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INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA

NO. 1937 **28 March 2022**

Findings Document on the Review of the 2014 Pro-competitive Remedies imposed on Licensees in terms of the Call Termination Regulations, 2014

1. The Independent Communications Authority of South Africa ("the Authority") published a questionnaire and gave notice[1] of its intention to review the pro-competitive conditions imposed on relevant licensees imposed on licensees in terms of the Call Termination Regulations, 2014 as amended[2] ("the Regulations"), and the markets for wholesale voice call termination, in terms of section 67(8) of the Electronic Communications Act, 2005 (Act No. 36 of 2005) ("the ECA") read with regulation 8 of the Regulations.

2. The Authority has since:
   - 2.1. Received responses to the to the questionnaire,
   - 2.2. Published a Discussion Document,
   - 2.3. Received submissions to the Discussion Document,
   - 2.4. Held virtual public hearings on the Discussion Document, and
   - 2.5. Received supplementary submissions after the hearings.

3. The Authority hereby publishes this notice regarding the conclusion of the review of the pro-competitive conditions imposed on relevant licensees imposed on licensees in terms of the Regulations.

4. This notice is published in terms of section 4C(6) of the Independent Communications Authority of South Africa Act, 2000 (Act No. 13 of 2000).

Dr. Keabetswe Modimoeng
Chairperson
Date: 23/03/2022

[1] Government *Gazette* No. 44636.
[2] Government *Gazette* No. 38042.

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1. An outline of the process followed

1.1. On 28 May 2021, the Independent Communications Authority of South Africa ("the Authority/ ICASA") published a questionnaire on its website[3] and a notice[4] of intention to review the pro-competitive conditions imposed on licensees in terms of the Call Termination Regulations, 2014 ("the 2014 Regulations").

1.2. The review was carried out in terms of section 67(8) of the Electronic Communications Act, 2005 (Act No. 36 of 2005) ("ECA") and also conducted in terms of the following phases:

- Phase 1 – commencement of the review and request for information;
- Phase 2 – publication of the discussion document for public comments;
- Phase 3 – public hearings on the discussion document;
- Phase 4 – publication of the findings document in the Government Gazette.

1.3. Following the publication of the notice and the questionnaire[5], the Authority held a virtual stakeholder workshop on 11 June 2021. The purpose of the workshop was to discuss questions of clarity on the process and the questionnaire.

1.4. On 21 June 2021, the Authority received written questions of clarity from Vodacom, Cell C, MTN, Telkom and Switchtel. On 26 June 2021, the Authority published a briefing note with consolidated responses to the questions of clarity.

1.5. On 31 August 2021, the Authority received submissions to the questionnaire from Vodacom, MTN, Cell C, Telkom, FirstNet, Switchtel and ECN.[6]

[3] https://www.icasa.org.za/legislation-and-regulations/regulations-underway/call-termination.
[4] Government *Gazette* No. 44636.
[5] Phase 1.
[6] Submissions were not published due to confidentiality.

1.6. On 5 November 2021, the Authority published the Discussion Document (Government Gazette No. 45426)[7] setting out its preliminary views with regard to the review of the 2014 pro-competitive conditions.

1.7. The Authority rejected requests for extension of the forty-five working days submission deadline of responses to the Discussion Document from Vodacom, Telkom and SACF.

1.8. The Authority received seven (7) written submissions to the Discussion Document from Vodacom, Cell C, MTN, Telkom, Mr. Ewan Sutherland (in his personal capacity), ISPA and Switchtel before the closing date of 11 January 2022.[8]

1.9. The Authority held virtual hearings on the Discussion Document on 7 February 2022.[9, 10]

1.10. The Authority received written responses from Vodacom[11], Cell C[12], Telkom[13] and Switch Telecom[14] to the questions raised by the Authority during the public hearings held on 7 February 2022.

1.11. This document contains the Authority's findings[15], and is structured in terms of the following sections:

- Section 3 - Legislative framework;
- Section 4 - Summary of the findings;
- Section 5 - An analysis of submissions on specific comments on the Discussion Document and the Authority's responses;

[7] Phase 2.
[8] All non-confidential responses are available at: https://www.icasa.org.za/legislation-and-regulations/regulations-underway/call-termination.
[9] Notice (including the schedule) as well as transcripts of the hearings is available at: https://www.icasa.org.za/legislation-and-regulations/regulations-underway/call-termination.
[10] Phase 3.
[11] Received on 18 February 2022.
[12] Received on 16 February 2022.
[13] Received on 15 February 2002.
[14] Received on 8 and 17 February 2022.
[15] Phase 4.

- Section 6 - The Authority’s findings; and
- Section 7 - The next steps.

2. Legislative framework

2.1. The review was initiated in terms of section 67(8) of the ECA read with regulation 8 of the Regulations.

2.2. Section 67(8)(a) of the ECA states that: *"(a) Where the Authority undertakes a review of the pro-competitive conditions imposed upon one or more licensees under this subsection, the Authority must-*

(i) review the market determinations made on the basis of earlier analysis;

(ii) decide whether to modify the pro-competitive conditions set by reference to a market determination."

2.3. Regulation 8 of the Regulations states that "The Authority will review the markets for wholesale voice call termination services… not earlier than three (3) years from the date of the publication of these Regulations".

3. Summary of the findings

3.1. Following the process outlined under section 2 above, the Authority's findings are as follows:

3.1.1. Neither retail nor wholesale constraints are likely to be effective in preventing a wholesale voice call termination services provider (mobile or fixed) from setting termination rates above competitive levels in the absence of regulatory intervention.

3.1.2. The relevant markets are Mobile termination markets and Fixed termination markets (including termination of voice calls originating outside of South Africa).

3.1.3. Each individual licensee that offers wholesale voice call termination services in South Africa has 100% share of the market in respect of voice calls terminating on its network and has Significant Market Power.

3.1.4. Four market failures as identified in 2014 will manifest in the absence of regulation of the relevant markets.

3.1.5. Cost-based pricing (including asymmetry) and Reference interconnection offer remedies are necessary in order to address market failures in the relevant markets.

3.2. To this end, the Authority will publish a Notice (after publication of the findings document) outlining the next steps and timelines with respect to the cost modelling exercise.

4. Responses to specific comments on the Discussion Document

4.1. As indicated above, the Discussion Document invited comments on specific questions on the Authority's preliminary views in respect of the review of the pro-competitive conditions of the 2014 Regulations. The views expressed by the various stakeholders in response to the questions raised by the Authority are summarised below, followed by the Authority's response. The focus is only on including the main points made in the various submissions and not to respond to each and every point made.

4.2. This section consists of the following sub-sections: (1) Market definition, (2) Methodology to evaluate effectiveness of competition, (3) Effectiveness of competition, (4) Significant Market Power determination, and (5) Pro-competitive conditions.

4.3. Regulation 3 – Market definition

4.3.1. **Mobile termination markets:**

4.3.1.1. <u>Retail demand-side substitution</u>

4.3.1.1.1. Vodacom stated that the Authority did not appropriately assess the impact of OTT services on mobile voice call termination for a number of reasons such as:[16]

- The growing popularity and the rapidly decreasing barriers for using OTT voice services based on its own customer data and independent research reports on the South African market.
- OTT services offers better functionality (i.e., video calling and multiparty calling) compared to traditional voice calls, reducing barriers to take up.

[16] pp 7-9.

4.3.1.1.2. Vodacom also stated that the Authority's assessment is not forward looking and also is not in line with the European Commission 2020 Explanatory Note on relevant markets.

