These are mostly rural regions, but a small minority contain large urban areas. In none of them did ICASA find Vodacom and MTN to both be dominant.
- 4.7.2. In the **site access market**, ICASA found that either Vodacom or MTN is dominant in some municipalities, mostly rural municipalities. In no municipality did ICASA find Vodacom and MTN to both be dominant.
- 4.7.3. In the **market for national roaming**, ICASA found that Vodacom and MTN are both dominant on a national basis.
- 4.8. As mentioned above, ICASA has made no finding of ineffective competition in the wholesale MVNO market, nor any dominance finding. It has also made no dominance finding in the wholesale APN market, despite finding competition in this market to be ineffective.³⁷
- 4.9. ICASA also finds that in all three markets where it has made a findings of dominance, Vodacom and MTN derive significant market power from their vertical integration, which could “harm competition”.³⁸ By way of example, ICASA explains that Vodacom and MTN have incentives to harm retail market competition by foreclosing access to sites or national roaming.³⁹
- 4.10. In reaching these conclusions, ICASA emphasises factors such as high barriers to entry in all markets identified⁴⁰; vertical integration (as mentioned)⁴¹; historical competition problems in voice markets preventing challenger networks from expanding⁴²; and the fact that little has changed over time.⁴³ As Telkom has grown, Cell C has declined, and, “... *entry overall in various regions in South Africa has been limited.*”⁴⁴
- 4.11. ICASA also concludes that ineffective competition will continue in the retail market⁴⁵, site access market⁴⁶, and the national roaming market⁴⁷ for the next three

³⁶ Draft Regulations, section 6. Findings Document, paras. 25, 94, 152, 179, and Tables 2 and 4.

³⁷ Findings Document, paras. 224 and 226. According to ICASA, wholesale prices for APN services being above associated retail prices necessitates a finding of ineffective competition. However, no licensee has market power because all operators can enter this wholesale market easily.

³⁸ Draft Regulations, section 6.

³⁹ Findings Document, paras. 153 and 192.

⁴⁰ Findings Document, paras. 73, 144

⁴¹ Findings Document, paras. 98, 153 and 192.

⁴² Findings Document, para. 85.

⁴³ Findings Document, para. 85.

⁴⁴ Findings Document, para. 92.

⁴⁵ Findings Document, para. 92.

⁴⁶ Findings Document, para. 150.

⁴⁷ Findings Document, para. 191.

years.⁴⁸ ICASA predicts no substantial impact on “market conditions” in the next three years of the licensing of the WOAN, the licensing of additional high demand spectrum, particularly sub-1 GHz spectrum via the auction ITA, or from 5G.⁴⁹ ICASA states the following reasons:

4.11.1. The sub-1 GHz spectrum included in the auction ITA is still being used by broadcasters.⁵⁰

4.11.2. The WOAN will take years to establish itself.⁵¹

4.11.3. 5G will remain in an early or nascent stage of development over the next three years, and in any case some existing deployments are linked to temporary COVID-19 spectrum assignments.⁵²

4.12. ICASA foresees some impacts on market dynamics and conditions within the next three years from certain design features of the auction ITA only.⁵³ As mentioned, ICASA states that, “... *these changes need to be accounted for in the analysis of competition.*”⁵⁴ Telkom notes, however, that ICASA does not spell out how it sees these impacts unfolding.⁵⁵

Summary of the Draft Regulations

4.13. To summarise the above, ICASA has found ineffective competition in the retail market and two wholesale markets; has found Vodacom and MTN to be dominant in those markets; and has found that current conditions of ineffective competition are unlikely to change significantly in the next three years.

⁴⁸ ICASA states that it must assess competition on a forward-looking basis (Draft Regulations section 4, sub-para. (c)). ICASA also states that this forward-looking analysis should be limited to the next three years only, because another market review will commence in three years’ time (Findings Document, para. 50). Telkom notes the Draft Regulations do not guarantee a new review after three years. Draft Regulation 8 states that, “*The Authority will review the markets for mobile services, to which these Regulations apply, as well as the effectiveness of competition and the application of pro-competitive terms and conditions in those markets when the Authority deems it necessary but not earlier than three (3) years from the date of publication of these Regulations (emphasis added).*”

⁴⁹ Findings Document, paras. 49, 50, 92, 126, and 150.

⁵⁰ Findings Document, para. 92.

⁵¹ Findings Document, para. 92.

⁵² Findings Document, para. 49. Telkom notes that ICASA says nothing about the impacts of licensing additional high demand spectrum in mid-band ranges such as 2600 MHz. This submission returns to this issue later on.

⁵³ Findings Document, para. 37 including sub-paras. As mentioned earlier, these design features are the coverage obligations; the spectrum caps and floors; the reference offer licence condition related to the site access market; open access obligations in respect of MVNOs; and an obligation to purchase capacity from the to-be-licensed WOAN.

⁵⁴ Findings Document, para. 37.

⁵⁵ The Findings Document also argues that the sharing arrangements either are already generating pro-competitive impacts on the market or will do in future (Findings Document, paras. 120 – 127), but the time period to which these views apply is not made clear. This submission discusses ICASA’s views on the sharing arrangements more fully later on.

- 4.14. These findings provide a solid basis to introduce strong pro-competitive regulations.
- 4.15. The pro-competitive remedies proposed by ICASA are at best instead extremely weak. They are limited to new information gathering and reporting requirements applicable to Vodacom and MTN, which are aimed at facilitating ICASA's ability to monitor wholesale pricing for potential margin squeeze activity in site access, national roaming, and wholesale MVNO and APN services; or non-price exclusionary conduct by MTN or Vodacom in site access. It is Telkom's submission that ICASA's ex post information gathering requirement does not meet the objective of pro-competitive remedies. Furthermore, ICASA does not explain how this information will be used and its commitment to address any concerns stemming from anti-competitive behaviour and what ICASA tends to do should they find any form of uncompetitive behaviour, other than referring to an undertaking by the Commission that it will prosecute if wholesale rates are above effective retail rates⁵⁶. In short, it is not clear how any evidence of anti-competitive behaviour coming to light through ICASA's monitoring will be addressed by ICASA and the timeframe for ICASA's response could run into years.
- 4.16. Specifically, the Draft Regulations propose to introduce the following pro-competitive remedies. They will apply to dominant operators, i.e., to Vodacom and MTN on the basis that they have significant market power in the retail market and in the wholesale markets for site access and national roaming.

Site access⁵⁷

- 4.17. The requirements listed below will apply only to macro site infrastructure owned or controlled by a dominant licensee. They require dominant licensees to submit the following information:
- 4.17.1. Quarterly lists of access requests approved within 20 business days.
- 4.17.2. All charges applied to site sharing arrangements.
- 4.17.3. Quarterly lists of access requests denied within 20 business days including reasons for the denial.
- 4.17.4. Reports summarising the information in the above lists including average effective charges and average approval times.
- 4.17.5. A list of all sites used by the dominant operator and charges applied to existing sharing arrangements for macro sites.

⁵⁶ In terms of Section 8(1)(d)(iv) of the Competition Act 89 of 1998 the Commission is already mandated to prosecute a dominant firm engaging in margin squeeze.

⁵⁷ Draft Regulations, section 7, para. 1.1 including sub-paras.

- 4.17.6. Location of all sites in the overall list mentioned above and categorisation of each into macro, rooftop, indoors, lamppost, billboard, micro, and other.

National roaming⁵⁸

- 4.18. Dominant licensees must provide reports showing:
- 4.18.1. Effective roaming prices paid by customers per roaming contract and showing any price variations by location or otherwise.
 - 4.18.2. National roaming data volumes by site.
- 4.19. Telkom notes that ICASA has not specified the frequency of this required reporting (e.g., monthly, quarterly, annually).

MVNO and APN⁵⁹

- 4.20. Dominant licensees⁶⁰ must provide reports and supporting data showing effective wholesale prices for wholesale MVNO and APN services, split by customer and excluding fixed-wireless access (“**FWA**”) traffic.
- 4.21. Telkom notes that ICASA has not specified the frequency of this required reporting (e.g., monthly, quarterly, annually).

Retail market⁶¹

- 4.22. Dominant licensees must submit reports to ICASA covering the following information:
- 4.22.1. Effective prices for mobile data services.
 - 4.22.2. Effective prices for mobile data services broken down by various customer segments, times of day, and geographic locations.
- 4.23. These reports should exclude the following types of data traffic: FWA, wholesale, MVNO, and enterprise business.
- 4.24. Telkom notes that ICASA has not specified the frequency of this required reporting (e.g., monthly, quarterly, annually).

⁵⁸ Draft Regulations, section 7, para. 1.2 including sub-paras.

⁵⁹ Draft Regulations, section 7, paras. 1.6.

⁶⁰ This refers to Vodacom and MTN even though ICASA has made no dominance findings in the wholesale MVNO or APN markets. Telkom notes that Cell C is not required to submit any information relating to its wholesale MVNO services despite being the largest provider thereof.

⁶¹ Draft Regulations, section 7, paras. 1.4 and 1.5 including sub-paras.

General⁶²

- 4.25. If a dominant licensee's retail prices drop below its wholesale prices, the licensee must submit reports and evidence to ICASA demonstrating that this is cost-based or temporary.

Reliance on the auction ITA

- 4.26. As mentioned earlier, ICASA has proposed weak pro-competitive remedies for most of the markets where ineffective competition was found because it believes the Draft Regulations can rely on the market impacts that ICASA expects the auction ITA design to create.⁶³
- 4.27. The national roaming market is the only market where this does not apply. ICASA's decision to only monitor conditions over the next three years in the national roaming market is due to ICASA's belief that recent changes in this market are encouraging and that there is no need for price regulation (as proposed by the Commission in the DSMI)⁶⁴ or any other potential remedy (ICASA considered a reference offer for roaming and also accounting separation in the MBSI Discussion Document).⁶⁵ It believes that the information submission requirements in the Draft Regulations will facilitate sufficiently-effective monitoring.⁶⁶
- 4.28. Telkom notes that ICASA also states that the retail market needs no interventions at this stage because interventions at the wholesale level will improve retail market competition. While Telkom agrees with the principle of first intervening at the wholesale level, Telkom disagrees with the following statements ICASA has made. ICASA says, "... *the remedies in wholesale markets ... are sufficient to remedy the ineffective competition and significant market power found in retail markets*".⁶⁷ ICASA repeats this later in the Findings Document: "*However, the Authority's view is that competition concerns in the retail market will likely be remedied through wholesale interventions including with respect to APN and MVNO price monitoring, set out in the draft Mobile Broadband Services Regulations.*"⁶⁸ Telkom is of the view that these statements cannot be correct, because the Draft Regulations are proposing no pro-competitive remedies for wholesale markets.

