



Government Gazette Staatskoerant

REPUBLIC OF SOUTH AFRICA
REPUBLIEK VAN SUID AFRIKA

Vol. 681

31

March
Maart

2022

No. 46155

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ISSN 1682-5845



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GOVERNMENT NOTICES • GOEWERMENTSKENNISGEWINGS

INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA

NO. 1960

31 March 2022

**MOBILE BROADBAND SERVICES REGULATIONS, 2021****PURSUANT TO SECTION 67(4) OF THE ELECTRONIC COMMUNICATIONS
ACT, 2005 (NO. 36 OF 2005), AS AMENDED**

I, Dr. Keabetswe Modimoeng, Chairperson of the Independent Communications Authority of South Africa hereby publish the Mobile Broadband Services Regulations set out in the Schedule in terms of section 4 read with section 67(4) of the Electronic Communications Act, 2005 (Act No. 36 of 2005), as amended.

DR. KEABETSWE MODIMOENG
CHAIRPERSON
DATE: 30/03/2022

“Free or zero-rated data” means data services provided to end-users at no charge or at a charge of R0.00;

“ICASA Act” means the Independent Communications Authority of South Africa Act, 2000 (Act No. 13 of 2000); and

“SMP” means significant market power as defined in section 67(5) of the Act.

2. PURPOSE OF REGULATIONS

The purpose of these Regulations is to:

- (a) Define relevant wholesale and retail markets or market segments for mobile services;
- (b) determine whether there is effective competition in those relevant markets and market segments;
- (c) determine which, if any, licensees have significant market power in those markets and market segments where there is ineffective competition;
- (d) declare licensees in the relevant market or market segments, as applicable, that have significant market power, as determined in accordance with regulation (6), and impose pro-competitive conditions applicable to each such license to remedy the market failure;
- (e) set out a schedule in terms of which the Authority will undertake periodic review of the markets and market segments, taking into account regulation (8) and the determination in respect of the effectiveness of competition and application of pro-competitive measures in those markets; and
- (f) provide for monitoring and investigation of anti-competitive behaviour in the relevant market and market segments.

3. MARKET DEFINITION

The relevant wholesale and retail markets or market segments for mobile services are defined as follows:

- (a) Retail market: mobile retail services provided in regional geographic areas (provincial, split by urban and rural);
- (b) Upstream market 1: wholesale site infrastructure access in local and metropolitan municipalities;

- (c) Upstream market 2: wholesale national roaming services for coverage purposes;
- (d) Upstream market 3a: wholesale national mobile virtual network operator ("MVNO"); and
- (e) Upstream market 3b: wholesale APN services (including resellers).

4. METHODOLOGY

In determining the effectiveness of competition in the markets defined in regulation 3 above, the Authority applied the following methodology:

- (a) the identification of relevant markets and their definition according to the principles of the Hypothetical Monopolist Test, taking into account the non-transitory (structural, legal, or regulatory) entry barriers to the relevant markets and the dynamic character and functioning of the relevant markets;
- (b) the assessment of licensees' market shares in the relevant markets; and
- (c) the assessment on a forward-looking basis of the level of competition and market power in the relevant markets.

5. EFFECTIVENESS OF COMPETITION

Pursuant to regulation 4, the Authority has determined that competition in the Retail market, Upstream market 1, Upstream market 2, and Upstream market 3b, as defined in regulation 3, are ineffectively competitive.

6. SIGNIFICANT MARKET POWER ("SMP") DETERMINATION

The Authority has determined that MTN and Vodacom are dominant in the following markets:

- (a) Retail market: MTN is dominant with a market share of between 49%-55% in two geographic markets for retail mobile services and therefore has SMP in those markets. Vodacom is dominant with a market share of between 47%-75% in 7 geographic markets for retail mobile services and therefore has SMP in those markets. MTN and Vodacom also have SMP as a result of vertical relationships that could harm competition.

- (b) Upstream market 1: MTN is dominant with a market share of between 45% and 52% in 8 geographic markets for site infrastructure access and therefore has SMP in those markets. Vodacom is dominant with a market share of between 45% and 65% in 39 geographic markets for site infrastructure access and therefore has SMP in those markets. MTN and Vodacom also have SMP as a result of vertical relationships that could harm competition.
- (c) Upstream market 2: MTN and Vodacom are dominant and have SMP in the market for wholesale national roaming since there are only two operators that provide this service for coverage purposes in South Africa. MTN and Vodacom also have SMP as a result of vertical relationships that could harm competition.

7. PRO-COMPETITIVE TERMS AND CONDITIONS

The operators with SMP in the retail markets, wholesale site infrastructure access, and wholesale national roaming services identified in regulation 6 above, must publish on their website and provide the Authority, with the following accounts, records and other documents, on a quarterly basis:

Retail market

- (a) A report and supporting data on effective retail prices¹ paid by end user customers for data services overall, calculated by dividing total revenue for data with total volume of data used (in Gigabytes) over the quarter.
- (b) A report and supporting data on effective retail prices² paid by end user customer category calculated by dividing total revenue for data with total volume of data used (in Gigabytes) over the quarter for each of the following categories:
- (i) By prepaid, hybrid and postpaid customer segments;
 - (ii) By consumer and business customer segments;
 - (iii) Data used between 5am and 12am midnight and data used from 12am midnight to 5am; and

¹ The calculations on effective retail prices should be done excluding free and zero-rated data volumes. Free and zero-rated data volumes should be separately provided.

² The calculations on effective retail prices should be done excluding free and zero-rated data volumes. Free and zero-rated data volumes should be separately provided.

- (iv) By province, and within provinces, and by urban and rural areas, as defined by the Authority.
- (c) Data revenue should exclude fixed-wireless data traffic, wholesale data traffic, mobile virtual network operator data traffic, and enterprise business traffic.
- (d) All retail tariffs available to customers over the quarter.
- (e) A report and supporting data on effective wholesale prices paid by ECS and ECNS licensees for MVNO and APN (including wholesale reseller) services calculated by dividing total revenue for data with total volume of data used (in Gigabytes) over the quarter split by wholesale ECS and ECNS licensee customer.
- (f) Furthermore, if any category of retail price is below any wholesale price the operator with SMP is required to submit an explanation for the differential and fully auditable evidence to the Authority, with all assumptions clearly specified, showing that this differential is cost based or temporary or is economically or technically justifiable on other grounds.
- (g) The Authority will monitor retail prices and wholesale prices, and in particular monitor for margin squeeze, and may refer a complaint to the Competition Commission if the Authority considers that there is a margin squeeze and there is no adequate justification for this.

