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FINDINGS DOCUMENT ON PRIORITY MARKETS INQUIRY IN THE ELECTRONIC COMMUNICATIONS SECTOR

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1. Introduction

1.1. The Priority Market Inquiry ("the Inquiry") is a priority setting exercise, the purpose of which is to identify markets susceptible to *ex ante* regulation that the Authority may prioritise for a market review in terms of section 67 of the Electronic Communications (Act No.36 of 2005) ("ECA"). Section 67 of the ECA provides the Authority with the legislative powers to address market failures and introduce pro-competitive remedies.

1.2. This prioritisation exercise does not preclude the Authority from identifying other markets outside of this exercise, susceptible to ex ante regulation and conducting a market review thereto in terms of section 67 of the ECA.

1.3. Following the prioritisation exercise, the Authority's preliminary view as contained in the Discussion Document was that the following markets should likely be prioritised for a market review:

- Wholesale fixed access, which refers to fixed access services and wholesale supply of asymmetric broadband origination.
- Upstream infrastructure markets incorporating national transmission services and metropolitan connectivity.
- Wholesale mobile services incorporating mobile radio access network services and wholesale supply of mobile network services.

1.4. The Authority has since received representations from various stakeholders on the Discussion Document. The representations are summarised in this document, which also provides the Authority's response and final findings.

1.5. This Findings Document is structured in terms of the following sections:

- An outline of the process followed;
- Legislative framework;
- An analysis of submissions on specific comments on the Discussion Document and the Authority's response;
- The Authority's findings and way forward;

2. An outline of the process followed

2.1. On 25 August 2017, the Independent Communications Authority of South Africa ("the Authority") published a notice in the Gazette[1] indicating its intention to conduct the Inquiry in terms of section 4B (1)(a) of the Independent Communications Authority of South Africa Act, 2000 (Act No. 13 of 2000) ("ICASA Act").

2.2. The purpose of the Inquiry is to identify broad markets and or market segments in the electronic communications sector that are susceptible to ex ante regulations, and determine which of these markets should be prioritised for market reviews and potential regulation in terms of section 67(4) of the ECA.

2.3. The Inquiry is conducted in four Phases (i.e. Phase I – Market study, Phase II - Discussion Document, Phase III – Public Hearings and Phase IV – Findings Document). As part of Phase I, the Authority published a questionnaire requesting information and opinions from stakeholders (including the general public) to inform its market study.

2.4. The Authority received questions of clarification from Vodacom, MTN and Cell C on 13 July 2017 regarding the questionnaire and the Inquiry process and further questions from Internet Services Providers' Association ("ISPA") on 14 July 2017. Vodacom, MTN and Cell C further requested for an extension for submission of responses to Phase I in their respective submissions requesting clarity.

[1] No. 40945

2.5. On 8 August 2017, the Authority published its responses to the questions of clarity raised by the aforementioned stakeholders. In addition, the Authority granted an extension in the Gazette[2] to stakeholders to submit their responses to the questionnaire of Phase I by 25 working days from 4 September 2017 to 10 October 2017.

2.6. On 10 October 2017, the Authority received responses to Phase I (the Market Study) and published a notice in the Gazette on 16 February 2018 with the Discussion Document, preliminarily identifying the markets to be subjected for a market review. The Discussion Document invited comments from the public and the Authority received written submissions on the 3rd, 25th, 26th and the 30th of April, from the following stakeholders:

- Vodacom,
- MTN,
- Cell C,
- Telkom,
- Liquid Telecom,
- The Wireless Access Providers' Association of South Africa ("WAPA"),
- ISPA,
- Project Isizwe.

2.7. The Authority held public hearings on the Discussion Document on Priority Markets on 7 June 2018 where the following stakeholders presented:

- Telkom,
- Cell C,
- Liquid Telecom,
- ISPA,
- Vodacom,
- MTN.

2.8. On 14 June 2018, the Authority received Vodacom's written response to the questions raised by the Authority during the public hearings held on 7 June 2018.

[2] No. 41040

3. Legislative framework

3.1. This Inquiry was initiated in terms of section 4B(1)(a) of the ICASA Act read with section 67(4) of the ECA.

3.2. The Authority is empowered under section 4B(1)(a) to conduct an inquiry into any matter in order to achieve the objects of the ICASA Act or the underlying statutes.