4.3.1.1.3. Further, Vodacom stated that for traditional voice services and OTT voice services to be in the same relevant market 5-10% increase in mobile termination rates should induce "…a sufficiently large number of customers (but not necessarily all customers) to substitute away, at the retail level, to OTT voice services, such that the MTR increase is unprofitable…"[17]

4.3.1.1.4. In addition, Vodacom disagreed with the reasons provided by the Authority in support of the preliminary view that OTT voice calling is unlikely to pose a sufficiently strong constraint on the setting of mobile termination charges. Vodacom stated that:[18]

- The lack of interoperability of OTT applications is diminishing due to high penetration rates of OTT voice usage. Vodacom argued that OTT applications are generally free to download and access allowing customers to easily access new OTT voice services.
- The OTT voice calls can offer similar or even better quality of service compared to traditional voice calls due to high 3G/4G coverage in SA.
- Whilst reliable data connection is necessary for OTT voice calling service to provide high quality service, it argued that is no longer an issue due to the significant increase in 3G and 4G coverage to 99.9% and 97.7%, respectively. Vodacom also argued access to emergency by OTT users has "…very limited impact on any HM test" and also that users can still use traditional voice calls for emergency calls.
- Customers can make OTT voice calls at low to zero cost due to the significant decrease in effective data prices and when customers have access to Wi-Fi or (large) data allowance.
- It is not necessary for customers to replace tradition voice service with OTT voice services completely and immediately but by a sufficient amount to render small but significant and non-transitory increase in price

[17] *Ibid* at p8.
[18] *Ibid* at pp9-13.

("SSNIP") of termination rates unprofitable. Also, Vodacom argued that there has been a steady increase in respect of customers with access to smartphones and lower end devices capable of supporting OTT services.

- Customers, who go out-of-bundle, should be aware of the unit price difference between OTT voice service and traditional voice services and "could therefore, theoretically, consider alternative services in the face of a SSNIP".

4.3.1.1.5. MTN stated that the Authority did not provide evidence in support or against its preliminary views on retail demand-side substitution, in particular mobile to fixed calls and on-net calls. Further, MTN stated that the Authority should continue to monitor substitution trends of OTT voice calls and Voice over Internet Protocol.[19]

4.3.1.1.6. Cell C agreed with the Authority's preliminary view on retail demand-side substitution.[20]

4.3.1.1.7. Professor Sutherland argued that lack of interoperability among OTT applications was not a major barrier to competition as even "very basic smartphone" can run more than multiple OTT applications despite the inconvenience of switching between applications.[21]

4.3.1.1.8. <u>The Authority's response:</u>

4.3.1.1.8.1. The Authority acknowledges the argument of Professor Sutherland and Vodacom that OTT voice calling service is growing in popularity and some barriers to entry are diminishing, and also that some of its functionalities are comparable to traditional voice service. However, as already noted in the Discussion Document, the Authority considers OTT voice calling service to be unlikely a sufficiently close substitute for traditional mobile voice calls during the period under review, because OTT voice calling services act as a complement rather than a substitute to traditional voice services. This

[19] p7.
[20] p12.
[21] pp16-17.

was recognised by MTN and Cell C in their submissions and during the oral hearings.

4.3.1.1.8.2. Regarding the arguments made by Vodacom summarised above, the Authority makes the following points:

- The lack of interoperability of OTT applications presents a barrier to switching from traditional voice to OTT voice calling service, as the called party might not necessarily be available on the same platform used by the calling party. Also, unlike traditional mobile voice services, OTT providers are not required to interconnect and interoperate with licensees, and, therefore, are unable to offer certain services offered by licensees. This can create consumer harm as consumers are not able to access certain type of calls, like emergency calls, toll-free calls, etc.
- Whilst the Authority acknowledges the increase in 3G and 4G coverage, high-quality mobile Internet coverage is not universally available such that customers would use traditional voice calling and OTT voice calling services interchangeably. This means that there are differences in the quality of OTT services. Further, drive tests conducted by Vodacom in three cities is not a fair representation of the quality of OTT voice calling services experienced by the majority of customers in South Africa. Further, given that OTT voice calling services are originated and terminated via third party Internet service providers, the quality of service cannot be managed or guaranteed compared to traditional voice calls.
- Access to data (including Wi-Fi) entails a cost which is unlikely be carried for the sole purpose of using OTT voice calling services, but rather for the purposes of accessing a wide array of other online services such as streaming, social media, etc. Also, Vodacom's argument that majority of end-users may not face pricing barriers due to the significant decrease in effective data prices is incorrect. According to the Competition Commission's Data Services Market

Inquiry Final Report[22], price reductions in data tariffs are not evenly distributed, and exclude the poorer customers who are mainly prepaid customers. Therefore, it is not correct for Vodacom to state that price of data is likely to be low to zero for the majority of customers. Also, Vodacom did not provide evidence based on its customer usage data to support this assertion.

- The Authority agrees that the HM[23] test does not require a customer to stop completely using traditional mobile voice calls and switch entirely to OTT voice calls, but to reduce their consumption of retail voice calls by a sufficient amount with their existing provider, in order to render a SSNIP of MTRs unprofitable.[24] However, a sufficient number of callers must be aware of the increase and deem it sufficiently material to act upon it (i.e., respond in sufficient volumes) in order for OTT voice calling service to be a sufficiently close substitute. This doesn't seem to be the case as Vodacom reported, on average, annual increases in minutes of use and voice traffic (minutes) albeit exponential growth in data traffic.[25] This implies that a sufficient number of customers still prefer to make traditional voice calls and that OTT voice services are complementary rather than substitutes.
- Vodacom's observation of customers' awareness of the price differential between traditional voice calls and OTT services is disputed. As indicated in the Discussion Document, for customers to switch away to other functionally substitutable retail products when faced with between 5-10% increase in termination rates, there must be a pass-through into retail voice prices and customers must be aware of this pass-through and act upon in. However, since termination rates make up only a small percentage of the overall retail cost[26] of a voice call, the pass-through is expected to be minimal or less than 5-10%. It is

[22] https://www.compcom.co.za/wp-content/uploads/2019/12/DSMI-Non-Confidential-Report-002.pdf, p 309.
[23] Hypothetical monopolist.
[24] p11.
[25] Vodacom Group annual results (https://www.vodacom.com/annual-results.php), p43.
[26] Other costs include, among others, customer acquisition and retention costs.

therefore unlikely that customers would be sufficiently aware of the increase in retail price of voice calls in order to change their behaviour.

4.3.1.1.8.3. Notwithstanding some degree of functional substitutability between OTT voice services and traditional voice services, the conclusion of the Authority is that OTT services are complements rather than substitutes to traditional voice calls. For the reasons outlined above and in line with other telecommunications regulators' decisions[27], the Authority determines that OTT voice calling services are not a sufficient constraint to traditional voice service. The Authority will, however, continue to monitor changes in technology and consumer behaviour with respect to OTT services as proposed by MTN.

4.3.1.2. Retail supply-side substitution

4.3.1.2.1. MTN noted the Authority's preliminary view that there is no potential retail supply side substitute.[28]

4.3.1.2.2. Cell C agreed with the Authority's preliminary view on retail supply-side substitution.[29]

[27] All Europeans Union telecommunication regulators, Australian regulator and New Zealand regulator
[28] p8.
[29] p12.

4.3.1.2.3. The Authority's response:

No adverse comments were submitted by the stakeholders on the Authority's preliminary views on wholesale supply-side substitution. Therefore, the Authority maintains its view that there are no potential retail supply side substitutes.

4.3.1.3. Wholesale demand-side substitution

4.3.1.3.1. MTN noted the Authority's view that there are currently no likely wholesale demand substitutes.[30]

4.3.1.3.2. Cell C agreed with the Authority's preliminary view on wholesale demand-side substitution.[31]

4.3.1.3.3. The Authority's response:

No adverse comments were submitted by the stakeholders on the Authority's preliminary views on wholesale demand-side substitution. Therefore, the Authority maintains its view that there are currently no likely wholesale demand substitutes.

4.3.1.4. Wholesale supply-side substitution

4.3.1.4.1. MTN noted the Authority's view that there are currently no likely wholesale supply substitutes.

4.3.1.4.2. Cell C agreed with the Authority's preliminary view on wholesale supply-side substitution.[32]

[30] p8.
[31] p12.
[32] p12.