Wholesale site infrastructure access market

- (h) In relation to wholesale site infrastructure access where the licensee owns the site or controls access to it:
 - (i) A list of sites approved for access within twenty (20) business days of the initial request during the previous quarter, together with the access seeker's name, date of request, date of approval, and all charges, whether recurring or non-recurring, for access to the site;
 - (ii) A list of sites not approved for access within twenty (20) business days of the initial request during the previous quarter, together with the access seeker's name, date of request, and reason for not approving it;
 - (iii) A report on the previous quarter's site access requests summarizing the information in regulations 7(a) and 7(b) above, including a summary of time to approve the requests, a summary of reasons for not approving site access requests, and average effective charges for the sites shared;

- (iv) An updated list of all sites used by the SMP operator, and all charges for sharing any site infrastructure owned or controlled by the SMP operator; and
- (v) In respect of information provided per site, the licensee must also provide the operator's identification code for the site, its longitude and latitude, and Statistics South Africa census 2011 main place code, and site category including macro > 15m, macro <15m, rooftop, indoor (including distributed antennae systems), lamppost, billboard, micro, etc.).

Wholesale roaming services market

- (i) A report and supporting data on effective prices paid for wholesale roaming services by each roaming customer calculated by dividing the total roaming revenue and data roaming volumes, over the quarter split by:
 - (i) Each roaming contract; and
 - (ii) Any contractual price variations used (e.g., metro and non-metro).
- (j) A report and supporting data on wholesale national roaming data volumes used over the quarter by site, together with details of that site including at least the operator's identification code for the site, longitude and latitude, and Statistics South Africa census 2011 main place code.

8. SCHEDULE FOR REVIEW OR REVISION OF MARKETS

The Authority will review the markets for mobile broadband 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 or after three (3) years from the date of publication of these Regulations.

9. CONTRAVENTIONS AND PENALTIES

A licensee that contravenes regulation 7 of these Regulations is subject to a fine not exceeding five million Rand (R5 000 000).

10. SHORT TITLE AND COMMENCEMENT

These Regulations are called the "Mobile Broadband Services Regulations, 2021" and will come into force upon publication in the *Government Gazette*.



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REASONS DOCUMENT
MOBILE BROADBAND SERVICES REGULATIONS, 2021

1. Introduction

1. Section 67(4) of the Electronic Communications Act, 2005 (Act No. 36 of 2005) (“the Act”) states that:

“The Authority must, following an inquiry, prescribe regulations defining the relevant markets and market segments and impose appropriate and sufficient pro-competitive licence conditions on licensees where there is ineffective competition, and if any licensee has significant market power in such markets or market segments.”

2. On 16 November 2018, the Authority published its Notice of intention to conduct Market Inquiry into Mobile Broadband Services in terms of section 4B of the Independent Communications Authority of South Africa Act, 2000 (Act No. 13 of 2000), as amended (“ICASA Act”) read with section 67(4) of the Electronic Communications Act, 36 of 2005, as amended (“the Act”).³
3. The purpose of the Mobile Broadband Services Inquiry (‘the Inquiry’) was to assess the state of competition and determine whether or not there are markets or market segments within the mobile broadband services value chain which may warrant regulation in the context of a market review in terms of section 67(4) of the Act.
4. The Inquiry was conducted in six (6) phases (i.e., Phase 1 – commencement of the market inquiry, Phase 2 - Discussion Document, Phase 3 – Public Hearings on the Discussion Document, Phase 4 – Findings Document and draft regulations (if necessary), Phase 5 – Public hearings on draft regulations and Phase 6 – Final regulations and reasons document).
5. On 26 March 2021, the Authority published the Findings Document on Mobile Broadband Services Inquiry (Government *Gazette* No. 44337) (“Findings Document”) and the draft Mobile Broadband Services Regulations (Government *Gazette* No. 44337) (“the draft Regulations”).
6. On 17 May 2021, the Authority published a notice of extension⁴ of written representations on the draft Regulations from 12 May 2021 to 28 May 2021.
7. On 28 May 2021, the Authority received written representations⁵ on the draft Regulations from Vodacom, MTN, Cell C, Telkom, ISPA, SACF, Falcon & Hume (on behalf of an anonymous licensee), the Free-Market Foundation and the ICT SMME Chamber.⁶

³ Government Gazette 42044 published on 16 November 2018.

⁴ Government *Gazette* 44590.

⁵ Submission by the World Bank was not considered as it did not follow due process and was submitted after the submission deadline.

⁶ <https://www.icasa.org.za/legislation-and-regulations/regulations-underway/mobile-broadband-services>

8. The Authority published a media statement on its website⁷ on 6 August 2021 inviting stakeholders to the virtual public hearings on the draft Regulations, which were held on 12 and 13 August 2021.
9. All interested parties, except the SACF⁸, who submitted written representations on the draft Regulations participated in the public hearings. The Authority did not request supplementary representations during the hearings.

2. Legislative framework

10. The Inquiry was initiated in terms of section 67(4) of the Act.
11. In terms of section 67(4) of the Act:

“the Authority must, following an inquiry, prescribe regulations defining the relevant markets and market segments and impose appropriate and sufficient pro-competitive license conditions on licensees where there is ineffective competition, and if any licensee has significant market power in such markets or market segments.”

3. The Authority’s reasons for decisions

3.1. Regulation 1: Definitions

12. ICT SMME Chamber proposed inclusion of the following definitions⁹:

“structural as referred to in the Hypothetical Monopolist Test”

“Transformation”

“ICT”

“Product – This is particularity in reference to the dominant players cutting out SMME by operating in any device that have a SIM Card through the Transversal Contracts and other means for them to have Monopoly in the ICT space.”

“SIM Card”.

“Device”

13. The Authority’s reason for incorporating regulation 1 (Definitions) is to provide clarity and certainty on the meaning of certain terms referenced in the Regulations. The Authority

⁷ <https://www.icasa.org.za/news/2021/virtual-public-hearings-in-respect-of-the-draft-mobile-broadband-services-regulations>

⁸ SACF was not available on the allocated time slot.

⁹ Page 3 of ICT SMME Chamber- Response to ICASA Draft Mobile Broadband Services Regulations submission dated 28 May 2021.

didn't include the above definitions as proposed by the ICT SMME Chamber in the final Regulations as they are not used in the body of the Regulations.

3.2. Regulation 2: Purpose of the Regulations

14. ICT SMME Chamber proposed that regulation 2(d) be revised as follows¹⁰:

“(d) declare licensees in the relevant market or market segments, as applicable, that have significant market power, as determined in accordance with subsection (6), and impose pro-competitive conditions applicable to each such license to remedy the market failure.”

15. Regulation 2 (Purpose of the Regulations) aligns with the mandate of the Authority to conduct an inquiry to assess the state of competition and determine whether or not there are market or market segments within the mobile broadband services value chain which may warrant regulation in the context of a market review in terms of section 67 of the Act.

16. The Authority has amended regulation 2(d) in line with the ICT SMME Chamber's proposal.

3.3. Regulation 3: Market Definition

3.3.1. Retail market

3.3.1.1. Submissions received

Vodacom

With regard to the product market, Vodacom stated that the Authority should consider, on a forward-looking basis, the potential impact of the recent growth in mobile broadband services. Vodacom also noted the inclusion of voice, SMS, and data services as part of one aggregated market and the reasons provided by the Authority.¹¹

With regards to the geographic market, Vodacom agreed with the Authority's finding that the retail mobile services market is sub-national.¹²

¹⁰ Page 3 of ICT SMME Chamber- Response to ICASA Draft Mobile Broadband Services Regulations submission dated 28 May 2021

¹¹ Page 60 of Vodacom's non-confidential submission.