⁶² Draft Regulations, section 7, paras. 1.7.

⁶³ Findings Document, paras. 38 (general statement), 165-166 (site access), 218 (wholesale MVNO; although ICASA made no finding of ineffective competition in this market).

⁶⁴ Findings Document, para. 201.

⁶⁵ MBSI Discussion Document, para. 1.3.4.

⁶⁶ Findings Document, para. 203.

⁶⁷ Findings Document, para. 102.

⁶⁸ Findings Document, para. 227.

5. RELIANCE ON THE AUCTION ITA DESIGN IS PROBLEMATIC BECAUSE IT IS NOT DESIGNED TO BE PRO-COMPETITIVE

5.1. In addition to the foundational problem of process created by ICASA's decision to have the Draft Regulations rely on the auction ITA design, Telkom's primary concern with ICASA's views, as summarised in the previous section, is that the design of the auction ITA is not pro-competitive.

5.2. To explain this, the following issues are discussed in this section.

5.2.1. ICASA itself has stated that the auction ITA is not designed to remedy competition problems, but only to ensure it does not worsen them. ICASA also states in the Findings Document that ineffective competition will continue in the retail market and in the wholesale markets for site access and national roaming for the next three years.⁶⁹

5.2.2. The auction ITA design ignored the sharing arrangements in the market and has thus ignored the strong probability that sharing arrangements undermine the purpose of a prominent feature of that design – the spectrum “caps”. ICASA's conclusions on these arrangements, as expressed in the Findings Document, are premature, flawed, and rely to some extent on a view of the UK's Ofcom without recognising contextual differences. ICASA has also confused the private incentives of operators to share networks with the effects of that sharing on competition and consumers.

5.2.3. The auction ITA design also ignored Cell C's exit as an infrastructure-based competitor. ICASA's views in the Findings Document on the competitive implications of this are highly debatable. Cell C's exit also has implications for the auction ITA design, which ICASA has ignored.

5.2.4. The auction ITA design glossed over the fact that Telkom will not have exclusive use of any low band spectrum in the 700 MHz and 800 MHz bands it may acquire and disregarded the competitive implications thereof. ICASA argues in the Findings Document that matching spectrum portfolios are not necessary for realising effective competition and relies on Ofcom for this view. At the same time, ICASA also argues that the licensing of additional sub-1 GHz spectrum will have no appreciable impact on competition because of delays in the digital migration.

5.2.5. The auction ITA design – specifically the reference offer condition – will not on its own remedy the competition problems in the site access market. This condition does not address the core competition problem in the site access market.

⁶⁹ Findings Document, paras. 92, 150, 191.

- 5.3. In addition, the licensing of additional high demand spectrum in the manner envisaged by the auction ITA will likely weaken competition in the short run, for reasons provided at the end of this section. It will not have limited pro-competitive impacts over the next three years, as ICASA has suggested.⁷⁰
- 5.4. Telkom notes that the Commission expressed very similar views at the MBSI public hearings. Telkom agrees strongly with the following statements the Commission made⁷¹:
- 5.4.1. The ITAs have pre-empted the MBSI but do not solve the competition problems in mobile broadband.
- 5.4.2. The ITA conditions do not remove the need for “interventions”, because the caps still allow Vodacom and MTN to acquire more than half the spectrum on offer; the reference offer condition for site access is weak; and more MVNOs will not, “... *impose a broad retail market constraint but more likely to be niche (sic).*”
- 5.4.3. The coverage obligations for Tier 2 operators in the auction ITA actually make pro-competitive interventions in the MBSI more important, since, in trying to meet those obligations, Tier 2 operators (like Telkom) must rely on site access from the dominant incumbents.⁷²

ICASA’s views on the competitive impacts of the auction ITA design have changed without explanation

- 5.5. ICASA stated in the ITA Reasons Document that the auction ITA was not designed to fix competition problems, but rather only to ensure that it did not worsen them: “*The forthcoming spectrum auction is not expected to solve the above wholesale and retail competition concerns in South Africa. However, the Authority is keenly aware of the need to prevent the auction award from worsening the competition concerns in mobile markets identified by the Authority. This is done by imposing appropriate obligations and spectrum caps prescribed in the ITA ...*”⁷³ The ICASA chairperson made similar remarks before the ITAs were published.⁷⁴

⁷⁰ Findings Document, para. 50.

⁷¹ Competition Commission (2020). “ICASA Public Hearings: Competition Commission Submissions”. 27 October 2020.

⁷² It is worth noting that the 80% coverage obligation for Tier 2 operators must be met with operators’ own spectrum, and that national access to sub 1 GHz spectrum is therefore necessary in order to meet this obligation.

⁷³ ITA Reasons Document, para. 32 at pg. 96 (in the “Competition Assessment” section).

⁷⁴ ICASA (2020), “Chairperson of ICASA Announcing Plans for the Licensing of High Demand Spectrum and the Wireless Open-Access Network”, 30 September 2020, available at <https://www.icasa.org.za/news/2020/plans-for-the-licensing-of-high-demand-spectrum-and-the-woan>.

- 5.6. ICASA also states in the Findings Document that it expects ineffective competition to continue in the retail market, the site access market and the national roaming market for the next three years.⁷⁵
- 5.7. Both these statements are at odds with ICASA's alternate view, in the Findings Document, that aspects of the auction ITA design will be pro-competitive in their impacts in the next three years – and sufficiently so to warrant relatively weak pro-competitive remedies in the Draft Regulations. Telkom also notes that ICASA has provided no explanation in the Findings Document for this apparent change in its view.

The sharing arrangements

- 5.8. The ITA Competition Assessment and the ITA Reasons Document did not mention the sharing arrangements. ICASA published ITAs that effectively assumed the sharing arrangements have no impact on, or relevance to, the design of the ITAs, especially the auction ITA. It is highly unlikely that ICASA would subsequently have concluded, in the Findings Document, that these sharing arrangements raised competition concerns or questions over changes in *de facto* control of spectrum. Doing so would have undermined the very foundations of the ITA.
- 5.9. This has turned out to be the case. The Findings Document has determined that the sharing arrangements give rise to no implications for the ITAs, nor for any other regulatory process, because they raise no questions over control of spectrum and are pro-competitive in effect. Specifically, the Findings Document reaches the following conclusions on the sharing arrangements:
 - 5.9.1. They have not given rise to a change in control over the spectrum licensed to any of the parties involved; and they do not amount to spectrum sharing or trading.⁷⁶ This conclusion is based on provisions of the Electronic Communications Act and spectrum-related regulations.⁷⁷
 - 5.9.2. They are “typically” non-exclusive. The smaller operators who are party to these deals – Rain, Liquid, Cell C – have access to spare or additional capacity over and above what they provide to Vodacom or MTN and they use it to service their own customers.⁷⁸
 - 5.9.3. To the extent that the sharing arrangements create a capacity “asymmetry” favouring Vodacom and MTN, such an asymmetry is warranted on the basis that Vodacom and MTN have more subscribers. It is also warranted because, even if one assumes that the relevant spectrum holdings of the smaller operators should be attributed to

⁷⁵ Findings Document, paras. 92, 150, 191.

⁷⁶ Findings Document, para. 124.

⁷⁷ Findings Document, para. 118.

⁷⁸ Findings Document, para. 118.

Vodacom and MTN, their shares of total assigned spectrum would still fall well below the total spectrum cap of 37% set by Ofcom for a recent auction in the UK, and because Ofcom does not believe that symmetrical spectrum holdings are necessary to achieve effective competition.⁷⁹

5.9.4. The sharing arrangements are on balance pro-competitive. They have not afforded Vodacom or MTN a first mover advantage in 5G; they have not entrenched the market positions or dominance of Vodacom or MTN; and they have promoted the entry of Rain into retail markets, partly because Rain can “leverage” its spectrum assets to obtain roaming, site access, and managed network services from Vodacom or MTN. They have also promoted the survival of Cell C, which is preferable to any potential counterfactual. These impacts outweigh any potential harm to competition.⁸⁰

5.10. Telkom is of the view that the conclusions in the Findings Document on the sharing arrangements are premature and that ICASA’s analysis of them is flawed.

Premature conclusions on control

5.11. Earlier in 2021, the Commission indicated a desire to investigate the Vodacom-Rain agreements as a merger. It was subsequently directed by the Tribunal to do so. The Commission is therefore currently investigating whether the Vodacom-Rain agreements have given rise to a change in control over the spectrum or spectrum-related network capacity of either party, particularly Rain’s.

5.12. The Commission’s investigation is ongoing. It is due to report back to the Tribunal in June 2021. Its input will feed into a broader Tribunal process. Telkom notes that ICASA is a respondent in that Tribunal process but has decided not to participate in the proceedings. To the extent that ICASA has not availed itself of the full set of facts or reviewed the analyses presented by parties in the proceedings, its views on this arrangement are based on incomplete information and any conclusions it reaches are premature. In any event ICASA has also stated that it will abide by the decision of the Tribunal in the Vodacom-Rain matter.⁸¹

5.13. Accordingly, if the Tribunal finds that the sharing deal between Vodacom and Rain has resulted in Vodacom gaining a form of control over Rain’s spectrum, the conclusions in the Findings Document on at least the question of control will necessarily have to be revisited.

5.14. In relation to the above Telkom also wishes to draw attention to the fact that Vodacom and Rain have both informed the Tribunal and Commission that they

⁷⁹ Findings Document, paras. 124, 126.

⁸⁰ Findings Document, paras. 122, 123, 125.

⁸¹ Competition Tribunal directions following the virtual pre-hearing in respect of Telkom SA Soc Limited// Vodacom (Pty) Limited, Wireless Business Solutions (Pty) Ltd t/a Rain, The Competition Commission of South Africa and the Independent Communications Authority of South Africa. Held on 29 March 2021

have activated inter-operator carrier aggregation (“**IOCA**”), and notes that ICASA’s investigation of the Vodacom-Rain agreements, as far back as 2017, tested whether IOCA had been implemented between the parties. Telkom notes further that the Commission has emphasised that, in its view, implementation of IOCA would raise serious questions that a change in control over spectrum had arisen.