4.3.1.4.3. The Authority's response:

No adverse comments were submitted by the stakeholders on the Authority's preliminary views on wholesale supply-side substitution.

4.3.2. **Fixed termination markets:**

4.3.2.1. Retail demand-side substitution

4.3.2.1.1. Vodacom agreed with the Authority with regard to the following:

- On-net fixed-to-fixed voice calls are not a substitute for mobile-to-fixed voice calls;
- Mobile-to-mobile voice calls are not a substitute for mobile-to-fixed and off-net fixed-to-fixed voice calls;
- Fixed-to-mobile voice calls are not a substitute for fixed-to-fixed voice calls.

4.3.2.2. Further, Vodacom agreed with the Authority that OTT voice calls are not a substitute for fixed voice calls. Vodacom stated that the potential constraint imposed by OTT voice services on the fixed voice call termination services market is likely to be weaker than it is for mobile voice call termination services due to the following reasons:

- Fixed line voice subscribers may value voice quality highly and prefer fixed voice services over OTT services.
- The Authority's view that OTT voice is not a substitute for mobile voice and mobile voice is not a substitute for fixed voice implies that OTT voice is not a substitute for fixed voice.

4.3.2.3. MTN agreed with the Authority that there are not viable retail demand-side substitutes for fixed termination service. However, MTN indicated that the

Authority should continue to monitor the trend with regard to OTT calling substitution of traditional voice service.[33]

4.3.2.4. Cell C agreed with the Authority's preliminary view on retail demand-side substitution.[34]

4.3.2.5. Telkom disagreed with the Authority's proposal that fixed and mobile voice calls are not in the same market. Telkom argued that the proposal was either flawed or did not consider the following developments in favour of market convergence:[35]

- Some fixed line customers are price sensitive and are likely to switch to mobile due to price increase in fixed prices. Telkom argued that fixed line customers (e.g. low-income customers) are expected to be aware of fixed call per minute due to price differential between prices for fixed-to-fixed *vis-à-vis* fixed-to-mobile. Further, Telkom argued that the Authority should consider marginal subscribers rather than non-marginal customers when applying SSNIP test.
- There is an increasing trend in fixed mobile substitution by businesses in favour of mobile over fixed due to the increase in enterprise mobile penetration and enterprise spend on mobile revenue. Telkom argued that the trend is likely to persist due to the Covid-19 pandemic.
- The significant increase in the quality of mobile voice calls due to the increase in 4G and 5G coverage (including inbuilding coverage) as well as the expected increase in 5G coverage.
- The significant increase in mobile coverage and penetration while fixed line penetration has fallen significantly, which is an indication of the switch from fixed to mobile.
- The increasing trend in mobile voice calls over a fixed Wi-Fi connection, which improves the quality and reliability of mobile voice calls, and, therefore, provides fixed line customers with a strong incentive to switch to mobile voice services.

[33] p8.
[34] p12.
[35] pp20-26.

- Increase in international precedents in respect of symmetry in mobile and fixed termination rates (e.g., Kenya, Namibia, Nigeria, Brazil and Botswana).

4.3.2.6. Telkom indicated "regardless of the Authority's determination on product market convergence", it should consider the convergence of the underlying cost of providing mobile and fixed termination services due to decline in the unit cost of mobile termination services *vis-a-vis* the increase in unit cost of fixed termination service.[36] Telkom also stated that failure to take into account convergence of mobile and fixed costs and update the cost models will lead to distortion of competition and investment.[37]

4.3.2.7. <u>The Authority's response:</u>

4.3.2.7.1. The Authority maintains that fixed and mobile voice services are in separate markets, and that the former does not face competitive constraints from the latter. In this regard, the Authority makes the following points:

- As indicated above, termination rates make up only a small percentage of the overall retail cost of a voice call, and the pass-through is expected to be minimal or less than 5-10%. It is therefore unlikely that customers would be unaware of and or would be insensitive to the voice calling prices and general expenditure on the fixed voice service. Even if the calling party has full knowledge of the termination rate, he/she is less likely to switch to mobile-to-mobile voice calls since the mobile termination rates are higher than the fixed termination rates. Further, the fixed line number of the called party may have been ported without the knowledge of the calling party, making it less likely for the calling party to know the relevant termination charged by the terminating licensee.
- Differences in fixed and mobile prices, especially for business voice plans with unlimited fixed mobile voice calls[38], make it less likely for an

[36] pp26-28.
[37] *Ibid* at pp28-29
[38] https://secure.telkom.co.za/today/shop/plan/biztalk/. BizTalk Unlimited Lite+ include limited mobile minutes.

informed customer to switch from cheaper fixed-to-fixed voice calls to more expensive mobile-to-fixed voice calls.

- Telkom's view to attribute the significant increase in mobile coverage and penetration *vis-a-vis* the significant decline in fixed line penetration to the switch from fixed to mobile is disputed. The majority of South African households do not have a choice between mobile or fixed line services due to the unavailability of a fixed infrastructure and prohibitive access costs such as installation and line rental fees. Therefore, the high rate of mobile subscriptions cannot solely be attributed to fixed / mobile substitution in favour of mobile services.
- The fixed voice and mobile voice services are in many cases complementary with different functionality and quality of service, rather than a price-induced substitution effect. The Stats SA 2020 General Household Survey shows that 94% of households with a fixed connection also have a mobile connection.[39] This means that fixed and mobile services are complementary services in respect of consumers that have a choice between mobile or fixed line services. Regarding quality of service, fixed voice services offer better quality of service and reliability compared to mobile voice services, especially for business customers. The quality of service of mobile voice services, however, can vary depending on time (peak vs off-peak) and location (suburban, semi-suburban or rural).

4.3.2.7.2. Notwithstanding the above, the Authority acknowledges some level of convergence between fixed and mobile services, which has been accelerated by the Covid-19 pandemic. The cost modelling exercise may assist in revealing the extent of the impact of such convergence, if any.

4.3.2.8. <u>Retail supply-side substitution</u>

[39] Stats SA – 2020 General Household Survey source data.

4.3.2.8.1. Vodacom agreed with the Authority that any potential retail supply-side substitution for calls to fixed lines is not possible.[40]

4.3.2.8.2. MTN noted the Authority's preliminary view that there is no potential retail supply side substitute.[41]

4.3.2.8.3. Cell C agreed with the Authority's preliminary view on retail supply-side substitution.[42]

4.3.2.8.4. <u>The Authority's response:</u>

No adverse comments were submitted by the stakeholders on the Authority's preliminary views on retail supply-side substitution.

4.3.2.9. <u>Wholesale demand-side substitution</u>

4.3.2.9.1. Vodacom agreed with the Authority that any potential retail supply-side substitution for voice calls to fixed lines is not technically possible.[43]

4.3.2.9.2. MTN noted the Authority's view that there are currently no likely wholesale demand substitutes.[44]

4.3.2.9.3. Cell C agreed with the Authority's preliminary view on wholesale demand-side substitution.[45]

4.3.2.9.4. <u>The Authority's response:</u>

No adverse comments were submitted by the stakeholders on the Authority's preliminary views on wholesale demand-side substitution. Therefore, the Authority maintains its view that there are currently no likely wholesale demand substitutes.

[40] p16.
[41] p8.
[42] p12.
[43] p16.
[44] p8.
[45] p12.

4.3.2.10. Wholesale supply-side substitution

4.3.2.10.1. Vodacom agreed with the Authority that there is no scope for wholesale supply-side substitution for calls to fixed lines given that it is not technically feasible for an alternative licensee (other than the terminating licensee) to provide termination services on the network of a licensee that the customer has called.[46]

4.3.2.10.2. MTN noted the Authority's view that there are currently no likely wholesale supply substitutes.[47]

4.3.2.10.3. Cell C agreed with the Authority's preliminary view on wholesale supply-side substitution.[48]

4.3.2.10.4. The Authority's response:

No adverse comments were submitted by the stakeholders on the Authority's preliminary views on wholesale supply-side substitution. Therefore, the Authority maintains its view that there are currently no likely wholesale supply substitutes.