¹² Ibid.

MTN

MTN indicated that ICASA did not provide sufficient reasons to conclude that the geographic market was provincial as opposed to national in scope. MTN also indicated that if ICASA had followed a proper application of the SNIPP test, it would have arrived at a national geographic market at retail level.

Telkom

Telkom stated that the Authority should define a national retail market as it was of the view that operators compete on a national basis.

In addition, Telkom stated that the Authority should have used competition issues arising from vertical integration as the basis for a national geographic market.

ICT SMME Chamber

ICT SMME Chamber indicated that the Authority's market definition should be aligned to the services offered to the customer instead of focusing on the underlying technology¹³.

3.3.1.2. The Authority's decision, having considered all the submissions received:

The Authority is of the considered view that the recent growth in mobile broadband services, largely as the result of Covid-19, is not significant to warrant the change in the retail market definition. It should also be noted that MTN's concern with regard to the geographic market definition was adequately considered and addressed by the Authority in the Findings Document on Mobile Broadband Services Inquiry.¹⁴

3.3.2. Upstream market 1

3.3.2.1. Submissions received

Vodacom

Vodacom disagreed with the market definition as it was of the view that all demand-side substitutes have not been included. Vodacom was of the view that unused rooftops, micro

¹³ Para 1 of ICT SMME Chamber - Response to ICASA Draft Mobile Broadband Services Regulations – No 44337 submission dated 28 May 2021

¹⁴ The Authority has outlined the reasoning for markets defined at the Retail level in detail in para 56-58 and 61-67 of the Final Findings Document. These findings remain unchanged.

sites, lampposts and billboards should have been included in the market definition as part of demand-side substitutes.¹⁵

MTN

MTN indicated that ICASA's approach to defining both the product and geographic market at site infrastructure access level was flawed, in that ICASA did not include microsites in the product market, and incorrectly defined the geographic market as municipal as opposed to national.

Telkom

Telkom submitted that the Authority should define a separate site access market for indoor and distributed antenna systems (DAS) sites due to distinct competition dynamics.

Telkom disagreed with ICASA's geographic market definition. Telkom was of the view that some, or all, of upstream market 1 product markets could be aggregated into wider geographic markets, depending on the degree to which competitive characteristics differ across them.¹⁶

3.3.2.2. The Authority's decision, having considered all the submissions received:

The comments from MTN and Vodacom relate to matters already considered during the inquiry and dealt with in the Findings document.¹⁷ Telkom's comment that distributed antennae systems (DAS) ought to have been included in the remedies proposed by the Authority is a relevant consideration. In the Authority's findings document, these are indeed included as a component of indoor sites and are part of the wholesale market for site infrastructure defined by the Authority. In addition, regulation 7(h) referred to 'macro' site infrastructure which implied that, for instance, indoor site infrastructure (such as DAS) where the licensee owns the site or controls access to it were excluded from the draft Regulations, which was not the Authority's intention. These issues are now clarified in regulation 7(h) of the final Regulations.

¹⁵ Page 72 of Vodacom's non-confidential submission.

¹⁶ Page 43.

¹⁷ The Authority has outlined the reasoning for markets defined in para 131-135 and 144-151 of the Final Findings Document.

3.3.3. Upstream market 2

3.3.3.1. Submissions received

Vodacom

Vodacom indicated that the revised market definition including coverage with a national geographic scope was inappropriate. Vodacom stated that the scope of the national roaming market should be limited to areas where access was not viable from an access seeker's perspective on a forward-looking basis.¹⁸

MTN

MTN submitted that ICASA had not provided any substantial evidence to support its claim that roaming for coverage was distinct from roaming for capacity. MTN also indicated that ICASA did not consider the role of supply-side responses and had based its analysis on historic conditions whilst ignoring dynamics which indicate fierce competition at that level.

3.3.3.2. The Authority's decision, having considered all the submissions received

The comments by Vodacom and MTN relate to matters already considered during the inquiry and dealt with in the Findings document.¹⁹

3.3.4. Upstream market 3b

3.3.4.1. Submissions received

Vodacom

Vodacom indicated the Authority's market definition was appropriate.²⁰

ISPA

ISPA agreed with the findings relating to the market for wholesale APN resellers, particularly identification of the anti-competitive effect of retail rates being set lower than wholesale rates.²¹

¹⁸ Page 78 of Vodacom's non-confidential submission.

¹⁹ The Authority has outlined the reasoning for defined in para 171-175 and 179-180 of the Findings Document.

²⁰ Ibid.

²¹ Para 3.4 of ISPA Submission Draft Mobile Broadband Services Regulations 2021 20210528.

Falcon and Hume

Falcon and Hume stated that ICASA has found that there is ineffective competition in the "Upstream market 3b: wholesale access point name services (including resellers)" and further submitted that the market dynamics of the upstream wholesale APN services are very similar to that of the upstream wholesale MVNO market for the following reasons:²²

- a) the APN reseller sells services of a MNO, which services are largely defined by the MNO;
- b) the APN reseller has very little bargaining power to define the services to be sold as the APN reseller is wholly dependent on the infrastructure (RAN) and resources (spectrum and coverage) of the MNO in order to be able to conduct its business (much like the MVNOs that are wholly dependent on MNOs).

3.3.4.2. The Authority's decision, having considered all the submissions received:

These comments refer to matters considered during the inquiry and dealt with in the Findings document.²³ The Findings Document states that MVNOs and wholesale APN services (including resellers) are in separate markets.²⁴

3.4. Regulation 4: Methodology

3.4.1.1. Submissions received

The SACF stated that the draft regulations are scant on the methodology employed and how the Authority applied the methodology in defining the market and in determining significant market power.

ICT SMME chamber submitted that regulation 4(a) be amended to include access to finance as a non-transitory entry barrier.²⁵

²² Para 3.2.6 of submission (Letter to ICASA - Submission in respect of Draft Mobile Broadband Services Regulations - FH Inc (25 May 2021)).

²³ The Authority has outlined the reasoning for markets defined in Retail in para 218-227 of the Findings Document.

²⁴ Para 210 of the Findings Document.

²⁵ Page 2 of ICT SMME Chamber - Response to ICASA Draft Mobile Broadband Services Regulations – No 44337 submission dated 28 May 2021.

3.4.1.2. The Authority's decision, having considered all the submissions received:

The methodology followed by the Authority is outlined in section 67 of the Act and also in a Guideline for conducting market reviews published on 8 March 2010.²⁶ The methodology used for the determination of market definition and significant market power is further expanded on in the Discussion Document.²⁷

3.5. Regulation 5: Effectiveness of competition

3.5.1. Retail market

3.5.1.1. Submissions received

Vodacom

Vodacom disagreed with the Authority's determination that competition in the retail mobile services market was ineffective based on an assessment of market shares for two (2) years being 2018 and 2019. Vodacom stated that the Authority's finding based on market shares only was flawed and incomplete given that high market shares doesn't necessarily imply that there was a lack of competition. Vodacom indicated that the Authority didn't consider the following factors which it believes have significant impact on the effectiveness of competition in the retail mobile services markets:

- (a) Limited barriers to expansion in the retail market given the rapid and successful expansion of Rain, Liquid Telecom and Telkom Mobile.
- (b) MTN has surpassed Vodacom and is the market leader in terms of network quality.
- (c) Implementation of significant price reductions despite spectrum constraints.
- (d) The potential significant impact of the spectrum to be assigned in terms of the ITA process.
- (e) Increased competition in terms of price and non-price factors despite spectrum constraints.