Faulty reasoning on control and bargaining power

- 5.15. The Findings Document states that, “... *the Authority considers that the smaller operators are able to use their spectrum assignments as bargaining power to leverage roaming, site access and managed services arrangements.*”⁸² ICASA sees this as a good thing, allowing later entrants (or Cell C) to enter or remain in the market.
- 5.16. However, it is also the case that the idea of “leveraging” spectrum assets necessarily connotes a willingness to relinquish a degree of control over those assets. Telkom agrees with ICASA that smaller operators have in effect traded certain of their spectrum assets for revenue or roaming services⁸³ (or possibly site access).
- 5.17. Telkom is also mindful of the context in which this leveraging is taking place. Vodacom and MTN offer by far the largest scale and demand for capacity roaming services.⁸⁴ They could offer Rain more than any other licensee could, including Telkom, even though Telkom is also capacity constrained (we return to this issue below). Furthermore, Vodacom and MTN are dominant at the retail level and therefore have the incentive and ability to foreclose other competitors from access to the capacity that Rain, Liquid or Cell C may be able to create via these sharing arrangements.

Premature and flawed conclusions on competitive effects – smaller operators

- 5.18. Competitive effects are to some extent intrinsically bound up in any investigation of control by the Competition Authorities, but a full investigation of competitive effects would commence only after the control question has been answered in the affirmative (if it is so answered). The Commission and Tribunal have not yet reached this stage in the Vodacom-Rain investigation, which underlines the premature nature of ICASA’s conclusions in the Findings Document regarding the competitive effects of the sharing arrangements.
- 5.19. ICASA has concluded that the sharing arrangements are pro-competitive. This is partly based on the claim that the sharing arrangements are “typically” non-

⁸² Findings Document, para. 125.

⁸³ It does not appear as if Cell C has paid MTN for roaming services for several quarters. MTN nevertheless still provides Cell C with national roaming services, since Cell C no longer operates a RAN of its own.

⁸⁴ Telkom notes that ICASA has distinguished between coverage roaming and capacity roaming, in the Findings Document. This submission comments on this later on.

exclusive, and partly on the claim that they have facilitated Rain's entry and Cell C's survival, which has in ICASA's view increased competition relative to the counterfactual in which no sharing arrangements exist.⁸⁵

- 5.20. The claim regarding exclusivity ignores *de facto* realities in the marketplace. The claim regarding the competitive contribution of Rain and Cell C is materially overstated.

Exclusivity claim

- 5.21. There is evidence in the public domain that Vodacom has *de facto* exclusivity over the spectrum and related capacity created by the Vodacom-Rain arrangement.⁸⁶ There are also public indicators that the same is true for MTN in the context of the MTN-Liquid agreement.⁸⁷ While it is possible that Cell C has shared its spectrum or capacity to both MTN and Vodacom⁸⁸, public information indicates that Cell C only has an active RAN sharing agreement with MTN.⁸⁹ Control over access to spectrum is made possible, on a technical level, through the active RAN sharing agreement between MTN and Cell C. Further, only MTN, and not Vodacom, has indicated the desire to "reverse roam" on Cell C, using Cell C's spectrum⁹⁰ and the Findings Document states that MTN "roams" on Cell C, but does not state that Vodacom does too.⁹¹ Finally, while public information suggests that Liquid has two wholesale 5G customers – Vodacom and Internet Solutions – these two companies are not close competitors at the retail level in the mobile market.

- 5.22. ICASA actually recognises that the sharing arrangements may be *de facto* exclusive to either Vodacom or MTN by noting that, "*Where the roaming deals are tied to the facilities leasing or managed services deals, this complicates the analysis further if smaller operators that require facilities are required to provide*

⁸⁵ Findings Document, paras. 118 and 122.

⁸⁶ Neither Rain nor its major investor, African Rainbow Capital, has ever mentioned another wholesale 4G customer other than Vodacom, as far as Telkom is aware. Telkom also notes that African Rainbow Capital has stated in public that the deal with Vodacom accounted for about 80% of Rain's market valuation. See <https://mybroadband.co.za/news/business-telecoms/390256-rains-plan-to-make-money.html>.

⁸⁷ There is no evidence Liquid has any other wholesale 4G customers, while there is evidence that Liquid predicated its 4G "network" on first signing an agreement with MTN (see http://www.rns-pdf.londonstockexchange.com/rns/5299C_1-2019-6-17.pdf, pg. 2, where it says that MTN was secured as a customer on 20 December 2018; and https://www.liquid.tech/about-us/news/Liquid_Intelligent_Technologies_to_establish_multi-billion_rand_4G_network_in_South_Africa, where Liquid announces its plans for a 4G network one day later, on 21 December 2018. The agreement is fifteen years in duration (https://www.rns-pdf.londonstockexchange.com/rns/5304C_1-2019-6-17.pdf, pg.1).

⁸⁸ Cell C roams on both networks.

⁸⁹ See <https://mybroadband.co.za/news/cellular/372400-cell-c-will-shut-down-its-network-soon-here-is-what-will-happen.html>. Cell C has made no similar statement regarding Vodacom before or after announcing a roaming deal with Vodacom that was in addition to the roaming deal it had signed with MTN. <https://mybroadband.co.za/news/telecoms/363014-all-cell-c-network-traffic-will-move-to-mtn-but-not-until-it-can-pay-its-bills.html>⁹⁰

⁹¹ Findings Document, para. 116.2.

*capacity in exchange for such deals. This potentially limits their ability to provide capacity to others even though the agreements are non-exclusive.*⁹²

Competitive contribution of Rain and Cell C

- 5.23. A further indication that ICASA has misunderstood the issue of exclusivity is seen in the statement that, “... *these agreements are generally structured to allow for roaming on the remaining available RAN capacity, at the capacity provider’s discretion, and Cell C, Rain and Liquid Telecom each use capacity for their own subscribers*”⁹³ (emphasis added).
- 5.24. Telkom notes that ICASA does not claim that Liquid has contributed to an increase in competition. This is correct – Liquid has confirmed in public that it has no intentions of competing in the consumer retail market for 4G or 5G services. In fact, Liquid’s bid document for the auction ITA suggests strongly that its only interest in bidding for additional spectrum is so that it can expand the deals it has with what it calls its “managed network service providers”. These are Vodacom and MTN.⁹⁴ It is therefore arguable that Liquid’s participation in the ITA is to obtain additional spectrum to further enable and support Vodacom and MTN as dominant players in the market.
- 5.25. To the extent that ICASA’s claim that the sharing arrangements allow Rain and Cell C to use the remaining capacity for their own retail customers is meant to support ICASA’s view that the sharing arrangements are pro-competitive, Telkom notes the following:
- 5.25.1. Rain’s 4G retail business suffers from significant capacity constraints and quality of service problems, and these have worsened over time.⁹⁵ Rain throttles all of its 4G products in one way or another, and for one of them charges a per-unit fee for peak period usage.⁹⁶ Rain appears to lack the physical ability (i.e., capacity) to provide a better service to its own retail subscribers. This evidence suggests that Rain cannot use any remaining 4G capacity to compete effectively at the retail level.
- 5.25.2. Public evidence also suggest that Rain does not necessarily want to compete effectively in 4G services at the retail level. Rain publicly markets itself as a *complement* to full-service MNOs, suggesting that consumers add Rain’s 4G data service to their “main” services, rather than replace

⁹² Findings Document, para. 121.

⁹³ Findings Document, para. 118.

⁹⁴ Liquid Telecom bid document, section 6.11. Available at <https://www.icasa.org.za/pages/imt-spectrum>.

⁹⁵ See <https://mybroadband.co.za/news/cellular/391351-rains-biggest-problem-network-quality.html>.

⁹⁶ See www.rain.co.za.

them.⁹⁷ Rain also accounts for a minute share of subscribers and has indicated ambitions to achieve only a 2% share overall.⁹⁸

5.25.3. Rain also has no wholesale customers other than Vodacom.

5.25.4. These facts suggest that Rain may be reserving capacity for, or otherwise prioritising, Vodacom's needs ahead of its own retail business – as with an outright exclusivity contract, the arrangement may well prevent the use of Rain's network in a way that creates meaningful competition to Vodacom. Instead it may entrench Vodacom's dominance. Rain's desire and ability to compete effectively in the retail market for 4G services falls far short of that which may be considered a substantial source of pro-competitive gains to consumers.

5.25.5. Turning to Cell C: It has lost millions of subscribers in the recent past⁹⁹ and remains in a precarious financial position with details of its second recapitalisation seemingly still under development. Moreover, it is now effectively a reseller of capacity on the MTN and Vodacom networks. Its ability to affect price and quality in the retail market is constrained by this. It cannot offer the same competitive constraint at the retail level as an infrastructure-based operator can.

5.26. Thus, ICASA's suggestions that the sharing arrangements are pro-competitive because they have helped Rain enter the retail market and have prevented Cell C's exit substantially overstate the competitive influence of those two operators. Rain is at most a very niche player in the retail market and Cell C provides much more of a limited competitive constraint than it might have done as a full-fledged facilities-based operator. The two sharing arrangements involving Liquid have made no contribution to retail market competition because Liquid has no intention of competing in the consumer retail market.

5.27. To the extent that there is *de facto* exclusivity in these sharing arrangements – as available evidence indicates – this also means that operators such as Rain, Liquid and Cell C do not offer additional competition at the wholesale level—indeed, they underpin Vodacom and MTN's dominance at both the wholesale level and the retail level.

⁹⁷ For example, on Rain's website, it states that it's "phone only" "unlimited" 4G service is "best for dual-SIM phones. See <https://www.rain.co.za>. Further, Khaya Dlanga, Rain spokesperson said, "We believe this [Unlimited 4G 24/7 LTE product] is an ideal product for mobile users – particularly in dual SIM phones – as 360p streaming quality is more than sufficient for smaller screens." See <https://mybroadband.co.za/news/cellular/357241-rain-24-7-unlimited-4g-tested-streaming-downloads-gamingand-a-vpn.html>.