[46] p16.
[47] p8.
[48] p12.

4.3.2.11. Common pricing constraints

4.3.2.11.1. Vodacom stated that the Authority's preliminary view with regard to common pricing constraints was not clear. Vodacom agreed with the Authority based on the assumption that the Authority meant that "…that the termination rate charged by one licensee will not constrain the termination rate charged by another licensee." Further, Vodacom indicated that common pricing constraint means that a licensee doesn't price discriminate in terms of call termination charges for call made to different subscribers on its network.[49]

4.3.2.11.2. MTN agreed with the Authority's preliminary view that there is no common pricing constraint linking the wholesale voice call termination rates set by different licensees.[50]

4.3.2.11.3. Switch Telecom stated that the 2017 amendment to the geographic market definition had invalidated the Authority's previous analysis on common pricing constraint.[51]

4.3.2.11.4. The Authority's response:

The Authority agrees with Vodacom's interpretation, which is in line with the Authority's 2010 and 2014 determinations in respect of a common pricing constraint. There is a common pricing constraint since the relevant markets include wholesale voice termination to all subscribers of one licensee. The alleged price discrimination argument by Switch Telecom in respect of voice calls originating outside of South Africa is addressed below.

[49] pp16-17.
[50] p9.
[51] p1.

4.3.2.12. Geographic market definition

4.3.2.12.1. MTN supports the Authority's view that mobile and fixed termination markets "should be defined nationally and exclude traffic originating abroad". MTN also agreed with the Authority that "the impact of excessive international termination rates on licensees' revenue and traffic volumes as well as the prevalence of OTT services in the international calling market disincentivise licensees from charging excessive international termination rates."[52]

4.3.2.12.2. Vodacom agreed with the Authority that the geographic market for call termination services is national in scope. Further, Vodacom stated that internationally originated voice traffic should not be included in the defined wholesale voice call termination markets due to the following:

- Maintaining the 2017 decision to deregulate the international termination rates would be in line with the market failures identified by the Authority.
- ITRs charged by Vodacom are still below the termination rate in other countries to (from) which Vodacom sends (receives) traffic.
- The Authority doesn't have the authority over termination rates charged by licensees in other jurisdictions.
- Regulation of ITRs will exacerbate the cross subsidy being provided by South African consumers to consumers in other countries.
- OTTs services is a viable alternative for international voice calls.

4.3.2.12.3. Further, Vodacom stated that setting ITRs above the regulated domestic termination rates is not discriminatory[53] and that traffic bypass should be addressed directly rather than regulating ITRs[54] as proposed by Switchtel and ISPA.

4.3.2.12.4. Whilst Telkom agreed with the Authority's proposal for ITRs to remain deregulated, Telkom raised a concern with regard to the increase in the level of bypass fraud and the potential negative impact on South African

[52] pp9-10.
[53] pp20-21.
[54] *Ibid* at pp21-22.

licensees and consumers. Telkom stated that the Authority should conduct regulatory impact assessment of bypass fraud and take appropriate actions.

4.3.2.12.5. Cell C agreed with the Authority's preliminary view on the geographic market definition.[55]

4.3.2.12.6. ISPA stated its continued disagreement with the Authority's proposal to continue to deregulate the international termination rates. ISPA reiterated that the deregulation of international termination rates in 2017 has led to the following:[56]

- The significant increase in international termination rates, which are not cost based. This resulted in the significant increase in international termination rates charged by operators in other countries in response to the increase in international termination rates by South African licensees.
- The significant increase in fraud and also created arbitrage opportunities.
- The significant increase in billing disputes due to lack of uniformity or lack of clarity in respect of the definition of internationally originated voice traffic.
- The suspension of voice interconnection agreement and back-billing of voice calls in cases where the incumbent unilaterally deems the voice traffic to be internationally originated.
- Incumbent operators moving towards disallowing aggregation of voice traffic and transiting of voice traffic.
- Small operators have to incur additional staff cost for revenue assurance and fraud detection.

4.3.2.12.7. Further, ISPA indicated the prior to the 2017 amendment of the geographic market definition licensees charged the maximum international termination rates of R1.25 (excl. VAT) per minute. However, licensees increased international termination rates by more than 25 times from

[55] p12.
[56] pp3-4.

R1.25 post the 2017 amendment, resulting in the differential between international termination rate and the regulated domestic termination rate of more than 2600%.

4.3.2.12.8. ISPA disagreed with the Authority's view that OTT voice calls are substitutes for international voice calls due to high international termination rates charged by South African licensees.[57]

4.3.2.12.9. ISPA stated that the Authority created market failure through the 2017 amendment, given that international providers in other jurisdictions set international termination rates based on high international termination rates charged by South African incumbent operators. ISPA argued that this prevents small licensees from competing with the South African dominant incumbents by setting lower international termination rates as "international providers do not want lots of specific granular routes".[58]

4.3.2.12.10. ISPA recommended that, as a compromise, the Authority adopt the principle of reciprocity of cost-based terminations, similar to the European Union and the United Kingdom, by regulating the maximum termination rates for locally and internationally originated voice calls.[59]

4.3.2.12.11. Similar to Telkom, ISPA stated that the Authority should conduct regulatory impact assessment of the 2017 amendment, ideally under section 67(4) of the ECA.[60]

4.3.2.12.12. Switch Telecom disagreed with the Authority's view about continued deregulation of international termination rates. Switch Telecom argued that the Authority's preliminary view is "unjustifiable and grossly irrational".[61]

4.3.2.12.13. Switch Telecom also disagreed with the Authority's preliminary view that the deregulation of international termination rates is in the best interest of South Africa. Switch Telecom argued that international carriers set the international termination rates (paid by South African licensees) per number prefix based on "a blended cost for termination to the various

[57] pp4-5.
[58] *Ibid* at pp4-5.
[59] *Ibid* at p6.
[60] *Ibid* at pp6-7.
[61] p2.

licensees serving those numbers".[62] Therefore, Switch Telecom argued that the effective international termination rates are dictated by large operators who are responsible for terminating a large proportion of international traffic, and that "the rates applicable to a number prefix will always trend towards the highest rate" of any large operator.

4.3.2.12.14. In addition, Switch Telecom indicated that international termination rates offered by small licensees (whether higher or lower than the blended cost of termination) don't have an impact or have insignificant impact on the blended cost of termination, which undermines competition in the international calling market. Switch Telecom also indicated that small licensees are not able to benefit from reciprocity provisions offered by other jurisdictions like the United Kingdom due to South African large operators' insistence to charge high international termination rates.[63]

4.3.2.12.15. Switch Telecom agreed with the Authority that OTT voice calls are substitutes for international voice calls given that bundles don't apply to international calls and the price differential is very high. Further, Switch Telecom stated that OTT services provide better quality and greater global reachability compared to traditional voice services. However, Switch Telecom indicated that this has been negated by the grey market 2017 amendment of market definitions.[64]

4.3.2.12.16. Professor Sutherland argued that in the absence of differentiation of termination of local originated traffic and termination of international originated traffic the deregulation of international termination rate would be "unjustifiable discrimination against foreign".[65] Further, Professor Sutherland argued the location of the calling party is immaterial because the market is about wholesale voice call termination as opposed to an individual making the call.[66]

4.3.2.12.17. <u>The Authority's response:</u>

[62] *Ibid* at p2.
[63] p2-3.
[64] *Ibid* at p1.
[65] p12.
[66] Ibid at p22.

4.3.2.12.17.1. The Authority considers it necessary to revise its preliminary view in respect of the 2017 decision to deregulate international termination rates by amending the geographic market definition.