3.3. In terms of section 67(4) of the ECA, 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.

4. Analysis of submissions on specific comments on the Discussion Document

The Discussion Document invited comments on its approach to identifying priority markets in the telecommunications sector, including its prioritised markets. 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 on including only the main points made in the various submissions and not to respond to each and every point made.

4.1. Approach to prioritisation

The Inquiry process is a screening exercise of the full range of electronic communications services to identify where the Authority should allocate resources to engage in an in-depth market review. It bears emphasis that this study is not a market review process as contemplated in section 67(4) of the ECA.

In identifying markets, the Authority utilised the following guiding principles as outlined in the Discussion Document:

- Markets were deliberately identified as broader than the narrowest possible market definitions in order to provide a collective of connected market segments that may form the logical basis for a market review;
- The Authority identified three layers in the telecommunications industry, namely an upstream infrastructure layer, which serves as input into the wholesale network services layer, which in turn serves as input into the retail services layer;
- The Authority did not include electronic communications facility ("facilities") as part of the identification of markets. This was on the basis that facilities are already subject to distinct facilities leasing obligations and regulations and that any issues raised with respect to facilities should be directed at the existing processes. It was further noted that if it is found that the regulation of facilities needs to go further, the market review process of telecommunications services could impose remedies that implicate facilities.

The Authority used screening measures to identify telecommunication markets that exhibit features suggesting potential ineffective competition. In particular, the Authority considered the following factors:

- Competition screening measures, which includes market shares and concentration, as well as barriers to entry and expansion. Both are key elements to market structure, having regard to the existing firms in the market as well as the role of potential competition from new entrants. These measures are also used in other jurisdictions to preliminarily assess competition in markets;
- The Authority also considered submissions made to ICASA, which raised competition concerns and provided a view on which markets to prioritise.

Following the screening of the likelihood of ineffective competition, markets were further screened for materiality of the market to government policy objectives and consumers (individuals and businesses). A further consideration of the materiality of markets included the assessment of factors such as the size of markets as well as their potential importance in the future.

The Authority considered other factors, including:

- The Authority had a preference for identifying markets at the wholesale market level susceptible to *ex ante* regulation where possible. However, the Authority noted that some retail competition issues cannot necessarily be addressed at the wholesale level and in those circumstances a retail market focus may be appropriate;
- The Authority did not consider prioritising markets already subject to a review process or markets already regulated following a section 67 market review process.

The Authority also dealt with some of the responses on approach as raised by several stakeholders in response to the Questionnaire. Some of these suggestions were incorporated in the approach adopted above, but a few of the other factors raised were not considered appropriate and these are described further below:

- Some submissions to the Authority tried to engage in a detailed assessment of the elements that are part of a market review process. Since the Inquiry is not a market review as contemplated in section 67(4) of the ECA, but is rather a process of identifying a list of markets that the Authority may prioritise for market reviews going forward, the Authority did not consider it appropriate to engage in a detailed assessment of market review elements for this particular Inquiry;
- Several respondents to the Questionnaire put forward the three-criteria test, as the preferred approach to be adopted by the Authority. The Authority explained that the European Commission process is not equivalent to the prioritisation exercise. The Authority, however, incorporated some elements of the three-part test but also excluded some elements of the test as not being appropriate or useful at the prioritisation stage. The Authority also incorporated other factors, such as those that are appropriate in the South African context;
- Some submissions proposed that wholesale markets cannot be considered on a standalone basis for market review and regulation unless the Authority first demonstrates that competition is ineffective in the downstream retail markets. The Authority noted that the ECA does not require a demonstration of a lack of competition at the retail level as a basis for initiating a market review at the wholesale level or in order to regulate wholesale markets.

4.1.1. Submissions received

4.1.1.1. Vodacom

Vodacom made the following points with regard to ICASA's approach to identifying markets: [3]

- The Authority had not adequately considered international precedent to guide its approach. Vodacom stated that the Authority's identified markets should not be narrower than the markets defined in other jurisdictions and that the Authority's approach to prioritisation should factor in where regulation has been prioritised in other jurisdictions.
- Vodacom was unclear on how competition law principles have been used by the Authority to determine broad markets for possible prioritisation;
- Vodacom agreed with the Authority's approach of adopting broad market segments. However, Vodacom noted that the Authority has deviated from this intention in certain instances;
- Vodacom agreed with the Authority that telecommunications services should be split into different layers. However, Vodacom noted that this split may potentially be rigid as it may not always be applicable and that regulation should be focused on bottlenecks which are present at the most upstream level;
- Vodacom disagreed with the Authority's approach to exclude duct and pole from prioritisation and holds the view that it should have been defined as a separate upstream market. Vodacom stated that the Authority had failed to recognise the importance of duct and pole access, as well as the lack of enforcement of the Facilities Leasing Regulations[4] promulgated under Chapter 8 of the ECA.