In addition, Vodacom raised a concern that the Authority's analysis on the effectiveness of competition were based on generic or national geographic scope of the market as opposed to the 16 sub-national retail markets that were identified.

²⁶ <https://www.icasa.org.za/uploads/files/Guideline-for-Conducting-Market-Reviews.pdf>

²⁷ Section 3 of the Discussion Document.

MTN

MTN submitted that ICASA had failed to consider the relevant factors which indicate vigorous competition in the retail mobile services market.

ISPA

ISPA agreed with the Authority that competition was ineffective in the retail market, and that there is an entrenched duopoly in the provision of retail mobile broadband services. Further, the specific identification of the anti-competitive effects of the vertically integrated nature of Vodacom and MTN such as to justify a finding of SMP in the markets under consideration²⁸.

Falcon and Hume

Falcon and Hume agreed with ICASA's determination that there was ineffective competition in the retail market.²⁹

3.5.1.2. The Authority's decision, having considered all the submissions received:

All of these comments refer to matters considered during the inquiry and dealt with in the Findings document³⁰, save for Vodacom's comment on the growth of Rain and Liquid Telecom.

In relation to the growth of Rain and Liquid Telecom, it is important to note that while Rain may have rolled out a significant number of sites, Liquid Telecom's site footprint is relatively small. In both cases, the end-user customer base remains small, in line with their relatively niche offerings. Rain, for instance, is a data-only provider and does not offer voice and SMS services, while Liquid Telecom targets business customers rather than consumers. In order to reach their niche target markets, both operators have rolled out sites on a limited geographic basis, mainly in higher-income urban areas and business nodes. In the case of Rain, their site expansion is linked to a roaming arrangement with Vodacom that is not generally available to site access seekers. Their expansion is therefore not indicative of low barriers to entry and effective competition.

²⁸ Para 3.3 of ISPA Submission Draft Mobile Broadband Services Regulations 2021 20210528.

²⁹ Para 3.1 of submission (Letter to ICASA - Submission in relation to Draft Mobile Broadband Services Regulations - FH Inc (25 May 2021)).

³⁰ Para 6.2.4 of the Findings Document.

3.5.2. Upstream market 1

3.5.2.1. Submissions received

Vodacom

Vodacom disagreed with the Authority's determination that there was ineffective competition in the site access markets. Vodacom indicated that the Authority's analysis was flawed as the Authority did not consider the following:³¹

- (a) access and non-discriminatory obligations that are imposed on licensees in terms of the Facilities Leasing Regulations. Also, Vodacom indicated that sharing of facilities is required in terms of the municipal or local government laws/policies. In addition, Vodacom indicated that the reference offer requirement in terms of the spectrum ITA will make the non-discrimination provision of the Facilities Leasing Regulations easier to enforce.
- (b) The strong competition in the site market which is mainly driven by site sharing. Vodacom also indicated that competition for site access seekers between MTN and Vodacom is strong and will likely intensify going forward.
- (c) Viable options that access seekers have in addition to Vodacom and MTN's infrastructure (i.e., tower companies and unused infrastructure available for development). Vodacom also indicated that number of shareable sites is growing with tower companies adding new sites.

Telkom

According to Telkom, the Authority provided limited reasons for its view that 5G will not impact the market in the next three years. On a forward-looking basis, Telkom stated that the Authority should have considered effective site access or sharing regulations for 5G sites to ensure effective competition in 5G occurs in the long run.

ISPA

ISPA agreed with the findings made in respect of the ineffective competition in the identified upstream markets³².

³¹ Page 73 of Vodacom's non-confidential submission.

³² Para 3.2 of ISPA Submission Draft Mobile Broadband Services Regulations 2021 20210528.

3.5.2.2. The Authority's decision, having considered all the submissions received: These comments refer to matters considered during the inquiry and dealt with in the Findings document.³³

3.5.3. Upstream market 2

3.5.3.1. Submissions received

Vodacom

Vodacom indicated that the Authority's determination was flawed given that:³⁴

- (a) The Authority's assessment of the effectiveness of competition was not forward looking.
- (b) The Authority did not calculate market shares for national roaming, but the Authority concluded that market shares for coverage-based national roaming were very high.
- (c) The Authority didn't consider fully competition dynamics in the national roaming market including significant price reductions for roaming.
- (d) The Authority adopted a static view on the market and therefore, underplayed factors that are likely to stimulate competition in the national roaming market.

In addition, Vodacom indicated that whilst it agreed with the Authority's view that there were only two operators capable of providing national roaming, this does not necessarily imply that competition is ineffective.

Cell C

Cell C supports ICASA's determination that the roaming market was characterised by ineffective competition, as there were only two choices of network providers.³⁵

ISPA

ISPA agreed with the Authority's determination that competition was ineffective.³⁶

³³ The Authority has outlined the reasoning for markets defined in Retail in para 144-151 and 61-67 of the Final Findings Document.

³⁴ Page 79 of Vodacom's non-confidential submission.

³⁵ Page 8 Redacted Version.

³⁶ Para 3.2 of ISPA Submission Draft Mobile Broadband Services Regulations 2021 20210528.

3.5.3.2. The Authority's decision, having considered all the submissions received: These comments refer to matters considered during the inquiry and dealt with in the Findings document.³⁷

3.5.4. Upstream market 3a

3.5.4.1. Submissions received

Vodacom

Vodacom agreed with the Authority's determination in relation to the MVNO access market.³⁸

MTN

MTN submits that there was vigorous competition in the MVNO access markets.

Cell C

Cell C agreed with the Authority's determination that MVNO markets were not characterised by ineffective competition, noting future developments and MVNO requirements contained in the Spectrum Invitation to Apply (ITA).³⁹

ISPA

ISPA agreed with the Authority's determination in respect of the ineffective competition in the identified upstream markets⁴⁰.

Falcon and Hume

Falcon and Hume submitted that there was also ineffective competition in "*Upstream market 3a*"⁴¹.

³⁷ The Authority has outlined the reasoning its views on roaming in para 185-191 of the Final Findings Document.

³⁸ Page 85 of Vodacom's non-confidential submission.

³⁹ Page 3 Redacted Version.

⁴⁰ Para 3.2 of ISPA Submission Draft Mobile Broadband Services Regulations 2021 20210528.

⁴¹ Para 3.1 of submission (Letter to ICASA - Submission in respect of Draft Mobile Broadband Services Regulations - FH Inc (25 May 2021)).