4.3.2.12.17.2. It is clear from the evidence received by the Authority that the 2017 amendment of geographic scope of the identified markets has led to the following unintended consequences:

- *Impact on operators* – a significant differential between domestic regulated termination rates and international termination rates of between 2,633% and 2,788%.[67] Also, Switch Telecom indicated that the United Kingdom licensees increased the international termination rates for calls originating from South African by more than 20,000% despite Ofcom's reciprocity regime[68]. Whilst the Authority is not able to ascertain with any precision the relationship between the differential in domestic regulated termination rates and international termination rates and the bypass fraud, it seems likely that the significant increase in bypass traffic mentioned by various operators was mainly driven by the significant increase in inbound international termination rates after the publication of the 2017 amendment to the Call Termination Regulations, 2014.

  In addition, the deregulation of international termination rates in 2017 did not materially improve the financial position of licensees in respect of certain routes and destinations.[69] The financial position of licensees is likely to have worsened post the 2017 amendment, due to the increase in the cost to curb the grey market, as well as the increase in the number of international operators that now charge South African licensees high international termination rates that they

[67] ISPA's submission, p4.
[68] According to reciprocity, termination rates to a non-European Economic Area cannot be higher than the termination rate offered by that non-EEA provider. Therefore, South African licensees can negotiate down the rates instead of the rates that are significantly higher than domestic regulated termination rates.
[69] Vodacom indicated that its international termination rate is still below the average in many other countries with which Vodacom exchanges significant volumes of traffic.

did not before the 2017 amendment. This suggests that a different regulatory approach that would benefit consumers and licensees is required.

- *Impact on consumers* – pricing freedom led to a significant increase in outbound international termination rates, as international operators responded to higher inbound international termination rates, to the detriment of South African consumers. In addition to price increase harm, South African consumers are likely to have experienced an increase in poor quality of service in respect of inbound international voice calls due to significant growth in the grey market for international voice calls.

4.3.2.12.17.3. The Authority has noted the challenges with respect to the Regulations pertaining to termination of internationally originated voice calls. To this end, the Authority considered various options as follows:

- *Option 1* – the same termination rate for domestic and internationally originated voice calls terminating in South Africa, as pre the 2017 amendment of the geographic market definition.
- *Option 2* – deregulation of international termination rates, allowing pricing freedom in respect of internationally originated voice calls terminating in South Africa, as per post the 2017 amendment of the geographic market definition (i.e. maintain the status quo).
- *Option 3* – international termination rates are still deregulated, but South African licensees are required to use the principle of reciprocity to negotiate down the international termination rates (not unilaterally). Therefore, the international termination rates charged by South African licensees should not be less than the domestic regulated termination rate or higher than the international termination rate offered by an international operator.

4.3.2.12.17.4. The Authority does not consider that consumers and licensees would best be served by *Option 1* and *Option 2.* With regard to *Option 1*, South African operators are likely to be pay high termination rates and receive low termination rates from international operators, resulting in an outflow of funds from South Africa to other countries and in South African consumers subsidising consumers in other countries. *Option 2* has led to worse outcomes for operators and consumers compared to *Option 1* due to high termination rates, increase in billing disputes and high retail international voice call prices.

4.3.2.12.17.5. *Option 3* is therefore likely to result in positive outcomes, as it will incentivise South African licensees and their international counterparts to reduce international termination rates. The Authority will embark on the process to amend the Regulations in this regard.

4.3.3. **Fixed and Mobile convergence**

4.3.3.1. MTN agreed with the Authority's preliminary view that mobile voice services and fixed services are not provided in the same market due to different network structures. However, MTN disagreed with the Authority's expectation for cost differences between fixed and mobile termination to under 5G technology as it expects similar efficiency gains in fixed networks.

4.3.3.2. Vodacom agreed with the Authority's proposal that mobile voice and fixed voice services are not provided in the same market. However, Vodacom stated that the Authority's view with regard to the cost of terminating a mobile call *vis-à-vis* a fixed call doesn't form part of the market review process.[70] Nevertheless, Vodacom stated that mobile and fixed networks have different cost structures and that the cost of terminating a call on the former network is higher than the cost of terminating on the latter network.[71]

[70] p24.
[71] *Ibid* at pp25-27.

4.3.3.3. Further, Vodacom indicated that mobile termination rates are higher than fixed termination rates in most other countries, and that parity or symmetric fixed and mobile termination rates could distort competition and result in economic inefficiencies.[72]

4.3.3.4. Telkom disagreed with the Authority's proposal that fixed and mobile services are complementary and are in separate product markets. Telkom argued that this proposal would not encourage investment or promote competition as required in terms of the ECA. Further, Telkom argued that "Even if the Authority were to erroneously disregard the evidence of increased substitutability between fixed and mobile voice services, it needs to take proper account of the convergence of unit costs for fixed and mobile termination". Telkom stated that failure to account for convergence between mobile and fixed services "would create distortions to competition and investment as well as inefficiencies" in contradiction of the ECA. [73]

4.3.3.5. ISPA disagreed with the Authority's view that fixed and mobile termination services are not provided in the same market. ISPA stated that the distinction between mobile and fixed services "…has blurred dramatically and to an extent makes no sense where "fixed services" are available with full mobility and are only "fixed" because of the number assigned to the service."[74]

4.3.3.6. Further, ISPA reiterated its concern that the Authority did not provide enough evidence to justify why licensees who provide fixed termination services should continue to subsidise licensees who provide mobile termination services despite the acknowledgement of some convergence of the two services by the Authority in the Discussion Document. In addition, ISPA stated that any amendments to the termination rates should reflect the actual and advanced level of convergence of mobile and fixed technologies and the cost of termination.[75]

[72] *Ibid* at pp27-29.
[73] p20.
[74] pp7-8.
[75] *Ibid* at pp9-10.

4.3.3.7. Switch Telecom disagreed with the Authority's preliminary view with regard to fixed and mobile convergence. Switch Telecom indicated the Authority's static differential between fixed and mobile termination rates was inconsistent with the Authority's view regarding some level of convergence between the two services in the Discussion Document. Switch Telecom recommended that mobile and fixed termination rates converge immediately or in terms of the glide path by the end of 2024.[76]

[76] p3.

4.3.3.8. The Authority's response:

The Authority maintains that fixed and mobile services should be in separate markets for the reasons already provided under fixed product market definition.[77] The Authority, however, acknowledges some level of convergence between the two services since the last review, which was driven largely by the Covid-19 pandemic.

4.4. Regulation 4 – Methodology

4.4.1. Apart from disagreeing with how the methodology was implemented, Vodacom agreed with the methodology used by the Authority.[78]

4.4.2. MTN is of the view that the methodology outlined in Regulation 4 is flawed as it relies mainly on structural measures of competition and ignores performance measures of competition as well as other measures of competition such as price, productivity, and innovation.

4.4.3. Cell C agreed with the Authority's preliminary view on the methodology used.[79]

4.4.4. Whilst agreeing with the methodology used, ISPA stated that the correct process was not followed before the amendment of the geographic market definition in 2017.[80]

4.4.5. Switch Telecom disagreed with the Authority's preliminary conclusion on the methodology used because the Authority did not "thoroughly examine the

[77] See the Authority's response to para 4.1.2.
[78] pp7-13, pp30-32.
[79] p12.
[80] p10.

factors that it has identified separately for national and international markets."[81]

[81] p4.

4.4.6. The Authority's response:

The Authority has followed the methodology required by section 67(4A) of the ECA, as well as the Guideline for Conducting Market Reviews[82].