Vodacom made the following points with regard to ICASA's approach to prioritising markets:[5]

- Vodacom was not against the use of competition screening measures but stated that a more detailed assessment of competition was required during a market review. Vodacom also noted that the use of competition screening measures used by the Authority presuppose correctly defined markets. It stated that the competition screening measures should also be compared to international benchmarks. It further noted that the Authority

[3] Vodacom response to Discussion Document (Non-confidential), pg. 9-20.
[4] Government Gazette No. 33252
[5] Ibid, pg. 21-22.

should have regard to the dynamic nature of telecommunications markets where competitive dynamics could change, thus making it more difficult to decide which markets to prioritise;

- Vodacom supported the use of materiality of markets as a screening tool to identifying priority markets. However, it noted that the potential importance of particular markets should also be considered. In particular, Vodacom highlighted that low access to fixed-line services relative to mobile services should not place more emphasis on mobile services;[6]
- Vodacom agreed with the Authority that regulation should not be focused on retail markets, and stated that the Authority should focus on the most upstream markets. It further stated that should regulation of the most upstream market be insufficient, then the regulation of the wholesale market is warranted;[7]
- Vodacom agreed that the Authority should not regulate markets that have already been subject to market reviews, such as fixed and mobile termination markets;
- Vodacom stated that the Authority should take into account effective broader regulations or policies.[8]

Vodacom made the following points with regard to specific issues raised by respondents on the on the Authority's approach:[9]

- Vodacom agreed that the Authority's Inquiry is not a market review, noting that this exercise was neither comparable nor able to substitute parts of a market review. However, it stated that the Authority should ensure that it does not prejudge market definitions by suggesting candidate markets or market definitions and that the Authority should have assessed the effectiveness of competition by going beyond simple screening measures;
- Vodacom submits it was difficult to assess the adequacy of competition law during this inquiry as this would require that the Authority take views on market definitions as well as the types of competition problems in different markets. It suggested that this was only possible after a thorough assessment of the effectiveness of competition. It disagreed with the Authority's position on the role of competition law in determining the necessity of ex ante regulation and further highlighted that competition law is important in the EU to avoid

[6] Ibid, pg. 23.
[7] Ibid, pg. 24.
[8] Ibid. pg. 24.
[9] Ibid, pg. 25-28.

excessive regulation and ensure proportionality in the application of ex ante and ex post competition law statutes;

- Vodacom suggested that the Authority should assess competition in the downstream markets during a market review of wholesale/upstream markets for the following reasons put forward by Vodacom:
  - Wholesale regulation was intended to improve end-user outcomes in retail markets, as such the Authority would not be able to determine whether wholesale regulation was required unless it has a clear understanding of the competition problems that exist at the retail level. Since the demand for wholesale services is derived demand, it would be difficult to assess wholesale markets without an understanding of the effectiveness of competition at the retail level;
  - The Authority's regulation of fixed and mobile call terminations without establishing ineffective competition at retail level does not support the Authority's position in the Discussion Document. In addition, the regulation of fixed and mobile call terminations is unique in that the market definitions used by the Authority result in operators having a 100% share of calls terminating on its network. Further, it was widely established that a lack of regulation of termination markets will lead to competition problems at the retail level. In addition, the Authority did assess mobile retail markets when regulating mobile termination rates, albeit without an assessment of appropriate market definitions and effectiveness of competition;
  - The Authority's position was not supported by international precedent. The EC had indicated that national regulatory authorities in the European Union need to identify competition concerns at the retail level to regulate wholesale markets.

4.1.1.2. MTN

MTN made the following points with regard to ICASA's approach to identifying markets:[10]

- in terms of section 67(4) of the ECA, a proper market definition exercise should be conducted at the first stage. Therefore, according to MTN, it is not correct that the Authority is not at the market definition stage. MTN highlighted that the Authority had undertaken some form of a market definition exercise, despite the Authority stating that a market definition exercise was not required for the prioritisation exercise;

[10] MTN response to Discussion Document, par. 3.2.1-3.2.3.

- it expressed concern that, although it agreed with the Authority's approach to identifying broad markets, the Authority had identified narrow market segments in its Discussion Document. According to MTN a standard approach to market definition will lead to fewer and broader markets.