⁹⁸ See comments of Willem Roos at <https://mybroadband.co.za/news/business-telecoms/390256-rains-plan-to-make-money.html>.

⁹⁹ See <https://www.businessinsider.co.za/cell-c-is-happy-with-its-strategy-of-right-sizing-the-customer-base-2020-10>.

5.28. Most fundamentally, ICASA's contentions regarding exclusivity rest on the premise that Cell C, Liquid and Rain might be able to use their own networks to serve their own customers. But given the negligible retail presence of Rain and Liquid and Cell C's fast-diminishing fortunes, a more meaningful analysis of exclusivity from a competition perspective would have focused on whether Rain, Liquid or Cell C would, *de facto*, be able to offer wholesale capacity to other operators, on a non-exclusive basis, despite apparent non-exclusivity provisions in the agreements.

Capacity asymmetries favouring Vodacom and MTN are not pro-competitive nor warranted

5.29. ICASA's conclusions on the competitive effects of the sharing arrangements explicitly discount the concerns that the Commission raised historically in respect of the attempted Vodacom-Neotel and MTN-Telkom mergers. The Commission's concern in both cases was that the mergers would grant the dominant incumbents access to additional spectrum or capacity, and that this would damage competition by making it even more difficult for later entrants to catch up.

5.30. ICASA acknowledges that the sharing arrangements increase capacity for Vodacom and MTN, and that this, "... *creates a measure of asymmetry between the larger two operators and the smaller operators (particularly Telkom)*."¹⁰⁰

5.31. ICASA argues that capacity asymmetries favouring Vodacom and MTN are warranted, for two main reasons. First, Vodacom and MTN have more subscribers.¹⁰¹ Second even if the spectrum currently licensed to Rain, Liquid, and Cell C was re-assigned to Vodacom or MTN (according to the various sharing arrangements), Vodacom and MTN would each control about 30% of the total. According to ICASA, this would not be a problem because 30% is well below a 37% "cap" Ofcom imposed in a recent UK spectrum auction. ICASA also endorses an Ofcom view that asymmetries in total holdings or sub-1 GHz holdings do not necessarily hinder effective competition.¹⁰²

5.32. There are several problems with these views:

5.32.1. First, subscriber numbers are not the most accurate measure of capacity requirements. Telkom has far fewer subscribers than MTN or Vodacom but carries more data traffic on its mobile network than either of those two operators. The capacity constraint affecting Telkom is no less problematic than that facing MTN or Vodacom.

5.32.2. Second, the idea of an asymmetry in spectrum or spectrum-based capacity favouring any one operator is obviously at odds with the logic underlying symmetric "caps" on total spectrum holdings, which is a prominent feature of the auction ITA design. These symmetric "caps" were

¹⁰⁰ Findings Document, para. 120.

¹⁰¹ Findings Document, para. 124.

¹⁰² Findings Document, para. 124.

designed to be symmetric to guard against anti-competitive effects of asymmetries favouring any one operator, particularly dominant operators. In endorsing not only the sharing arrangements but also the impact of them on capacity across competing operators, ICASA is effectively saying that Vodacom and MTN ought to have higher “caps” in the auction ITA than any other bidder. There is an obvious tension between the thinking on this issue across the ITAs and the Findings Document.

- 5.32.3. Third, the appeal to Ofcom on the total spectrum cap of 37%, and to the Ofcom argument that operators do not necessarily need matching spectrum portfolios to compete effectively, ignores the very different market contexts in which Ofcom and ICASA operate¹⁰³. The UK mobile market is less concentrated and more competitive than the South African market and this has been the case for some time.
- 5.32.4. In addition, ICASA’s argument that capacity asymmetries favouring Vodacom and MTN are warranted because of their larger subscriber base will have a circular effect and be detrimental to competition: because they have the largest subscriber base they will receive ‘more’ spectrum which will in turn will improve their competitive ability thus increasing their subscriber base *vis a vis* smaller players with a smaller subscriber base.
- 5.32.5. Furthermore, asymmetries in total holdings or mismatches in overall portfolios between operators may be the result operators’ different operating strategies (e.g., the ease with which they can make trade-offs between capital expenditure and more spectrum, or the complementarity of particular spectrum bands with their existing holdings), and not regulatory action, or agreements struck by dominant incumbent operators. The fact remains that the sharing arrangements afford the two dominant incumbent operators with a greater amount of spectrum relative to other operators that they could potentially harness. This effectively asymmetric cap on how much spectrum an operator can hold will constrain the growth potential of rivals to Vodacom and MTN. For example, if all three of Vodacom, MTN and Telkom see substantial growth in their data traffic, the cap of 184 MHz per operator will constrain Telkom, but not Vodacom and MTN because they have access to additional spectrum through the sharing arrangements. In short, the cap will asymmetrically limit Telkom’s long-term growth prospects, but not those of the two leading operators.

Vodacom and MTN will exploit advantages to the detriment of competition

¹⁰³ ICASA’s consultant, Prof H Sama Nwana, has warned against ICASA comparing markets (see transcript in the record of the spectrum ITA review application; presentation delivered to ICASA on 15 January 2020).

- 5.33. ICASA acknowledges that the sharing arrangements confer advantages on Vodacom and MTN: “*The access to additional capacity in the context of a spectrum constrained market does confer some benefit to the large operators. It can potentially provide the incumbent operators with a first mover advantage in new technologies (such as 5G) which could serve to enhance the market power of incumbents.*”¹⁰⁴
- 5.34. However, ICASA also argues that the sharing arrangements do not confer an “unnaturally strong advantage” on Vodacom and MTN in 5G, because Rain has launched 5G services, Liquid is providing non-exclusive wholesale 5G capacity, and Telkom has some 3500 MHz spectrum.¹⁰⁵
- 5.35. The problems with these views are as follows:
- 5.35.1 First, the sharing arrangements cover both 4G and 5G, and have quite clearly supported and improved the 4G quality of service that Vodacom and MTN are able to provide.¹⁰⁶ This is highly consequential for current competition.
- 5.35.2 Second, MTN and Vodacom have already launched retail 5G services and have the greatest potential to quickly scale up, more so than Rain or Telkom. MTN and Vodacom have the widest and densest networks of sites that can be used to deploy new 5G RANs, and they have the largest subscriber bases with large numbers of high-ARPU post-paid users to which they can market 5G services and whom are most likely to be “early adopters” of a new consumer 5G proposition. They are therefore able to spread 5G coverage and grow 5G service levels much more rapidly than any other rival. In this respect it is important to note that Rain’s site access agreement with Vodacom is limited to 4G sites only. Rain’s 5G network is separate and being built from scratch, and it is having to build a customer base from scratch.
- 5.35.3 It is also important to note that Telkom’s assignment in the 3500MHz band is very limited (i.e. only 28 MHz on a regional basis); internationally at least 80-100MHz of contiguous spectrum is necessary in this band to deploy 5G services.

ICASA has failed to grasp the significance of considering spectrum an input not a market

- 5.36. In the Findings Document ICASA has departed from the approach it took to spectrum in the MBSI Discussion Document to considering spectrum. In the latter,

¹⁰⁴ Findings Document, para. 121.

¹⁰⁵ Findings Document, para. 123.

¹⁰⁶ Rain and Vodacom have both stated that Rain supports Vodacom’s network. See for example <https://www.itweb.co.za/content/DZQ58vVPawpMzXy2> and <https://businesstech.co.za/news/internet/345078/5g-provider-rain-outlines-plans-for-south-africa/>. Rain has described itself as a performance layer for Vodacom.

ICASA defined a spectrum market, assessed “shares” of it, and suggested that no competition problems were evident. Following submissions, ICASA now considers spectrum an input rather than a market.¹⁰⁷

- 5.37. But ICASA does not seem to grasp the implication of this change. It states that the change does not affect any of its conclusions on spectrum, even though it also states that the change now means that the MBSI considers the impacts of spectrum on downstream markets, and it claims that in fact this is how ICASA considered spectrum issues in the first place, in the MBSI Discussion Document.¹⁰⁸
- 5.38. Whatever the case may be in relation to this issue, Telkom submits that viewing spectrum as an input rather than a market forces consideration of how changes in spectrum holdings **directly** affect competition and market power further down the value chain. It also forces consideration of access to spectrum via the sharing arrangements. Assessing “shares” of a spectrum market do not allow this to be factored in.
- 5.39. This is critical because spectrum is not produced, nor, in South Africa, is it traded. It is licensed by ICASA and ICASA has control over how it is licensed, and therefore ICASA can directly affect competition via its licensing. This is the relevant consideration for the MBSI, but it is absent from the Findings Document. Instead ICASA states that all spectrum-related considerations, including remedies, are for the ITAs and relevant spectrum regulations.¹⁰⁹

“Roaming” for capacity is a misnomer

- 5.40. In the Findings Document ICASA also distinguishes between two types of wholesale roaming services – one for coverage (the traditional form of national roaming) and one for capacity. When analysing the market for national roaming ICASA is concerned with roaming for coverage only, and does not recognise Rain, Liquid, or Cell C as suppliers of this type of roaming service. Only Vodacom and MTN provide these services.
- 5.41. Telkom welcomes this distinction, which was only implicit in the MBSI Discussion Document. Nevertheless, Telkom urges ICASA to recognise further that “roaming for capacity” is a misnomer. Vodacom and MTN are not “roaming” on networks built independently by other operators, under arms-length wholesale contracting arrangements. They are in partnerships with those smaller operators, are extensively sharing their own networks with them (to the point where the smaller partners are investing in little or no RAN equipment themselves); and are in return using their spectrum.
- 5.42. These “capacity roaming” deals and the “wholesale networks” created off the back of these deals may primarily provide the dominant operators with a means to emit

¹⁰⁷ Findings Document, para. 107.

¹⁰⁸ Findings Document, para. 107.

¹⁰⁹ Findings Document, para. 107.

the smaller operators' spectrum on their own sites. This additional spectrum may greatly reduce the cost of meeting peak capacity needs, particularly at the most congested sites. It is naïve to believe that a dominant operator like Vodacom or MTN would sign a standard arms-length "roaming" agreement for *capacity*. Vodacom and MTN have entered into multi-year agreements worth billions of Rands, which they would not do unless they were guaranteed to be able to access to the capacity they need when and where they need it.