4.5. Regulation 5 – Effectiveness of competition

4.5.1. MTN noted the Authority's preliminary view that competition will be ineffective in the absence of regulations given that there cannot be any competition in the mobile and fixed termination markets since these markets are limited to individual licensee's network. However, MTN argued that there is little evidence to support the Authority's view that the potential for discrimination between licensees offering similar services and inefficient pricing market failures are likely to manifest given that call termination markets have been subject to price regulation since 2010.[83]

4.5.2. Cell C disagreed with the Authority's preliminary view of the assessment of effectiveness of competition. Cell C argued that asymmetry in respect of network costs still persists between large and small operators. Whilst acknowledging that small operators may have the incentive to charge high termination rates (if the termination markets aren't regulated), Cell C argued that small operators lack countervailing buyer power due to scale disadvantage and therefore, asymmetry should be maintained.[84]

4.5.3. ISPA agreed with the Authority that competition remains ineffective in the fixed termination markets.[85]

4.5.4. The Authority's response:

[82] Issued on 8 March 2010, p. 10.
[83] pp11-12.
[84] pp12-13.
[85] pp10.

4.5.4.1. Regarding the argument made by MTN, the Authority already provided reasons in the Discussion Document that in the absence of regulation in the relevant termination markets a licensee with a 100% share of terminating minutes on its network (which provides a strong presumption of significant market power) would have the ability and incentive to influence competition parameters such as prices. This is in line with the purpose of *ex ante* regulation, which is to prevent potential competition problems which may arise over the review period.

4.5.4.2. The Authority maintains that economies of scale and scope are not relevant in the assessment of the effectiveness of competition, given that each licensee has 100% control of voice minutes terminating on its network or termination market.

4.5.4.3. The Authority may, however, consider the economies of scale when considering appropriate and proportionate pro-competitive remedies. However, whilst the Authority acknowledges potential cost disadvantages faced by smaller or new entrant mobile operators, indefinite asymmetry would harm competition and result in consumer detriment, as smaller and new entrants would have less of an incentive to become efficient operators. Also, regulation of termination rate at marginal cost from 2014 is expected to have reduced the negative externalities faced by smaller operators.

4.5.5. Legislative requirements

4.5.5.1. <u>The Authority's response:</u>

No comments were submitted by the stakeholders.

4.5.6. Relevant markets

4.5.6.1. The Authority's response:

No comments were submitted by the stakeholders.

4.5.7. Actual and potential existence of competitors

4.5.7.1. Wholesale voice call termination

4.5.7.1.1. The Authority's response:

No comments were submitted by the stakeholders.

4.5.7.2. Relevant downstream markets

4.5.7.2.1. Vodacom was unclear about the relevance of retail markets graphs to the Authority's analysis of the effectiveness of competition and significant market power in wholesale call termination markets. Vodacom stated that the Authority also acknowledged this irrelevance in section 2.3.4 of the Discussion Document.

4.5.7.2.2. Despite its question of the relevance of retail downstream markets, Vodacom questioned the inclusion of retail voice services only as opposed to a broad retail market for mobile services (i.e., voice, SMS and data) in line with the Authority's Mobile Broadband Services Inquiry process.

4.5.7.2.3. In addition, Vodacom raised a concern about the accuracy of market share data for voice services in the Discussion Document. Vodacom alleged that the inaccuracy was caused by information request that was not clear and inconsistent responses to stakeholders' questions of clarity pertaining to methodology to be used to measure subscriber numbers.[86]

[86] p32.

4.5.7.2.4. <u>The Authority's response:</u>

4.5.7.2.4.1. Whilst retail market information may not be relevant for assessment of the effectiveness of competition and significant market power in wholesale call termination markets, the Authority's analysis was meant to understand the extent of the impact of the reduction in termination rates on retail voice services. The Authority's expectation is that the reduction of wholesale voice call termination rates will reduce barriers to entry in the provision of off-net voice calls and thus foster competition and dynamism in the retail environment.[87]

4.5.7.2.4.2. The inclusion of retail voice services only, as opposed to a broad market for the supply of retail mobile services, is mainly because the focal product under review is voice call services.

4.5.7.2.4.3. Regarding inaccurate market shares, the Authority already provided a reason in the Discussion Document why market share calculations may not necessarily represent the completely accurate picture of the actual market shares.[88] This is because the Authority did not receive sufficient data in terms of questionnaire (as part of phase 1) from all licensees.

4.5.8. Level, trends and concentration and history of collusion

4.5.8.1. Wholesale voice call termination

Vodacom disagreed with the inclusion of graphs comparing market shares of termination minutes on fixed and mobile networks, and also graphs depicting the Herfindahl–Hirschman Index ("HHI")[89] for termination minutes. Vodacom was of the

[87] The Authority acknowledges that the reduction in termination rates doesn't necessarily feed through directly to a reduction in retail voice prices.
[88] Discussion Document, p26.
[89] A measure of market concentration of an industry.

view that this was inconsistent with the Authority's view that each licensee's network represents a separate market and with 100% share of the minutes terminating on its network.

4.5.8.1.1. The Authority's response:

Market shares and HHI for termination minutes are relevant when assessing the effectiveness of competition in the relevant markets. This is in line with section 67(4A) of the ECA and A Guideline for Conducting Market Reviews. However, the Authority agrees that market shares and HHI may be inconsistent with the significant market power determination in the context of call termination services.

4.5.8.2. Relevant downstream markets

4.5.8.2.1. The Authority's response:

No comments were submitted by the stakeholders.

4.5.9. Overall size of each of the market participants

4.5.9.1. The Authority's response:

No comments were submitted by the stakeholders.

4.5.10. Control over essential facilities

4.5.10.1. The Authority's response:

No comments were submitted by the stakeholders.

4.5.11. Impact of technological advantages or superiority of a given market participant

4.5.11.1. Wholesale voice call termination

4.5.11.1.1. <u>The Authority's response:</u>

No comments were submitted by the stakeholders.

4.5.11.2. Relevant downstream markets

Cell C indicated that Vodacom and MTN have benefitted from scale advantage in terms of revenue market share and share of terminated minutes compared to Cell C and this has persisted over 20 years. Cell C argued that scale is very important in order to understand structural market issues facing small operators in South Africa. Therefore, Cell C argued that the proposed symmetric termination rates will have negative impact on competition in the mobile market.[90]

4.5.11.2.1. <u>The Authority's response:</u>

As indicated above, the Authority did not assess competition in the market with reference to economies of scale and scope. Instead, economies of scale and scope may be relevant to the assessment of appropriate and proportionate pro-competitive

[90] pp14-16.

remedies. Also, the use of revenue market share for the scale advantage argument is misleading because the cost of termination is driven by termination minutes as opposed to retail revenues.

4.5.12. Firms' access to capital markets and financial resources

Cell C argued that scale advantage enjoyed by Vodacom and MTN and sufficient cash resources compared to Cell C enables them to maintain scale and cost advantage.[91]

4.5.12.1. The Authority's response:

The Authority maintains that a firm's access to capital markets and financial resources is considered of nugatory relevance. Based on the definition of mobile and fixed termination markets, there is only one supply in each relevant market, and there are no actual or potential competitors with which to compare a firm's access to capital markets and financial resources.

4.5.12.2. Wholesale voice call termination

4.5.12.2.1. The Authority's response:

No comments were submitted by the stakeholders.

4.5.12.3. Relevant downstream markets

4.5.12.3.1. The Authority's response:

[91] *Ibid* at pp16-17.

No comments were submitted by the stakeholders.

4.5.13. Dynamic characteristics of the market, including growth, innovation and products and services differentiation

4.5.13.1. <u>The Authority's response:</u>

No comments were submitted by the stakeholders.

4.5.14. Economies of scale and scope

4.5.14.1. Despite agreeing with the Authority that economies of scale and scope is not relevant for the assessment of the effectiveness of competition for mobile call termination services, Vodacom disagreed with the Authority's view that they might be relevant when considering the appropriate remedies.

4.5.14.2. Cell C stated that the economies of scale and scope is relevant in determining fair and reasonable prices for wholesale voice termination in line with regulation 7(2) of the Call Termination Regulations of 2018 (Government Gazette 41943).[92]

4.5.14.3. <u>The Authority's response:</u>

The Authority maintains that economies of scale and scope are not relevant for the assessment of the effectiveness of competition in the relevant markets. Although economies of scale and scope may be relevant to the assessment of appropriate pro-

[92] p18.

competitive remedies, the Authority is required to take a more proportionate approach.