3.5.4.2. The Authority's decision, having considered all the submissions received:

These comments refer to matters considered during the inquiry and dealt with in the Findings document.⁴²

3.5.5. Upstream market 3b

3.5.5.1. Submissions received

Vodacom

Vodacom disagreed with the Authority's determination that competition is ineffective in the APN services market. Vodacom indicated that the spectrum ITA will, among others, enhance competition in the provision of APN services. Vodacom also indicated that the possible provision of APN services by the WOAN will further improve competition in the APN services market.⁴³

3.5.5.2. The Authority's decision, having considered all the submissions received:

These comments refer to matters considered during the inquiry and dealt with in the Findings document.⁴⁴

3.6. Regulation 6: Significant Market Power determination

3.6.1. Retail market

3.6.1.1. Submissions received

Vodacom

Vodacom indicated that the Authority's analysis of SMP in respect of market shares and vertical integration was incomplete and inaccurate. With regards to market shares, Vodacom indicated that the market shares of Vodacom and MTN were not stable which was an indication of robust competition. With regard to vertical integration, Vodacom indicated that

⁴² The Authority has outlined the reasoning for findings related to market 3 in para 218-227 of the Final Findings Document.

⁴³ Page 87 of Vodacom's non-confidential submission.

⁴⁴ The Authority has outlined the findings on competition in the APN market in para 223-226 of the Final Findings Document.

the Authority did not provide evidence on the harm to competition. In addition, Vodacom indicated that the risk of foreclosure is very low even on a forward-looking basis.⁴⁵

MTN

MTN indicated that it was crucial to address ICASA's continued treatment of MTN and Vodacom on a combined basis. MTN also indicated that ICASA appears to find that MTN is dominant or possesses substantial market power, on a collective basis with Vodacom.

MTN further indicated that ICASA has not complied with the requirements of administrative law in that it has considered irrelevant factors and failed to consider relevant factors, and thus made decisions that no reasonable decision-maker would have made.

SACF

SACF was of the view that the draft Regulations have cited the definition of SMP as defined in section 67(5) of the Act. In the absence of a study to determine dominance, the basis for the determination is unclear and should be outlined in the interests of transparency and fairness. The SACF indicated that the lack of clarity on how SMP was determined makes it difficult to support the determination of SMP.⁴⁶

Telkom

Telkom submitted that the Authority's decision to strictly adhere to the 45% market share test for dominance is not required by the Act. Furthermore, Telkom indicated that adhering to a 45% market threshold in a market with at least four operators reduces the likelihood of making a finding of dominance in any given relevant market.

Telkom disagreed with the Authority that Vodacom and MTN have market power in some regions of the country and not nationally.⁴⁷ Telkom indicated that the sub-national approach to defining markets and the dominance findings in some regions of the country, which are mostly rural would significantly reduce the potential in any pro-competitive remedies.

⁴⁵ Page 69 of Vodacom's non-confidential submission.

⁴⁶ Para 27 – 29.

⁴⁷ Page 44-45.

Cell C

Cell C agreed with the Authority that both Vodacom and MTN have market power in all markets that have been characterised by ineffective competition, regardless of the exact geographic market definition.⁴⁸

ISPA

ISPA agreed with the Authority's determination in respect of the ineffective competition in the identified upstream markets⁴⁹.

3.6.1.2. The Authority's decision, having considered all the submissions received:

These comments refer to matters considered during the inquiry and dealt with in the Findings document.⁵⁰

3.6.2. Upstream market 1

3.6.2.1. Submissions received

Vodacom

Vodacom disagreed with the Authority's determination on SMP in respect of Upstream market 1. Vodacom indicated that the Authority failed to provide evidence that vertical integration would harm competition.⁵¹

Telkom

Telkom was of the view that ICASA applied the 45% threshold too strictly which is not necessarily required by the Act.

Telkom raised its concern with regard to the Authority's approach at measuring market shares in upstream market 1. Telkom indicated that the approach is likely to create a downward bias on market shares. It also creates the possibility that market shares are influenced by different

⁴⁸ Page 4 Redacted Version.

⁴⁹ Para 3.2 of ISPA Submission Draft Mobile Broadband Services Regulations 2021 20210528.

⁵⁰ The Authority has outlined the reasoning for its finding on SMP in the Final Findings Document in para 93-98.

⁵¹ Page 75 of Vodacom's non-confidential submission.

underlying strategies with respect to property acquisition across competing operators, and it is not apparent why any such influence would be appropriate⁵².

Cell C

Cell C agreed with the Authority that both Vodacom and MTN have market power in all markets that have been characterised by ineffective competition, regardless of the exact geographic market definition.⁵³

3.6.2.2. The Authority's decision, having considered all the submissions received:

These comments refer to matters considered during the inquiry and dealt with in the Findings document.⁵⁴

3.6.3. Upstream market 2

3.6.3.1. Submissions received

Vodacom

Vodacom indicated that the Authority's determination of licensees with SMP was not backed by evidence and was inconsistent with the Act.⁵⁵

Telkom

Telkom submitted that the Authority's decision to strictly follow the 45% market share test for dominance is not necessarily required by the Act.

Cell C

Cell C agreed with the Authority that both Vodacom and MTN have market power in all markets that have been characterised by ineffective competition, regardless of the exact geographic market definition.⁵⁶

⁵² Page 46- 47.

⁵³ Page 4 Redacted Version.

⁵⁴ The Authority has outlined the reasoning for its finding on SMP in the Final Findings Document in para 152-155.

⁵⁵ Page 82 of Vodacom's non-confidential submission.

⁵⁶ Page 4 Redacted Version.

3.6.3.2. Authority's decision, having considered all the submissions received:

These comments refer to matters considered during the inquiry and dealt with in the Findings document.⁵⁷

3.7. Pro-competitive Terms and Conditions

3.7.1. Retail market

3.7.1.1. Submissions received

Vodacom

Vodacom agreed with the Authority's decision not to impose cost-based pricing in the retail market as this was in line with best practice.⁵⁸ Vodacom raises concerns that the detailed nature of the pricing information remedy may disincentivise pro-poor pricing, and that price discrimination is an efficient means of recovering fixed costs.

Vodacom also considers that all products should be taken into account when evaluating retail prices, including voice, data and SMS.

MTN

MTN stated that the information remedies proposed are unduly onerous.

Telkom

Telkom raised concerns that the Authority's proposed pro-competitive remedies do no more than impose additional reporting requirements on Vodacom and MTN. Telkom indicated that reporting requirement will not enhance competition.

Telkom indicated that the remedies ought to apply nationally as it was of the view that the geographic markets are national.

Cell C

Cell C raised a concern about the proposed remedies and that they seem too broad, they are vague and too crude a measure to yield any real insights or results. According to Cell C, ICASA will not be able to have a view of overall prices in the market, or of price competition, as the

⁵⁷ The Authority has outlined the reasoning for its finding on SMP in the Final Findings Document in para 192.