- 5.43. In the case of MTN-Cell C, Telkom notes that Cell C did not pay MTN for national roaming services for several quarters, and yet MTN continued to provide Cell C with national roaming services everywhere in the country.¹¹⁰ MTN's first quarter results for 2021 state that R350 million in roaming revenue from Cell C remains unrecognised.¹¹¹ This is highly unusual commercial behaviour. MTN would never do this for a firm it considered to be a meaningful competitive threat, or which had no other means of paying MTN for the service. These facts suggest that the value of the "roaming" deal to the "roaming" provider, MTN, lies not in the roaming fees it can earn from Cell C, but in the "reverse roaming" using Cell C's spectrum.

ICASA has conflated private and social benefits of network sharing

- 5.44. In the Findings Document, ICASA continues a theme that commenced in the MBSI Discussion Document on network sharing. That theme was, essentially, that network sharing is becoming more common because the economics of the mobile industry demand more cost sharing between competing operators. Increasingly, network sharing is taking the form of active RAN sharing. ICASA emphasises these factors in both MBSI documents and tends to draw the conclusion that because they benefit operators, they are beneficial in general, i.e., beneficial to competition and consumers, and not just to operators.
- 5.45. Both documents therefore tend to confuse the private incentives of operators to share networks with the potential impacts on competition of doing so. It may be in the interests of two operators to share, but the effects thereof may not be in the best interests of consumers. This confusion is also evident in ICASA's general endorsement of the spectrum sharing arrangements from an effects perspective. All of these deals contain an active RAN sharing component.
- 5.46. ICASA appears not to appreciate that active RAN sharing arrangements necessarily raise questions regarding anti-competitive effects. In Europe and the UK such arrangements are scrutinised by regulators for this reason¹¹², and many

¹¹⁰ See for example <https://www.businessinsider.co.za/crisis-hit-cell-c-owes-mtn-money-2019-8>.

¹¹¹ MTN Group Limited Quarterly Update for the period ended 31 March 2021. See <https://www.mtn.com/wp-content/uploads/2021/05/Quarterly-trading-update-for-the-period-ended-31-March-2021.pdf>.

¹¹² See, for example, the discussion in Bourreau, Marc, Steffen Hoernig and Winston Maxwell, Implementing Co-Investment and Network Sharing, Report prepared for Centre on Regulation in Europe ("CERRE"), 2020, p. 47, available at <https://cerre.eu/publications/telecom-co-investment-network-sharing-study/>.

are in fact developed as joint ventures and notified and reviewed as mergers.¹¹³ The DSMI also expressed concerns over the potential anticompetitive effects of active RAN sharing,¹¹⁴ as did the 2016 ICT Policy White Paper.¹¹⁵

5.47. Given this, and given that ICASA states in the Findings Document that new MOCN/MORAN¹¹⁶ technologies have, "... *changed how sharing occurs in the market*" (meaning that they have made active RAN sharing easier and more prevalent), Telkom believes that ICASA ought to also be interested in investigating them carefully for potential anticompetitive effects. Telkom notes that the 2016 ICT Policy White Paper directed ICASA, "... *to develop a framework for RAN sharing to mitigate these and lay down rules to ensure that RAN sharing will contribute to lower cost of communications while balancing potential competition concerns.*"¹¹⁷ This may be especially important when any such RAN sharing arrangements include or underpin spectrum or capacity sharing arrangements that are designed to provide extra capacity to dominant incumbents in the context of a highly concentrated market.

Cell C's status and effectiveness as a competitor

5.48. The Findings Document states that Cell C has entered a MOCN-based network sharing deal with MTN, which Cell C uses to roam on MTN everywhere in the country; and which, according to ICASA, MTN uses to roam on Cell C.¹¹⁸ This aligns to submissions made to ICASA during the public hearings, where Cell C explained this change in its business model. Cell C has since provided additional details on this change in various public statements.¹¹⁹ It is clear that Cell C has

¹¹³ See Bourreau et al. (2020), op cit., at Chapter 6.

¹¹⁴ Competition Commission (2019). "Data Services Market Inquiry Final Report", 02 December 2019 available at <http://www.compcom.co.za/wp-content/uploads/2019/12/DSMI-Non-Confidential-Report-002.pdf>. Paragraph 504 of this report states: "*The Commission also expressed its reservations relating to the overall direction of the amendments, particularly in relation to potentially mandating the sharing of active infrastructure. In this regard, the Commission argued that active infrastructure sharing increases the risk of collusion given the closer collaboration and greater extent of information access that the arrangements require. In addition, active sharing may also inhibit beneficial infrastructure-led service competition if it means additions to quality or service innovations are immediately shared with rivals. The Commission therefore proposed that the direction taken should be facility-specific, weighing up the incremental benefits of moving to active sharing as against any risks to competition.*"

¹¹⁵ National Integrated ICT Policy White Paper. 28 September 2016. Government Gazette Vol. 616, No. 40325. See pg. 69 of the policy paper (pg. 77 of the Gazette).

¹¹⁶ "MOCN" stands for "multi-operator core network." It is a form of active RAN sharing where operators sharing a RAN maintain their own core networks. On some definitions MOCN arrangements involve the sharing of spectrum. See GSMA (2019), "Infrastructure Sharing: An Overview", available at <https://www.gsma.com/futurenetworks/wiki/infrastructure-sharing-an-overview/>. "MORAN" stands for multi-operator radio access network. It is a different form of active RAN sharing, and it also discussed in the GSMA overview cited above.

¹¹⁷ National Integrated ICT Policy White Paper. 28 September 2016. Government Gazette Vol. 616, No. 40325. See pg. 69 of the policy paper (pg. 77 of the Gazette).

¹¹⁸ Findings Document, para. 116.2.

¹¹⁹ See, for example, Cell C's discussion of its turnaround strategy in any of its results documents since its year-end results for 2019.

exited the industry as an infrastructure-based competitor¹²⁰, and the Findings Document recognises this.¹²¹

5.49. In the Findings Document, ICASA is silent on the implications of this for competition and spectrum policy. The Findings Document merely insists that Cell C remains valuable to competition and consumer welfare by providing additional choice and by increasing retail competition.¹²² The Findings Document also assumes that (i) Cell C would exit the market absent the sharing arrangements and (ii) that this would be worse for competition than any means of keeping Cell C in the market.¹²³

5.50. The Findings Document provides no basis for this conclusion. Cell C is now effectively dependent on MTN and Vodacom for its business. ICASA endorses a position that effectively ensures that a considerable amount of spectrum is shared between an MVNO-type operator with a highly uncertain financial future and a limited ability to strengthen competition, and MTN, a dominant operator (and possibly also Vodacom). ICASA has assumed that Cell C has not relinquished control over its spectrum and it has assumed that having Cell C in the market in its current form is better than any other potential alternative.

5.51. More pro-competitive alternatives are apparent.

5.51.1. One of the key objectives of the spectrum licensing process is the licensing of a WOAN. Another is MVNO entry and expansion, and the WOAN is meant to facilitate that. More MVNOs could easily replace or even enhance the competitive role Cell C plays now that it has exited infrastructure-based competition. The WOAN could be made much stronger with more spectrum, some of which could be reassigned from Cell C.

5.51.2. Like the WOAN, the remaining vertically integrated infrastructure-based competitors would also benefit from being assigned some of Cell C's spectrum. Competition would be strengthened as a result by more than is currently the case where Cell C shares that spectrum with MTN.¹²⁴

¹²⁰ Whether Cell C is becoming or has become a type of MVNO is a distraction. Cell C insists it is not an MVNO nor is it becoming one. What matters, however, is that Cell C is no longer a vertically-integrated infrastructure-based competitor. This necessarily constrains its competitive options in ways that do not apply to Vodacom, MTN, or Telkom. In addition, we know that Cell C is concerned about future competition from MVNOs. In the public hearings on 26 and 27 October 2020, Cell C expressed concern over potential regulation of wholesale MVNO prices or margins. Cell C did so presumably out of fears that wholesale MVNO services may become more price-competitive than the national roaming and managed network services that Cell C purchases from Vodacom and MTN, and upon which Cell C is now dependent for its entire business. No vertically-integrated infrastructure-based competitor would be concerned about potential competition from MVNOs.

¹²¹ Findings Document, para. 125.

¹²² Findings Document, para. 125.

¹²³ Findings Document, para. 122.

¹²⁴ In Rain's case, this would only apply if Rain was prohibited from adding any 4G spectrum it may receive from Cell C to the arrangement it has with Vodacom, and instead being required to utilise it for its own retail 4G business.

5.51.3. In fact, because Cell C in its current form cannot create any real competitive constraint on infrastructure-based operators, a scenario in which Telkom and Rain receive Cell C's spectrum is more pro-competitive than maintaining Cell C in its current form, even without more MVNO entry.

Site access competition and potential remedies

5.52. Before the ITAs, ICASA was considering, through the MBSI, a range of pro-competitive remedies for the site access market. These included revision of existing facilities leasing regulations; the imposition of accounting separation on dominant operators with respect to their sites operations; preventing dominant operators from indefinitely reserving space on their masts for their own future deployments; and requirements to publish site information online and to commit to timeframes for considering access requests from other parties.¹²⁵ In the background, the DSMI had called for the introduction of cost-oriented access price regulation.¹²⁶

5.53. The Commission reiterated that recommendation at the public hearings.¹²⁷ At the same hearings, Telkom advocated for the site access market to be regulated on an "equivalence of inputs" approach, noting that the main issue is exclusionary discrimination. Telkom has always been of the view that constraining the ability of dominant operators to discriminate in favour of their own retail businesses, and against competitors, when providing access to their sites, is the most important pro-competitive regulatory objective in the site access market.

5.54. The auction ITA pre-empted all of this. The ITA Competition Assessment stated that, "*In order to ensure that Tier-2 national wholesalers and any sub-national operators are able to compete effectively post-auction, the Authority provides for measures to ensure that Tier-1 operators provide reference offers for site access. This will address anti-competitive behaviour in relation to facilities and spectrum sharing.*"¹²⁸ There is no reasoning provided to justify this view, which had not been mentioned in any ICASA document prior to the ITA being published, including not being discussed at all in the MBSI Discussion Document. There is also no detail provided in the ITA Reasons Document, the Findings Document or the Draft Regulations on the minimum requirements for the reference offers that would be introduced. There has also been no scope for industry to comment on this remedy in the context of the MBSI, prior to the publication by ICASA of Draft Regulations.