4.5.15. Nature and extent of vertical integration

4.5.15.1. Wholesale voice call termination

4.5.15.1.1. The Authority's response:

No comments were submitted by the stakeholders.

4.5.15.2. Relevant downstream markets

4.5.15.2.1. The Authority's response:

No comments were submitted by the stakeholders.

4.5.16. Market and regulatory barriers to entry

4.5.16.1. Wholesale voice call termination

4.5.16.1.1. The Authority's response:

No comments were submitted by the stakeholders.

4.5.16.2. Relevant downstream markets

4.5.16.2.1. The Authority's response:

No comments were submitted by the stakeholders.

4.5.17. Countervailing bargaining power

4.5.17.1. The Authority's response:

No comments were submitted by the stakeholders.

4.5.18. Conclusion on the assessment of effectiveness of competition

4.5.18.1. Assessment of competition

4.5.18.1.1. <u>The Authority's response:</u>

No comments were submitted by the stakeholders.

4.5.19. Determination on market failures

According to Cell C, inefficient pricing market failure refers to over recovery by large operators and under recovery by small operators of the underlying cost of providing call termination service resulting in inefficient outcomes. Cell C argued that the proposed symmetric termination rates will result in small operators under recovering on the cost of termination which will not benefit competition at the retail and wholesale level. [93]

4.5.19.1. <u>The Authority's response:</u>

The Authority disagrees with Cell C that inefficient pricing would lead to over-recovery of the cost of termination by large operators and under-recovery by small operators. Whilst this could have been the case before 2014, where termination rates were set above LRIC-plus, the move to the LRIC-plus cost standard from 2014 removed the market failure associated with above-cost pricing and also provided considerable market assistance to the smaller operators.[94] Further, the possibility of inefficient pricing to manifest in the absence of regulation should be understood in the context

[93] pp18-20.
[94] Reasons for the Call Termination Regulations, 2014.

of significant market power where each SMP licensee, by virtue of its market power, has the ability and incentive to set its termination rates above the level which would otherwise be expected in a competitive market.

4.6. Regulation 6 – Significant Market Power determination

4.6.1. Despite noting the Authority's preliminary view that each licensee has 100% market share in respect of voice calls terminating on its network, Vodacom reiterated its view about the competitive constraint of OTT services on mobile call termination services. Further, Vodacom stated that given that each licensee, irrespective of the size or network coverage, has SMP in its own market, all licensees (including class licensees) should comply with the same remedies.[95]

4.6.2. MTN noted the Authority's preliminary view that each licensee has 100% share of the market in respect of voice calls terminating on its network and has Significant Market Power given the narrow market definitions.[96]

4.6.3. Cell C and ISPA agreed with the Authority's preliminary view on significant market power in the mobile termination markets and fixed termination markets.[97,98]

4.6.4. Despite agreeing with the Authority's preliminary conclusion on SMP, Switch Telecom reiterated its previous views that toll-free calls should be part of the call termination review process.[99]

4.6.5. <u>The Authority's response:</u>

[95] p33.
[96] pp12-13.
[97] Cell C submission, p20.
[98] ISPA submission, p10.
[99] p4.

4.6.5.1. Regarding the argument made by Vodacom above, the Authority maintains that OTT voice calls are unlikely to be a sufficiently close substitute for traditional voice calls to mobile and fixed locations for reasons already provided under the product market definition above. In 2010 and 2014, the reference interconnection offer obligation was imposed on Vodacom, MTN and Telkom because they benefitted from the assignment of more efficient spectrum and also from economies of scale and scope, with each licensee maintaining a share of total minutes terminated in their respective markets of greater than 20%.

4.6.5.2. The Authority disagrees with Vodacom that this obligation should apply to all licensees. The Authority maintains that a RIO obligation must be imposed on Vodacom, MTN and Telkom, because the three licensees still continue to benefit from economies of scale and scope, with each licensee maintaining a share of greater than 20% of the total terminated minutes in South Africa.[100]

4.6.5.3. The Authority maintains that toll-free is not part of the call termination process, given that the wholesale market for voice call origination and wholesale market for voice call termination are not in the same market, even though the two services might use the same network elements.

4.7. Regulation 7 – Pro-competitive terms and conditions

4.7.1. Vodacom supports the Authority's move from asymmetric to symmetric termination rates and notes that this is supported by international precedent in Europe and Africa. However, Vodacom stated that the Authority's proposal that new entrants should qualify for asymmetric termination rates for up to 3 years upon entry ignores the competitive advantage of new entrants and their ability to compete effectively with the incumbents. In addition, Vodacom stated that the Authority should provide clarity that the existing operators in

[100] Discussion Document on Call Termination (GG45426) – share of mobile termination minutes (p29) and share of fixed termination minutes (p30).

the mobile market would not qualify for asymmetry since they have been in the market for more than 3 years.[101]

4.7.2. According to the Frontier Economics[102] report asymmetric mobile termination rates cannot be justified based on the following:[103]

- Higher unit cost of termination justification for asymmetric MTRs as the result of lack of spectrum and lower economies of scale is not in line with international precedent (i.e., the European Commission 2009 recommendation on termination rates) and ignores the local market developments.
- The imposition of asymmetry for more than 11 years in South Africa extends far beyond 4 years under the EC's 2009 recommendation on termination rates.
- Traffic imbalances, which is a function of entry and expansion in the retail mobile markets, cannot be justified for asymmetry.
- Historic market failures cannot be regarded as justification for asymmetry as the mobile termination rates should be based on forward looking costs.
- Asymmetric mobile termination rates will not have a major impact on small entrants given the decline in voice services *vis-à-vis* data services as well as the increase in usage of OTT voice services.
- Asymmetric termination rates would not encourage economic efficiency.

4.7.3. Further, Vodacom indicated that the obligation to provide reference offers by Vodacom and MTN is not necessary as the majority of the reference offer requirements are met by licensees in terms of the Interconnection Regulations. Vodacom indicated that to the extent that reference offer is maintained by the Authority, all licensees should be required to comply with it, which will be in line with the SMP finding by the Authority. Vodacom stated that imposing this obligation on Vodacom and MTN only may disadvantage the WOAN since it will need to interconnect will all existing licensees.[104]

[101] p34.
[102] Confidential report of Frontier Economics. Frontier was commissioned by Vodacom to conduct a study on the merits of asymmetric mobile termination rates.
[103] pp34-36.
[104] p39.

4.7.4. MTN agreed with the Authority's preliminary views with regard to pro-competitive terms and conditions. However, with regard to a cost-based termination rates remedy, MTN indicated that new termination rates should be based on LRAIC+ cost standard to allow for recovery of joint and common costs, and also based on one hypothetical efficient operator for mobile and fixed networks. MTN also stated that a glide path should be maintained to avoid significant business model shock. With regard to the reference interconnection offer remedy, MTN stated that all licensees should comply with it since a lack of transparency market failure is applicable to all call termination markets and not only to some licensees in the markets.[105]

4.7.5. Cell C disagreed with the Authority's preliminary view that only new entrants should be allowed to charge high termination rates for 3 years upon entry. Cell C argues that the proposed move to symmetry will materially change the 2014 pro-competitive terms and conditions and under recovery of the underlying cost of termination service. Further, Cell C argues that symmetric rates will be based on the cost of MTN and Vodacom, resulting in under recovery of the cost of termination by Cell C.[106]

4.7.6. Cell C stated that the proposed limitation of asymmetry to new entrants is not in line with the 2018 call termination review process and the principle of gradual move to symmetry in terms of the 2018 Briefing Note on asymmetry.[107]

4.7.7. Telkom disagreed with the Authority's proposal to limit asymmetry to new entrants within three years after entry into the market. Telkom stated that the proposal is flawed based on the following:[108]

- The proposal is not in line with the object of the ECA in respect of promotion of investment or competition and stability in the ICT sector.
- The Authority relied on the European Commission's 2009 recommendation without consideration of the local market conditions. Also, the Authority

[105] pp13-16.
[106] pp21-24.
[107] *Ibid* at pp24-26.
[108] pp9-19.

did not consider precedents from other developing markets such as Brazil, Nigeria and Ghana.