⁵⁸ Ibid, 70.

reporting requirement does not apply to smaller players. Furthermore, Cell C indicated that retail market competition problems identified by the Competition Commission's Data Services Market Inquiry were ignored by ICASA.⁵⁹

Cell C's proposed adding promotions to the list of price categories in order for prices in the retail market to be effectively monitored.⁶⁰

Cell C raised a concern that the proposed remedies are not sufficiently nuanced to address the retail structure issue identified by the Competition Commission whereby the poor are charged high prices per megabyte or are forced to purchase data bundles of lower utility (i.e., restricted and short-term validity bundles).⁶¹

Falcon & Hume

Falcon & Hume agreed with the Authority's proposed pro-competitive terms and conditions in relation to the SMP operators as set out in regulation 7. However, Falcon & Hume proposed the following additions and amendments to regulation 7:⁶²

- (a) Insertion of the following sentence at the end of paragraph 2:

"Additionally, to the extent that any category of retail price is below any wholesale price in relation to any SMP operator, the Authority shall immediately inform the Competition Commission thereof and shall provide all such supporting documentation to the Competition Commission as the Competition Commission may require from time to time."

- (b) Insertion of a new paragraph 3 as follows:

"To the extent that any category of retail price is below any wholesale price in relation to any SMP operator ("Inflated Wholesale Price and the SMP operator has not provided the Authority with satisfactory evidence and explanations showing that the differential is cost based or temporary, the Authority shall be entitled to require the SMP operator to:

⁵⁹ Page 13 Redacted version.

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² Para 2 of submission (Letter to ICASA - Submission in relation to Draft Mobile Broadband Services Regulations - FH Inc (25 May 2021)).

- a) *reduce its wholesale price to a wholesale price which is less than the lowest comparable retail price; and*
 - b) *credit or reimburse any customer which purchased from the SMP operator at the Inflated Wholesale Price, with an amount equal to the difference between the retail price and the Inflated Wholesale Price, for a period which is equal to the period during which the SMP operator charged the Inflated Wholesale Price."*
- (c) Insertion of a new paragraph 4 as follows:

"In addition to the required reporting on retail and wholesale prices, any SMP operator must submit detailed and fully auditable supporting data and evidence of the cost per Gigabyte for total data used. This cost is to include only the direct network costs applicable to provide a wholesale data service and any indirect costs and overhead costs are to be excluded from the calculation of the cost per Gigabyte of total data used."

ICT SMME Chamber

ICT SMME Chamber proposed the following additions on Regulations 7:

"Impose interconnection obligations to support new network operators, and wholesale access obligation to enable services completion where competition in the underlying network infrastructure was lacking." International Telecommunications Union, 2013⁶³.

3.7.1.2. The Authority's decision, having considered all the submissions received:

The Authority has identified market failures, where there is ineffective competition and licensees that have significant market power, in a number of markets, and has proposed regulations that are proportionate to these market failures. The Authority did not consider it necessary to have remedies such as cost-based pricing or the structural separation of SMP operators because such interventions may disincentivise investment or result in instability in the sector. Rather, a proportionate response calls for an information remedy, which enables the Authority to monitor market outcomes including wholesale and retail prices. As contemplated in the Authority's Findings Document, regulatory considerations in relation to

⁶³ Page 2 of ICT SMME Chamber - Response to ICASA Draft Mobile Broadband Services Regulations – No 44337 submission dated 28 May 2021.

spectrum, including the pro-competitive remedies, were considered in the Authority's Invitation To Apply for International Mobile Telecommunications process.

As mentioned above, the Authority received submissions that the remedies proposed are too light in nature. The information remedies that the Authority is introducing are proportionate to the competition concerns that the Authority has found, for the reasons discussed above.

The Authority did not amend regulation 7 as proposed by Falcon & Hume as the proposed insertion is addressed by regulation 7(g) of the final Regulations.

The Authority added regulation 7(d) requiring that all tariffs available to consumers over the quarterly reporting period are to be provided by the SMP operators. This will enable the Authority to monitor retail tariffs in a systematic manner, and enable improved wholesale and retail pricing margins, as well as other retail pricing concerns such as on-net and off-net discrimination.

3.7.2. Data submission

3.7.2.1. Geographic considerations

In summary, MTN, Cell C and Telkom's view is that geographic markets are national. Telkom is of the view that remedies ought to apply nationally. Vodacom agrees with the Authority's assessment that markets are local or regional. MTN and Vodacom are of the view that the information remedies that the Authority has put in place should only apply to the geographic areas where they have SMP.

3.7.2.2. Time period:

Several comments were also received regarding the time period over which the pricing information should be collected.

3.7.2.3. Products:

Vodacom also considers that all products should be taken into account when evaluating retail prices, including voice, data and SMS. Cell C also raised concerns about on-net and off-net retail voice price discrimination.

3.7.2.1. The Authority's decision, having considered all the submissions received:

The Authority determines that information on all geographies in South Africa should be supplied by the SMP operators, for the following reasons:

- First, the data for all of the geographies where the SMP licensees operate are needed so as to compare wholesale and retail prices, and other information on their activities where they have SMP and where they do not. This information will assist the Authority to meet the objectives in Section 2 of the ECA to ensure that the SMP operators' prices, quality and variety of products are reasonable and promote the interests of consumers.
- Second, there are economies of scale in the supply of data, and the preparation of reports and analysis, once carried out for one locality, can practically be carried out for another.

With regard to the time period, the Authority revised the Regulations to include the average volumes, revenues and resulting prices are to be reported over a quarterly period. In addition, in order to take into account Vodacom's concerns regarding disincentivising pro-poor pricing, free volumes have been separated from the calculations of effective retail prices, though these must still be made available, and these may be taken into account by the Authority when computing a margin squeeze.

With regard to products, the Authority has accordingly added a regulation requiring that all tariffs available to consumers over the quarterly reporting period are to be provided by the SMP operators. This will enable the Authority to monitor retail tariffs in a systematic manner, and enable improved wholesale and retail pricing margins, as well as other retail pricing concerns such as on-net and off-net discrimination.

3.7.3. Upstream market 1

3.7.3.1. Submissions received

Vodacom

Vodacom was of the view that site access market pro-competitive remedies were not necessary as the market was competitive and that the Facilities Leasing Regulations are also effective. In addition, Vodacom indicated that it does not support additional remedies, as they may harm investment incentives without delivering significant benefits.⁶⁴

Telkom

Telkom stated that the proposed pro-competitive remedies in respect of site access will not enable the Authority to effectively monitor prices in the manner and for the purpose stated in the Regulations.

⁶⁴ Page 77 of Vodacom's non-confidential submission.

Telkom also indicated that the Authority does not explain how the proposed pro-competitive remedies will address concerns arising from anti-competitive behavior and what action the Authority will take should it find any form of anti-competitive behavior other than referring to an undertaking by the Commission that it will prosecute if wholesale rates are above effective retail rates.⁶⁵

Telkom submitted that the Authority should propose stronger remedies in the site access market in order to address exclusionary discrimination by vertically integrated dominant incumbents.⁶⁶

Telkom further proposed that the Authority should adopt an “equivalence of inputs” approach to site access regulation which should be tailored for the specific challenges that prevail with access to indoor and DAS sites⁶⁷.