5.55. In the Findings Document, ICASA agrees with the views it stated in the ITA Reasons Document on the reference offer remedy. ICASA states in the Findings Document that the reference offer condition replaces the need for ICASA to

¹²⁵ MBSI Discussion Document, para. 1.3.3.

¹²⁶ Findings Document, section 6.4.5.1.

¹²⁷ Competition Commission (2020). "ICASA Public Hearings: Competition Commission Submissions". 27 October 2020.

¹²⁸ ITA Reasons Document, "competition assessment", para. 60, pg. 105.

proceed with one of the potential options in the MBSI Discussion Document, i.e., the proposal to develop new regulations and guidelines dealing with timelines and other conditions.¹²⁹ ICASA also states that it should begin the process of defining “essential facilities”.¹³⁰ However, it provides no details on what this may mean in terms or process, deadlines, or content.

5.56. ICASA offers no reasons why this is an appropriate course of action.

5.56.1. It offers no explanation as to why all of the other options that were being considered at the MBSI Discussion Document stage should now be ignored, other than to say that accounting separation is too burdensome and complex, and that the information reporting requirements in the Draft Regulations constitute a more appropriate replacement.¹³¹ This is the same view as that which ICASA has taken on the need (or lack thereof) for accounting separation in the national roaming market.

5.56.2. It neglects to respond to other proposals, including the Commission’s price regulation proposal and Telkom’s “equivalence of inputs” proposal. This is so despite the Authority having stated in the ITA Reasons Document, in response to the Commission’s proposals, that, “*The Authority’s response is that these views expressed by the respondents are out of scope and should be dealt with through other regulatory processes of the Authority. However, the Authority is mindful that these obligations / interventions may not be adequate to address the structural and other inefficiencies in the market.*”¹³²

5.57. In Telkom’s view this is an unacceptable outcome. There is no analysis of the potential effectiveness of the reference offer remedy stipulated in the auction ITA, which may itself change as a result of ongoing litigation anyway. There is no basis for ICASA to conclude, in the ITA process or in the Findings Document, that a reference offer remedy is sufficient to cure competition problems in site access.

5.58. Telkom has no confidence that this remedy will significantly improve the ineffective competition in the site access market. The proposals in the Findings Document and the Draft Regulations to add new reporting requirements on Vodacom and MTN, and to begin the process of defining essential facilities, will add no further pro-competitive impacts.

5.59. This is made all the more concerning by the fact that the Draft Regulations would not apply to all of Vodacom’s or MTN’s sites. As discussed later in this submission, the Draft Regulations would only apply to sites in geographic markets where the Findings Document has found Vodacom and MTN to be dominant. ICASA has

¹²⁹ Findings Document, paras. 165 and 166.

¹³⁰ Findings Document, para. 164.

¹³¹ Findings Document, para. 167.

¹³² ITA Reasons Document, pg. 54, in response to points summarised in para. 150 including sub-
paras, also on pg. 54.

defined these geographic markets at the municipal level, and Vodacom and MTN have been found dominant in only a minority of them, most of which are rural.

- 5.60. Telkom finds this overall outcome unacceptable for the simple reason that promoting the ability of later entrants to access the sites of dominant operators on fair, reasonable and non-discriminatory terms wherever they need to would provide an enormous boost to infrastructure-based competition. It would also prevent the need for operators like Rain to seek to “leverage” their spectrum to obtain better wholesale terms from dominant incumbents. It would also facilitate the entry of the WOAN once it is licensed. Had such site access regulation been in place 20 years ago, Cell C may still be an infrastructure-based competitor.
- 5.61. Telkom also notes that the need for meaningful pro-competitive site access remedies is greater in South Africa than it is in the UK or Europe because the market here is so skewed towards the first two entrants. In the UK and Europe, more balanced markets have always resulted in reasonable site sharing between competitors, which has always been reinforced by general *ex ante* obligations to share where reasonable and possible to do so.
- 5.62. In this vein, it is not surprising that Vodacom and MTN have created site pairing arrangements between the two of them. They entered first, at the same time, and are roughly equal in terms of sites, network capacity, capital expenditure, coverage, quality of service, and so on. ICASA recognises this in the Findings Document.¹³³ It also recognises that Vodacom and MTN have no incentive to behave in similar fashion towards other competitors.¹³⁴ And yet the Findings Document and Draft Regulations see no need for stronger remedies.

Sub-1 GHz spectrum

- 5.63. Telkom needs spectrum in frequency bands below 1 GHz in order to be able to expand coverage in an economically efficient manner. Lacking such spectrum is a key barrier to Telkom’s ability to compete more effectively against Vodacom and MTN on coverage and quality, including in-building quality in urban areas. Vodacom and MTN have had exclusive use of sub-1 GHz spectrum for decades. For Telkom, this issue is critical, probably more so than the urgency around better access to Vodacom and MTN sites.
- 5.64. ICASA disagrees. It relies on a view from Ofcom that competing operators do not need matching spectrum portfolios, especially not matching sub-1 GHz portfolios, for effective competition to emerge. The MBSI Discussion Document made specific reference to the UK operator EE, which has limited sub-1 GHz spectrum holdings.¹³⁵ In ICASA’s view, this has not prevented EE from being a highly effective competitor in the UK market. ICASA is of the view that EE has made up

¹³³ Findings Document, paras. 148, 154.

¹³⁴ Findings Document, para. 154.

¹³⁵ MBSI Discussion Document, para. 87.

for its limited sub-1 GHz holdings with other strategies. ICASA presumably believes Telkom could do the same in South Africa.

5.65. Telkom disagrees with this view for several reasons:

5.65.1. First, EE has 10 MHz of sub-1 GHz spectrum. Telkom has none.

5.65.2. Second, as stated earlier, the reliance on Ofcom is inappropriate because Ofcom is regulating a more balanced and competitive market in the UK, in which EE is able to compete effectively.

5.65.3. Third, EE developed into a dominant player partly due to first-mover advantage in 4G, which was enabled by Ofcom. EE was the only operator with 1800 MHz holdings (ideal for 4G), and Ofcom approved its application to use that spectrum to launch 4G well before EE's competitors would be able to purchase similar spectrum at auction. EE launched 4G in October 2012, just under a year before its competitors.¹³⁶ EE also acquired additional 4G spectrum at that auction.

5.66. The situation in South Africa is different. Late entrants have all struggled to build ubiquitous national networks and thereby eliminate their need to buy national roaming services from the dominant incumbents. Telkom, like Cell C before it, has identified a clear need for sub-1 GHz holdings that at least match those of Vodacom and MTN. It has requested ICASA to focus on this issue. The DSMI has also identified this issue as a material barrier to expansion for Telkom. ICASA is therefore misguided in its reliance on Ofcom when responding to Telkom's concerns in this area.

5.67. Finally, Telkom notes the view in the Findings Document that licensing additional sub-1 GHz now would likely have limited impacts on competition in the next three years. ICASA takes this view because the digital migration process is not complete, and no-one is sure when it will be completed.¹³⁷ This suggests that ICASA itself does not believe that the Ofcom view described above is necessarily applicable in South Africa. ICASA clearly does believe that the licensing of additional sub-1 GHz spectrum would be pro-competitive but for the digital migration problem, and this suggests that the point ICASA is trying to make in the Findings Document by appealing to Ofcom's views on the need, or lack thereof, for matching portfolios is a red herring.

Short run impacts of licensing additional high demand spectrum under the current auction ITA design will not be pro-competitive nor competitive neutral

5.68. ICASA states that the full impacts of assigning additional high demand spectrum through the auction ITA will only materialise in the longer run, i.e., beyond the

¹³⁶ <https://www.4g.co.uk/news/4gee-turns-three/>

¹³⁷ Findings Document, para. 92.

three-year time horizon.¹³⁸ ICASA also believes these impacts will be significantly pro-competitive. ICASA therefore suggests limited positive impacts on competition in the next three years.

5.69. Telkom disagrees with these views for the following reasons:

5.69.1. Telkom expects Vodacom and MTN to acquire significantly more spectrum in both the coverage and capacity bands, but especially the latter, and to use that to improve LTE service and grow 5G deployments. As the Commission has pointed out, they could acquire more than 50% of the total spectrum included in the auction ITA.¹³⁹ They could each acquire around 100 MHz of additional spectrum, and only about 20 MHz thereof would be in the sub-1 GHz bands. This would be in addition to the spectrum they access through the sharing arrangements.

5.69.2. Vodacom and MTN will immediately begin to extend their lead over the rest of the industry once they acquire additional high demand spectrum at auction. While other operators will also deploy rapidly, none possess the same network density or coverage, and none other than Cell C will possess low band spectrum that can be used on an exclusive basis (as mentioned earlier, Cell C's competitive relevance is limited).

5.69.3. Vodacom and MTN have been densifying their networks significantly over the past few years, and they have been creating sharing arrangements for 4G and 5G spectrum with Rain, Liquid, and Cell C. The service quality on the Vodacom and MTN networks will improve markedly as soon as they deploy additional spectrum obtained at auction.

5.69.4. The quality on Telkom's network will also improve, but Telkom will have no greater ability to accelerate its network rollout post-auction on a national basis due to the digital migration issue. Telkom will thus continue to face a key disadvantage in trying to compete on coverage and in-building quality of service.

5.69.5. Furthermore, Vodacom and MTN have already launched 5G services, and will be in pole position to scale those up across their networks and customer bases. Rain is their only competitor so far. Rain's 5G network is inherently limited by Rain's need to still acquire passive infrastructure and site space to build new 5G sites (whereas Vodacom and MTN can use existing passive infrastructure for this).

5.70. In short, the impacts of the auction will be felt within the next three years, and the key impact will be Vodacom and MTN extending their lead over the competition and entrenching their market power. This was the main concern expressed by the

¹³⁸ Findings Document, para. 50.

¹³⁹ Competition Commission (2020). "ICASA Public Hearings: Competition Commission Submissions". 27 October 2020

Commission in the Vodacom-Neotel and MTN-Telkom attempted mergers. Allowing this to happen as a consequence of the auction ITA will make it more difficult for Telkom to catch up over the longer term.