- The Authority did not provide market or unit cost evidence to support its proposal that asymmetry is no longer required to support competition since its 2008 decision.
- The rationale and conditions identified by the Authority for retaining the MTR asymmetry in South Africa remain. Telkom indicated that it still faces high unit cost of termination and lacks minimum efficient scale of 20% due to a variety of factors outside of its control such as access to spectrum, access to sites, barriers to subscriber switching and network effects that constrain its ability to reach minimum efficient scale to compete more effectively. Further, Telkom indicated that network effects continue to persist to the disadvantage of late entrants as well as lack of effective competition.
- The move to symmetry will result in under-recovery of termination costs and also disincentivise small licensees to compete. Further, Telkom argued that symmetry will increase net-payments of small licensees and increase net in-payments of large licensees, strengthening their financial position.
- The move to symmetry too early or abruptly will undermine investment and competition as well as consumer welfare. Telkom argued that "the Authority should therefore adopt a conservative approach to determining when to remove MTR asymmetry, and only do so when there is strong evidence that it is no longer required to support the development of effective competition"
- The Authority should retain asymmetry for operators who have not reached minimum efficient scale in order to support competition and investment in the sector.

4.7.8. ISPA supported the view that price control for termination services should be maintained and that the rates should be cost-based.[109] ISPA stated that fixed asymmetry is of no value to potential new entrants due to low traffic volume.

[109] pp10-11.

Further, ISPA strongly supported the Authority's view that mobile termination rates should move to symmetry.[110]

4.7.9. ISPA stated that reference interconnection offer obligation is overstated as "the obligation to include detailed information in an interconnection agreement is largely contained in the Interconnection Regulations 2010". However, ISPA recommended that the Authority review the approval process of the RIO.[111]

4.7.10. <u>The Authority's response:</u>

4.7.10.1. The Authority maintains that mobile termination rates should be symmetric (in line with fixed termination rates, which moved to symmetry on 1 October 2020[112]), for the reasons already provided by the Authority in the Reasons Document for the Call Termination Regulations of 2014 (GG 38609 of 2015),[113] the Briefing Note on Asymmetry of 2014[114], and Briefing Note on Asymmetry of 2018[115]. The Authority also maintains that indefinite asymmetry could disincentivise smaller operators to become efficient operators. Further, since 2014, the Authority has used the LRIC-plus cost standard to calculate the efficient cost of providing fixed and mobile termination services. This has led to a reduction in the negative externalities faced by smaller operators.

4.7.10.2. Indefinite asymmetry will not be in line with international best practice, where asymmetry is provided to new entrants for a limited period of three to four years upon entry. The basis for this limited period of asymmetry is to achieve a balance between recognising cost differences between small and

[110] *Ibid* at p11.
[111] *Ibid* at pp11-12.
[112] Fixed termination rate base rate decreased from R0.07 in 2019 to R0.06 in 2020 while fixed asymmetric rates decreased from R0.08 to R0.06 during the same period.
[113] The Authority stated that indefinite asymmetry provision potentially holds the danger that smaller and late entrants would have less of an incentive to become efficient operators.
[114] https://www.icasa.org.za/LegislationRegulations/MarketsCompetition/MarketsCompetitionAnalysis/CosttoCommunicateProgramme/CallTermination/tabid/743/ctl/ItemDetaIs/mid/2697/ItemID/6054/Default.aspx.
[115] https://www.ellipsis.co.za/wp-content/uploads/2018/02/Briefing-note-termination-rate-asymmetry.pdf.

large operators, and perpetuating cost inefficiencies amongst small later entrants. The Authority has already granted small entrants asymmetry for twelve years, which is more than the recommended international best practice of three to four years. Therefore, granting small entrants an additional three years of asymmetry will not be in line with international practice, and would potentially distort competition, with a negative impact on consumers' welfare[116]. Customers will be impacted negatively, as the originating licensee will presumably increase retail off-net prices by a premium equivalent to the asymmetric paid to the smaller operator, and, thus, generate allocative and productive inefficiencies.

4.7.10.3. As discussed above, the move to symmetry will not lead to under-recovery of the cost of termination by smaller licensees, because the termination rate will be based on the efficient cost of providing termination service by a hypothetical efficient operator using LRIC or the LRIC-plus cost standard.

4.7.10.4. Having considered the views expressed by Telkom and Cell C, the Authority has, however, determined that it is necessary to minimise the shock of a move of mobile termination rates to symmetry in order to provide adequate time for small operators to adjust their business models. Therefore, the Authority determines that mobile termination rates will move to symmetry within a transitional period of twelve months.

4.7.10.5. Notwithstanding the above, the Authority maintains that new entrants should be eligible for asymmetry based on cost differences and for a limited transitional period of three years in line with the glide path period. The Authority, however, expects asymmetry to be of limited value to new entrants because of the significant increase in data traffic and minimal growth in voice traffic. The Authority will consult on the appropriate level of asymmetry for new entrants during the cost modelling process.

[116] Asymmetry may result in high off-net prices. Also, it should be noted that asymmetry is paid by customers of the originating licensee and or the originating licensee. The originating licensee consider the asymmetric termination rate when pricing retail off-net voice calls.

5. The Authority's findings

5.1. Having regard to the above, the Authority's findings are as follows:

5.1.1. <u>Regulation 3 - Market definition</u>

The Mobile termination markets and Fixed termination markets are defined as follows:

- Mobile termination markets: The market for wholesale voice call termination services on the network of each licensee that offers termination to a mobile location within the Republic of South Africa, including termination of voice calls originating outside of South Africa.
- Fixed termination markets: The market for wholesale voice call termination services on the network of each licensee that offers termination to a fixed location within the Republic of South Africa, including termination of voice calls originating outside of South Africa.

5.1.2. <u>Regulation 4 - Methodology</u>

The Authority sees no need to amend the specified approach in the evaluation of effectiveness of competition in the defined markets as per section 67(4A) of the ECA.

5.1.3. <u>Regulation 5 - Effectiveness of competition</u>

The Authority found that competition in the Mobile termination markets and Fixed termination markets would be ineffective without regulatory intervention. This is due to the nature of the call termination markets (i.e. each licensee, whether new, existing or small, has monopoly in the provision of termination services over its own network).

5.1.4. Regulation 6 - Significant Market Power determination

The Authority found that each Individual Electronic Communications Network Service and Individual Electronic Communications Service licensee that offers wholesale voice call termination services has Significant Market Power in its wholesale voice call termination market defined above.

5.1.5. Regulation 7 - Pro-competitive terms and conditions

5.1.5.1. The Authority has determined to retain the following pro-competitive terms and conditions:

- Licensees must charge cost-based pricing;
- Licensees must publish a reference interconnection offer.

5.1.5.2. Mobile termination rates will move to symmetry within a transitional period of twelve months.

5.1.5.3. New licensees will qualify for asymmetry for a limited period of three years after entry into the market.

5.1.5.4. South African licensees must charge reciprocal international termination rates for voice calls originating outside of South Africa. The international termination rates charged by South African licensees should not be less than the domestic regulated termination rate or higher than the international termination rate offered by an international operator. Therefore, the difference between domestic termination rates and international termination rates should be fair and reasonable.

6. Next steps

The Authority will publish a notice of intention to commence the public consultation process (or cost modelling process) in order to determine the efficient cost of providing wholesale voice call termination services. The notice will include detailed explanation on the steps to be undertaken by the Authority in order to carry out the cost modelling process.

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