Telkom reaffirmed its view that accounting separation should be imposed and implemented to address the identified competition concerns and the dominance of incumbent players. Telkom further submitted that ICASA is incorrect to view accounting separation as an unjustifiable burden.

Cell C

Cell C indicated that the proposed site access regulations were wholly ineffective to deal with the failures identified by ICASA and elaborated on by many of the submissions.

Cell C did not agree with the regulatory requirements that only apply to ‘macro site infrastructure’ and seem to exclude rooftops, indoor, micro, lamppost, billboards, and other infrastructure considered by Cell C as essential. Cell C was of the view that the proposed regulations should apply to all of the proposed list of essential facilities previously submitted by Cell C.⁶⁸

⁶⁵ Page 17

⁶⁶ Page 8

⁶⁷ Ibid.

⁶⁸ Page 6 Redacted Version

Cell C submitted that Section 43(8) of the Act requires ICASA to prescribe a list of essential facilities and that ICASA ought to prescribe this list, as doing so would significantly enhance the capacity of licensees seeking access to such facilities to compete in the relevant markets⁶⁹.

Cell C cautioned that the proposed regulations will be ineffective in preventing denial for access to sites on the basis that it is not technically feasible. It is also unclear to Cell C what remedy will be used, once ICASA finds that site access has been unreasonably denied or that access prices are too high.⁷⁰

Cell C indicated that there is no clarity on the Authority's decision to remove accounting separation, redrafting facilities leasing regulations remedies from the draft Regulations.⁷¹

3.7.3.2. The Authority's decision, having considered all the submissions received:

Cell C and Vodacom's comments relate to matters considered and dealt with in the Findings Document at paragraphs 164-168 on remedies, and in relation to the Authority's findings on market definition, ineffective competition, significant market power, in sections 6.1.4-6.4.4 of the Findings Document. In relation to Vodacom, Telkom and Cell C's comments on the proportionality of the Authority's remedies, including in relation to the impact on investment, see the discussion in Section 3.7.1.2 above.

As mentioned above, Telkom commented that distributed antennae systems (DAS) ought to have been included in the remedies proposed by the Authority. Regulation 7(h) referred to 'macro' site infrastructure which implied that, for instance, indoor site infrastructure (such as DAS) where the licensee owns the site or controls access to it were excluded from the draft Regulations, which was not the Authority's intention. These issues are now included in regulation 7(h) of the final Regulations. In the Authority's findings document, these are indeed included as a component of indoor sites and are part of the wholesale market for site infrastructure defined by the Authority.

3.7.4. Upstream market 2

3.7.4.1. Submissions received

⁶⁹ Page 7 Redacted Version

⁷⁰ Page 8 Redacted Version

⁷¹ Ibid

Vodacom

Vodacom indicated that regulation of national roaming was not necessary as competition was effective and was expected to intensify on a forward-looking basis.

Vodacom also indicated that coverage roaming, and retail prices cannot be easily compared. Furthermore, Vodacom indicated that it was unclear how the Authority intends to use the detailed site-level information required in terms of the national roaming market. Also, Vodacom indicated that it was not clear how the Authority will ensure the data will be comparable or usable across operators.⁷²

Telkom

Telkom stated that the proposed pro-competitive remedies in respect of roaming will not enable the Authority to effectively monitor prices in the manner and for the purpose stated in the regulations.

Telkom reaffirmed its view that accounting separation should be imposed and implemented to address the identified competition concerns and the dominance of incumbent players. Telkom further submitted that ICASA is incorrect to view accounting separation as an unjustifiable burden.

Cell C

Cell C welcomed the Authority's intervention in the roaming market and the decision that roaming agreements and effective roaming prices will be required to be submitted as this will at least provide insight into these agreements and introduce some transparency. In addition, Cell C proposed that further detail about wholesale national roaming volumes, used by site, should also be submitted to ICASA on a quarterly basis.⁷³

Cell C is of the view that 'self-reporting' remedy by incumbents, will be ineffective as relying on the incumbents to identify and self-report on margin squeeze is an impractical solution. The obligation for MNOs to submit evidence to show that 'the differential is cost based or temporary' is far too vague and unpractical to prevent margin squeeze, which is a technical abuse to identify.⁷⁴

⁷² Page 82 of Vodacom's non-confidential submission.

⁷³ Page 11 Redacted Version.

⁷⁴ Page 3 Redacted Version.

Cell C submitted that it was not clear that ICASA will have the ability to compare the specific access charges (wholesale) e.g. paid by roaming customers with the associated retail rates, to monitor retail and wholesale prices, and particularly margin squeeze.⁷⁵ Cell C therefore recommended that ICASA refine the reporting requirements, to include more clarity about the format, level of detail required, as well as an indication of how the information will be used and what further interventions are contemplated.⁷⁶

Cell C was of the view that a pricing remedy may be a radical remedy at this stage but encouraged ICASA to consider doing a cost study in order to understand whether the roaming charges bear any relationship to the underlying cost of the network, especially in cases where the network costs have mostly been recouped.⁷⁷

3.7.4.2. The Authority's decision, having considered all the submissions received:

As noted previously, the Authority has decided on an informational remedy (regulation 7) that will assist in monitoring pricing. In relation to the comments on the proportionality of the Authority's remedies, see the discussion in Section 3.7.1.2 above.

In addition, several comments were received regarding the nature of the assessment of margin squeeze, and the process for the referral of complaints to the Competition Commission. This has now been clarified in regulation 7(g) of the final Regulations, to explain that the Authority will consider the information submitted and then decide whether to refer a complaint to the Competition Commission. While Vodacom, for example, raises concerns that the Authority's regulations may have unintended consequences, SMP licensees will be permitted to provide justifications for its wholesale and retail prices, including on economic and technical grounds, and the regulations have been clarified accordingly.

3.7.5. Upstream market 3a and 3b

3.7.5.1. Submissions received

Vodacom

Vodacom was of the view that the Authority was not empowered to impose Section 67(4)(d)

⁷⁵ Ibid.

⁷⁶ Page 4 Redacted Version.

⁷⁷ Page 9 Redacted Version.

of the Act remedies on MVNO services as the Authority had made the determination that competition is effective and that no operator has SMP in this market.⁷⁸

Vodacom indicated that no licensee has SMP in the APN services market and therefore, the Authority was not empowered in terms of section 67 of the Act to monitor margins or impose remedies on operators in wholesale APN services market.

Despite the above concern, Vodacom was of the view that the Authority should compare the average prices for wholesale APN services with the average prices for retail APN services as opposed to all retail mobile services. Vodacom was also of the view that this would more accurately reflect how APN access seekers use wholesale APN services.⁷⁹

MTN

MTN submitted that the terms and conditions are unduly onerous, in that they were not borne out by fact and ICASA has not provided evidence of a market failure as required by section 67 (4) of the Act, to impose regulations.

The reporting obligations, especially in markets where there is no market failure, are inappropriate and disproportionate remedies, which are impractical and financially burdensome.

In addition, MTN submits that it is inappropriate and irrational for ICASA to impose regulation regarding MVNO and APN services, as it has admitted that there are no operators with SMP in these markets.