Three-year time limit

- 5.71. To the best of Telkom's knowledge ICASA has mentioned a three-year forward-looking review period for the first time in the Findings Document. No such concept was discussed in the MBSI Discussion Document or in the notice announcing the MBSI.¹⁴⁰
- 5.72. The Findings Document does not itself explain the rationale for this time period. The Draft Regulations do not actually guarantee another market review in exactly three years' time.¹⁴¹
- 5.73. Telkom is concerned that this limit is artificial and is preventing ICASA from developing a long-term vision for mobile market competition. A long-term vision is required in order to identify what foundations need to be laid now so as to realise that vision. This would not be the first time ICASA has failed to take a long-term view on competition. It did not do so when Cell C entered, and so it did not recognise the threat posed by Vodacom and MTN abusing mobile termination rates. Today, ICASA should be developing its long-term vision for a data-centric economy, and the role of mobile competition in that. Competition in 5G should feature prominently, and ICASA should be determining what it believes the optimal market and industry structure should be to best-promote effective competition in the long run. The MBSI was ICASA's opportunity to at least significantly advance this process.

¹⁴⁰ Government Gazette, Vol. 641, No. 42044, 16 November 2018.

¹⁴¹ Draft Regulations, Section 8.

6. THE FINDINGS ON MARKET DEFINITION AND DOMINANCE

Site access – product market definition

- 6.1. The MBSI Discussion Document concluded that a wholesale market for site access is likely to exist separately from the market for national roaming, and independently of any site sharing possibilities. It did not go further than this, and thus placed all sites together into the same market.
- 6.2. The Findings Document refined this analysis by identifying four categories of site: macro sites, rooftops, indoor sites (some of which are enabled by distributed antenna systems (“**DAS**”)), and “micro solutions”.¹⁴² It assesses demand-side substitutability across these four types of site by referring to each site-type’s potential for coverage and capacity.
- 6.3. On this basis, micro solutions are excluded from the product market because they are unlikely to provide the same coverage and capacity as the other three types of site. Indoor sites are included on the basis that they are designed to provide additional capacity in large indoor spaces such as shopping malls, or are used to differentiate an operator’s offering.¹⁴³ ICASA is of the view that indoor sites are substitutes on the demand side for rooftop or macro sites.¹⁴⁴
- 6.4. Telkom disagrees with the conclusions in respect of indoor sites, for the following reasons.
 - 6.4.1. Indoor sites and DAS sites are not only for capacity. Operators need access to DAS for coverage and capacity purposes, to ensure that voice and data services are available to customers in structures that are complex to cover with radio frequency (“**RF**”). Without access to its own DAS Telkom often needs to roam in urban areas even where it has its own sites – Telkom customers enter large indoor spaces like shopping malls and experience reductions in signal-level beyond the defined threshold on Telkom’s network, resulting in handover to Vodacom’s network. Telkom strives to minimise roaming usage and would prefer not to roam in areas where it has its own sites but is often forced to do so in order for its users to experience good quality coverage and service at indoor locations.
 - 6.4.2. To ensure good quality coverage Vodacom and MTN construct indoor and DAS sites despite having large numbers of macro and rooftop sites in urban areas, and low-band spectrum suitable for penetrating buildings and providing indoor coverage. They also have capacity spectrum which they emit from these sites. If those sites were adequate substitutes on the demand side for indoor solutions in large indoor spaces, there would be no need for Vodacom or MTN to build indoor sites or DAS, and Telkom

¹⁴² Findings Document, para. 132.

¹⁴³ Findings Document, para. 134.

¹⁴⁴ Findings Document, para. 134.

would not need to seek access to these. The more reasonable interpretation is that DAS sites serve a particular purpose and are unique, suggesting demand-side and supply-side differences relevant to market definition.

- 6.4.3. Telkom also notes that there is no information in the Findings Document concerning the relative prices of the three site types included in the same product market, and in particular for DAS sites versus rooftop or macro sites. In Telkom's experience the prices charged for access to DAS sites bear no resemblance to the prices charged for access to rooftop or macro sites by the same site owner or controller. Again, this is because DAS sites are unique and the competitive dynamics around them are distinct from those applicable to rooftop or macro sites.
- 6.4.4. Accordingly, Telkom believes that DAS sites form a separate site access product market, or at least a clearly distinguishable segment in a broader site access market that is characterised by distinct competition dynamics. They may also be essential facilities. At the very least, Telkom is of the view that ICASA has not interrogated this issue in the Findings Document nor provided evidence in support of its view that rooftop and macro sites are substitutes for DAS sites. Telkom also believes that bespoke regulatory solutions are needed to improve access to DAS sites. The site access reference offer condition in the auction ITA, and the provisions in the Draft Regulations will have very limited pro-competitive impacts in site access in general and for DAS sites in particular.
- 6.4.5. While Telkom recognises that ICASA has suggested that ICASA will commence a process of defining essential facilities in relation to mobile sites, and while Telkom believes that DAS sites may be essential facilities, Telkom notes that the Findings Document contains no details on the proposal ICASA has made concerning essential facilities. Telkom is concerned that whatever process ICASA may embark upon with respect to essential facilities will not deliver results in the short run, whereas improved access to DAS sites is a major short-term priority for Telkom.

Site access – geographic market definition

- 6.5. In the Findings Document ICASA has maintained the view taken in the MBSI Discussion Document that geographic markets for site access are local or at least as narrow as local municipalities. The latter matters most in practice because ICASA assesses market shares and dominance in the context of geographic markets defined by local municipal boundaries.
- 6.6. Telkom argued in response to the MBSI Discussion Document that the geographic market should be defined on a national basis for practical reasons (implementing remedies on a national basis is simpler); for reasons that have to do with the fact that all mobile operators in South Africa except for Rain compete on a national

basis and need either national network coverage of their own or national roaming; and, lastly, because even if a traditional market definition test (i.e., a SSNIP test)¹⁴⁵ would suggest that virtually every site falls into its own local geographic market, it is common for regulators to aggregate these up to a national market based on the argument that competition conditions in each local market are likely to be similar.

- 6.7. In other words, Telkom agreed with the view ICASA took in the MBSI Discussion Document that a strict implementation of the SSNIP test¹⁴⁶ indicates highly localised markets for site access, and therefore potentially thousands of such markets. Telkom still maintains the view that some, or all, of these can be aggregated into wider geographic markets, depending on the degree to which competitive characteristics differ across them.
- 6.8. Telkom disagrees that local municipalities are necessarily the most appropriate geographic unit in this instance. Aggregating to the municipal level, but no further, appears to be somewhat arbitrary. This is explained as follows:
 - 6.8.1. ICASA does believe that local markets exhibiting similar competitive characteristics can be aggregated into wider geographic market, and notes that these local markets need not be physically contiguous and indeed one should not expect them to be so.¹⁴⁷
 - 6.8.2. Within any given local municipality, especially larger ones containing cities, competitive conditions will differ across all of the local site access markets, of which there may be hundreds.
 - 6.8.3. Therefore, aggregating to the local municipality level may violate the rationale for such aggregation (i.e., it may well include in the same geographic market local site access markets across which competitive conditions differ).
 - 6.8.4. Accordingly, if ICASA is prepared to aggregate to local municipalities, there is no real reason to stop at municipal boundaries – markets could be aggregated further into provincial (or sub-provincial) markets, or a national market.
- 6.9. On a more practical level, Telkom is concerned that the approach taken by ICASA in the Findings Document has resulted in no dominance findings in any cities or major metropolitan areas; any locations in Gauteng; and only one in the Western Cape – a small town in the Karoo called Prince Albert (which the Final Findings defines as an urban area, but is in reality a small town in a deeply rural area). All

¹⁴⁵ That is, the “small but significant non-transitory increase in price” (“SSNIP”) test.

¹⁴⁶ That is, that a small but significant and non-transitory increase in the price of a site in one part of a large city may have no impact on demand for a similar site located in another part of the city.

¹⁴⁷ Findings Document, para. 64.1.

dominance findings are in municipalities that are in rural areas, or which possess one or two small towns but are otherwise rural.

- 6.10. While Telkom agrees that the site access market is highly concentrated in the local municipalities identified in the Findings Document, and may be somewhat less concentrated in other municipalities, especially those containing cities, this does not mean that site access is more competitive in less-concentrated municipal markets, or that Telkom experiences no unreasonable exclusionary behaviour from the operators who are dominant in the retail market.
- 6.11. The approach taken by ICASA in the Findings Document cannot cater for the reality that operators that are dominant at the retail level have incentives to limit site access irrespective of whether they are dominant in a particular municipality or not.
- 6.12. In Telkom's view, it may be advisable to define highly localised markets, aggregate according to the similarity of competitive conditions, and regulate all resulting markets where dominance is found. Failing that, ICASA should define a national market and rely on its own arguments and observations that the fact that Vodacom and MTN are vertically integrated and have market power at the retail level strongly suggests market power in site access too, and incentivises them to exclude or foreclose access to smaller rivals.¹⁴⁸ The current position – determining that the geographic market as local is to be able to assist in enabling fair access to all of the sites where abuse of dominance is taking place..

The dominance test applied is too strict

- 6.13. In the Findings Document ICASA has maintained a very strict interpretation of the dominance test – a licensee is found to be dominant only if it accounts for at least 45% of a relevant market. Telkom's response to the MBSI Discussion Document questioned this approach given that the test for dominance in the Electronic Communications Act is the same test specified in the Competition Act, and that test is not limited to a strict 45% market share test. Section 7 of the Competition Act states that any firm with market power is dominant including firms with less than 35% market share. It also states that firms with between 35% and 45% market share are dominant unless they can show they have no market power.
- 6.14. As Telkom pointed out in response to the MBSI Discussion Document, plenty of evidence has been presented across the DSMI, the MBSI Discussion Document, and now the Final Findings document, that Vodacom and MTN possess market power in all of the markets that the MBSI has identified as suffering from ineffective competition.
- 6.15. Telkom disagrees with ICASA that Vodacom and MTN have market power in the retail market only in some areas of the country and not on a national basis (as

¹⁴⁸ Findings Document, paras. 153 – 155.

explained above, it also seems plausible that Vodacom and MTN could be found to possess market power in a national site access market too). ICASA's position on this issue is counterintuitive.

- 6.15.1. ICASA concludes in the Findings Document that MTN and Vodacom are dominant in the retail market in several sub-provincial regions – most of them rural. Accordingly, no finding of dominance in a national retail market is tantamount to saying that Vodacom and MTN have no market power in cities or in sub-provincial regions characterised by the presence of large metropolitan urban areas.
 - 6.15.2. Even if Vodacom and MTN account for less than 45% of the subscribers they do still possess market power in these areas. One indication of this is that they charge the same headline retail prices across the country. These do not vary by region, the number of competitors present, or regional differences in market shares. Moreover, they probably earn higher margins in dense urban areas due to economies of scale and greater network utilisation.
 - 6.15.3. It seems highly unlikely that Vodacom and MTN have market power in the retail market in rural areas only, and somehow leverage that market power into urban areas such that they can charge the same (above-cost) prices, and likely earn higher profit margins, in regions where their market shares are (slightly) lower.
- 6.16. The South African market is not like Canada and India, for example, where there are some strong regional competitors. None of the later entrants in South Africa are stronger than MTN or Vodacom in any region of the country at the retail or wholesale levels. This is largely because South Africa, while large, is nowhere near as large as these other countries, making a national entry strategy including national network coverage and retail distribution essential to competitiveness.
- 6.17. It is also worth noting the following:
- 6.17.1. The DSMI assessed retail market competition in mobile on a national basis and concluded that Vodacom and MTN are dominant in a national retail mobile market.¹⁴⁹
 - 6.17.2. The UK's Competition and Markets Authority ("**CMA**") defined a national market for retail mobile services in its assessment of the BT-EE merger. The CMA noted that prices are set on a national basis and that supply-side substitution to address local quality of service variations allowed these local areas to be aggregated to the national level. The CMA also

¹⁴⁹ Competition Commission (2019). "Data Services Market Inquiry Final Report." 02 December 2019. See Chapter 4.

noted Vodafone's view that local quality variation affected overall national competition via reputation effects.¹⁵⁰

- 6.18. Overall, strict adherence to the 45% market share threshold in a market with at least four operators reduces the likelihood of making a finding of dominance in any given relevant market. Combined with a sub-national approach to geographic markets, and dominance findings in only some parts of the country, most of them rural, would significantly reduce the potential in any pro-competitive remedies (i.e., even if the Draft Regulations were proposing meaningful pro-competitive interventions, they would not apply to large parts of the country).
- 6.19. In Telkom's view, these two approaches adopted by ICASA – the 45% market share rule, and sub-national geographic markets – create outcomes that favour Vodacom and MTN without adequate justification.

Site access – counting sites and measuring market shares

- 6.20. In addition to the issues identified above with the strict application of the 45% share threshold, Telkom has concerns with the way ICASA has measured market shares in the site access markets it has defined.
- 6.20.1. ICASA states that all macro sites, rooftops currently occupied, and indoor sites have been included in the measure of total market size.
- 6.20.2. It is not clear, however, what exactly has been included in the site counts for each operator. At paragraph 133 of the Findings Document it is stated that rooftop sites not owned but rather leased by an operator from a landlord are not included in that operator's site count. At paragraph 146.1 it is stated that the same approach has been applied to macro sites.
- 6.20.3. At paragraph 146.2 it is stated that ICASA has assigned no macro, rooftop of indoor sites to any operator. Telkom interprets this paragraph to be saying that no such sites that are not owned by the operator have been assigned to that operator.
- 6.20.4. In paragraph 146.3 it is stated that duplicates have been eliminated.
- 6.21. On the whole, it would seem that the approach ICASA has taken to measure total market size is to count and include all extant macro, rooftop and indoor sites regardless of ownership. In contrast, ICASA has measured each operator's share of that market by excluding sites where the operator leases the space rather than owns it. ICASA does not explain why this approach has been adopted. It would seem to create a clear downward bias on market shares. It also creates the possibility that market shares are influenced by different underlying strategies with

¹⁵⁰ CMA (2016), "BT Group plc and EE Limited: A report on the anticipated acquisition by BT Group plc of EE Limited." 15 January 2016. See Chapter 10. Available at https://assets.publishing.service.gov.uk/media/56992242ed915d4747000026/BT_EE_final_report.pdf.

respect to property acquisition across competing operators, and it is not apparent why any such influence would be appropriate. ICASA provides no reasons why these potential inaccuracies need to be introduced when ICASA could have simply removed the same sites from the numerator and denominator.

7. THE FINDINGS ON 5G

- 7.1. In the Findings Document ICASA adopts a general position that the advent and growth of 5G will have insignificant impacts on the market over the next three years. ICASA mentions Telkom's view that effective site access or sharing regulations for 5G sites are required now to ensure effective competition in 5G emerges over the longer run, but ultimately does not engage with this view due the strict focus on the next three years only.
- 7.2. Telkom finds such an approach by a regulator to be myopic and risky:
- 7.2.1. First, Omdia has conducted a study indicating that the adoption rates of new technologies, such as 5G, will be faster than previous generations. As 5G capable devices become available, Telkom expects the three-year horizon to potentially shrink by 30%-50%.¹⁵¹
- 7.2.2. Telkom remains of the view that the dominant operators are strategically positioned to be able to be able to gain significant first mover advantages in 5G given the lack of regulatory intervention. This will significantly limit the extent to which others will be able to compete against them in future. This is so even if the basic economics of 5G RANs encourages more sharing than has been the case in the past. Vodacom and MTN would likely be comfortable sharing with each other, as they have done in the past (they have adopted a "pairing" strategy in the past, as ICASA has noted in the Findings Document), and that may be sufficient to address this pressure to share. It does not necessarily mean that either will have a strong interest in sharing with smaller rivals.
- 7.3. In addition to this, Telkom notes that ICASA has concluded that "micro solutions" are in a separate market from other types of sites and has also stated that these sorts of sites will be needed for 5G.¹⁵² Telkom agrees with both propositions. "Micro solutions" likely constitute their own separate product market in the broader wholesale site access market, and they will be especially important for 5G.
- 7.4. There is no reason for ICASA to ignore this separate market. The only reason ICASA has done so is because it has limited its analysis in the Findings Document to three years hence and has asserted that in the next three years 5G will have no real impact on the market.
- 7.5. ICASA ought to be analysing site numbers and shares in the market for "micro solutions" sites and be considering appropriate pro-competitive remedies now rather than waiting, based on the fact that in three years' time Vodacom and MTN will have the most 5G sites if they do not already. ICASA should urgently be committing to developing a regulated 5G site sharing regime now.

¹⁵¹ <https://www.itweb.co.za/content/raYAyqodRpJvJ38N>

¹⁵² Findings Document, paragraph 135.

- 7.6. By failing to act now on 5G site sharing, ICASA is reducing the chances of effective 5G competition emerging in South Africa.

8. CONCLUSION

8.1. The views and concerns set out in this submission may be summarised as follows:

- 8.1.1. Competition in mobile broadband is not effective, as ICASA has found. ICASA has also found that competition is unlikely to become significantly more effective in the next three years.
- 8.1.2. The auction ITA in its current form will most likely weaken competition further, not strengthen it. ICASA has ignored or assessed incorrectly key issues such as the sharing arrangements, Cell C's status, and the impact of additional mid-band spectrum in the hands of Vodacom and MTN, that undermine the pro-competitive potential of the auction ITA design. In any event, the auction ITA design is currently subject to litigation and may change.
- 8.1.3. Therefore, ICASA's decision to have the Final Findings and Draft Regulations rely on the auction ITA design – and, as a result, be weaker than they otherwise might be – rests on unsupported and indeed dubious foundations. In Telkom's view and that of the Commission, the auction ITA design means that the proposed remedies in the Draft Regulations need to be *stronger* than they otherwise might needed to have been.
- 8.1.4. Accordingly, there is a glaring disconnect between ICASA's findings on competition and ICASA's proposals for remedying the competition problems it has found. The combination of the auction ITA design and the proposed remedies in the Draft Regulations fall well short of what is required to improve the effectiveness of competition in mobile broadband. Even if the auction ITA was more pro-competitive the Draft Regulations would still need to be stronger, because, while spectrum licensing can be a powerful tool for improving competition, it cannot address all competition problems on its own.
- 8.1.5. Telkom is concerned that ICASA has proposed pro-competitive remedies in the Draft Regulations that do no more than impose additional reporting requirements on Vodacom and MTN. This reporting requirement will not enhance competition. More could and should be done to make site access competition more effective – especially considering site sharing will be more important to 5G than any previous generation. The key challenge is exclusionary discrimination by dominant incumbents, and the reference offer condition in the auction ITA design does not address this problem.
- 8.1.6. Telkom is also concerned with ICASA's approach to product market definition in the site access market; geographic market definition in the retail market and the site access market; and to testing for significant market power. The concern is that ICASA's approach has narrowed the

scope of its findings on dominance, and hence the applicability of any potential pro-competitive remedies, without proper justification.

- 8.1.7. In fact, ICASA has not illustrated how it plans to address the market failures it identified. There is no correlation between ICASA's proposed remedies and how the same addresses the various market failures. ICASA has also not illustrated the various regulatory instruments and tools it may have considered to address the found market failures and why it chose to rely on the specific remedies it proposes *vis a vis* any other potential regulatory remedies.
- 8.2. Telkom believes that an "equivalence of inputs" approach to site access regulation is possible and warranted based on the evidence ICASA has presented on dominance and market failure. Regulation based on this approach should be implemented on a national basis as a matter of urgency.
- 8.3. Telkom remains of the view that accounting separation, as proposed by ICASA in the MBSI Discussion Document, should be imposed and implemented – as a priority – to address the identified competition concerns and the dominance of incumbent players in the site access and national roaming markets. In addition, incumbent operators should be required to implement sufficiently detailed accounting separation prior to spectrum being released, to ensure that they do not unnecessarily delay and frustrate the spectrum licensing process.
- 8.4. Overall, Telkom is deeply concerned that ICASA will miss a once-in-a-generation opportunity to strengthen competition. Telkom urges ICASA to rethink the pro-competitive remedies it has proposed and, in doing so, to set aside any expectations ICASA has about the potential market impacts of the spectrum licensing process. Ideally, ICASA rethinks the auction ITA design too. Both the MBSI and the spectrum licensing process should be more pro-competitive on their own, and in combination.

END OF SUBMISSION