Cell C

Cell C agreed with the reporting requirements for MVNO services as there were various potential abuses (such as margin squeeze) which could hamper competition in these markets

⁷⁸ Page 87 of Vodacom's non-confidential submission.

⁷⁹ Page 87 of Vodacom's non-confidential submission.

going forward. It further suggested that the active monitoring of prices in MVNO market should entail more detailed reporting and analyses.⁸⁰

Cell C was of the view that the proposed regulations for MVNO access, are not sufficient to prevent a margin squeeze by Vodacom and MTN.⁸¹

Cell C proposed that ICASA specify *ex ante* that the price for MVNO access should allow for a sufficient return for the MVNO customer. This is because the cost of mobile services for Cell C is impacted by the price it pays for roaming which in turn determines the access price for the MVNO's hosted by Cell C. If the other MNOs are mandated to provide MVNO access as part of their spectrum conditions, then they may engage in margin squeeze behaviour vis-à-vis Cell C by providing MVNO services at a cost lower than the roaming service to Cell C.

⁸²

In addition to ICASA monitoring prices, Cell C was of the view that a more targeted approach is required to prevent margin squeeze. It proposed ICASA should consider the more specific recommendation of the Competition Commission in this regard. Cell C indicated that while a price remedy may be premature, ICASA should develop a cost model for MVNO access pricing to be used by the incumbents, with a reasonable margin (as defined by ICASA).⁸³

Cell C was of the view that the proposed regulations for APN market were not sufficient to prevent a margin squeeze by Vodacom and MTN.

Nevertheless, Cell C submitted that the active monitoring of the APN market prices will be important for ICASA to identify trends and monitor for margin squeeze.⁸⁴

Falcon and Hume

Falcon and Hume proposed an amendment to regulation 6 of the draft Regulations: Significant Market Power Determination for "Upstream market 3a: wholesale national MVNO" and "Upstream market 3b: wholesale APN services (including resellers)"⁸⁵.

⁸⁰ Page 3 Redacted Version.

⁸¹ Page 10 Redacted Version.

⁸² Ibid.

⁸³ Page 11 Redacted Version.

⁸⁴ Page 10 Redacted Version.

⁸⁵ Para 4 of submission (Letter to ICASA - Submission in relation to Draft Mobile Broadband Services Regulations - FH Inc (25 May 2021)).

3.7.5.2. The Authority's decision, having considered all the submissions received:

It is important to note that the information remedy (regulation 7) incorporated in respect of MVNO, and APN markets relates to findings of ineffective competition in retail markets, mitigating the significant market power of mobile operators in those retail markets. This remedy therefore applies to SMP operators in markets for retail services. The remedy will allow the Authority to ensure that the supply of wholesale APN and MVNO services is made on a competitive basis, enabling APN and MVNO service providers to compete effectively in retail markets.

Several comments were received regarding the nature of the assessment of margin squeeze, and the process for the referral of complaints to the Competition Commission. This has now been clarified in the final Regulations, to explain that the Authority will consider the information submitted and then decide whether to refer a complaint to the Competition Commission. While Vodacom, for example, raises concerns that the Authority's regulations may have unintended consequences, SMP licensees will be permitted to provide justifications for its wholesale and retail prices, including on economic and technical grounds, and the Regulations have been clarified accordingly.

In relation to the comments on the proportionality of the Authority's remedies, see the discussion in Section 3.7.1.2 above.

3.8. Schedule for review or revision of markets

3.8.1.1. Submissions received

MTN

MTN submitted that the schedule for review was too lengthy, especially given the increasingly fast-paced dynamism characterising mobile telecommunications services, and rapid technological advancements in the relevant markets.

MTN raised a concern that the review period is left to the discretion of ICASA and does not provide a firm commitment for review. The implications of this discretionary review period are that the severe impact of regulation on incorrectly defined markets (such as reducing incentives to invest and innovate) would be compounded if left unremedied for long periods.

Accordingly, MTN submits that the draft Regulations be reviewed no later than eighteen (18) months from publication of the final Regulations.

Telkom

Telkom was of the view that the draft Regulations guarantee another market review in exactly three years' time⁸⁶.

Falcon & Hume

Falcon and Hume submitted that regulation 8 be amended by deleting the phrase⁸⁷: *"but not earlier than three (3) years from the date of publication of these Regulations"*; or alternatively be amended as follows⁸⁸: *"provided that if during such three (3) year period the Competition Commission and/or the Competition Tribunal finds a SMP operator guilty of contravening any provision in the Competition Act, 1998 dealing with the abuse of dominance, vertical restrictive practices or horizontal restrictive practices, or enters into a settlement agreement with a SMP operator in respect of any such alleged contraventions ("Competition Authorities Findings"), then the Authority may undertake a review of the relevant markets for mobile services at any time so determined by the Authority but in any event not more than two (2) months following the date of the Competition Authorities Findings."*

3.8.1.2. The Authority's decision, having considered all the submissions received:

The Authority is still of the view that the minimum period of review of three years is appropriate and is in line with international best practice. In addition, the minimum period of 3 years is necessary to ensure certainty and stability in the sector. However, it should be noted that regulation 8 does not preclude the Authority from reviewing the relevant markets earlier than 3 years if deemed necessary.

3.9. Regulation 9: Contraventions and Penalties

3.9.1.1. Submissions received

MTN

MTN submitted that the penalties for infringement were excessive and disproportionate given that they would be levied on operators that failed to provide ICASA with a quarterly

⁸⁶ Page 40.

⁸⁷ Para 2.2 of submission (Letter to ICASA - Submission in respect of Draft Mobile Broadband Services Regulations - FH Inc (25 May 2021)).

⁸⁸ Ibid.

report as set out in the Draft Regulations and not for unlawful conduct that would have an impact on any market.

SACF

The SACF stated that it has long enjoyed the incentive-based approach the Authority has adopted towards penalties and remedies. As such, the SACF believes that the current proposed penalties are punitive and lack remedial incentive.⁸⁹

Accordingly, the SACF proposes that the section on the penalties should be aligned to section 17H of the ICASA Act.

ICT SMME Chamber

ICT SMME Chamber proposed the following amendments to regulation 9 “*A license that contravenes regulation 7 of these Regulations is subject to a fine not exceeding the greater of R30 000 000 (thirty million Rand) or a maximum of 30% of the license’s annual turnover for every day or part thereof during which contravention continued*”⁹⁰.

3.9.1.2. The Authority’s decision, having considered all the submissions received:

The Authority has revised regulation 9 with section 17H(3)(iii) of the ICASA Act.

In relation to the comments on the proportionality of the Authority’s remedies, see the discussion in Section 3.7.1.2 above.

⁸⁹ Para 75 on page 13.

⁹⁰ Page 2 of ICT SMME Chamber - Response to ICASA Draft Mobile Broadband Services Regulations – No 44337 submission dated 28 May 2021.

Printed by and obtainable from the Government Printer, Bosman Street, Private Bag X85, Pretoria, 0001
Contact Centre Tel: 012-748 6200. eMail: info.egazette@gpw.gov.za
Publications: Tel: (012) 748 6053, 748 6061, 748 6065