With regard to the approach adopted to the prioritisation of the identified markets, MTN noted the following:[11]

- It agreed with the Authority that a competition screening exercise should involve the assessment of barriers to entry as this forms the first step of the EC's three-criteria test. However, it stated that effective competition could exist between players in spite of high barriers to entry. MTN proposed that the Authority should assess the effectiveness of competition, which is done in the second stage of the EC's three-criteria test. It stated that an assessment of the effectiveness of competition would result in less markets being prioritised. It further suggested that the EC three-criteria test was a good basis to approach the next phase;
- It stated that the prioritisation exercise was the first phase of the inquiry process but stated the information that was useful during market review should also be used during the prioritisation phase. MTN's presentation to the Authority during the public hearings emphasized that the analysis for prioritization should go beyond barriers to entry and concentration and also include the state of competition[12];
- It agreed with the Authority on the stance that assessing government objectives were important but indicated that materiality to government objectives should not necessarily translate to materiality with respect to prioritisation. It suggested that the next phase should involve a full cost benefit analysis;
- It agreed with the Authority regarding the view that the upstream level should be regulated when there are inefficiencies at that level, but stated that over-regulation of competitive upstream markets could harm upstream incentives, as well as the basis for downstream competition;
- It agreed with the Authority on the view that effective competition at the retail level does not imply a competitive retail price if the prices at the wholesale level were inflated. It further stated that the relevant question was whether competition at the retail is weak

[11] Ibid, par. 2.4, 3.3.12-3.3.15, par. 4.1-4.6
[12] ICASA Priority Market Oral Hearings MTN South Africa, 7 June 2018

enough to justify regulation and therefore competition at the retail level should be considered.

4.1.1.3. Cell C

With regard to ICASA's approach to prioritisation, Cell C made the following main points: [13]

- It disagreed with the Authority's identification of markets. It states that the Authority should correctly define markets in order to identify markets whose competition levels should be enhanced. It also indicated that correctly defined markets need to be understood in order for the state of competition to be understood;
- It indicated that screening measures proposed by the Authority will not be of use if markets have not been correctly identified according to international best practice. Cell C questioned the approach used by the Authority to define markets broadly instead of applying the narrowest possible market definition;
- It disagreed with the Authority's approach of excluding facilities from the identification of markets as an assessment of market power would require an assessment of the control of essential facilities in a market review;
- In terms of the competition screening measures identified by the Authority, Cell C stated that a market review would also consider these measures and therefore this was a duplication of effort and resources;
- It questioned why competition concerns have not been identified in the Discussion Document, although the Authority stated that it would consider responses received from respondents to identify competition concerns;
- It stated that it is not aware of a way in which the Authority's prioritisation approach can legally or practically determine the importance that markets have to national policy. It indicated that it was unclear on why there was only reference to the National Development Plan and not SA Connect and the National Integrated ICT Sector Policy White Paper;
- It stated that the EC's three-criteria test was an indispensable tool for market reviews and the prioritisation of market reviews. It further stated that it is unclear on why the Authority dismisses the need for the EC's three-criteria test and yet proposes to use some elements of it.

[13] Cell C submission in response to the priority markets in the electronic communications sector, 2018, par. 2 – 13.

4.1.1.4. Telkom

Telkom considered it appropriate for the Authority to undertake a prioritisation exercise of this nature but indicated that it must be done correctly and be based on the realities of South Africa.[14]

In terms of the identification of markets, Telkom stated that Authority's list of markets was based on markets identified by EU regulators and was, therefore, not specific to South Africa. It indicated that caution should be applied when applying conclusions from other markets to South Africa. [15]

Telkom made the following statements with regard to the approach applied for the prioritisation of the identified markets:[16]

- It found the approach adopted by the Authority to be reasonable but questioned the manner in which it had been applied;
- It indicated that the competition screening exercise requires the use of properly defined markets. It further indicated that not defining markets properly can lead to incorrect statistics;
- It stated that the Authority should have considered how market shares and barriers to entry evolve. It also indicated that while it had a high market share as historically it was the only licensed provider of fixed services, barriers to fixed sub-markets were lower than in mobile on a local scale;
- It agreed with the Authority that government policy was a relevant consideration as the Authority should factor in the environment within which it operates. Telkom also indicated that materiality was an important criterion for prioritising markets;
- It agreed with the Authority that competition concerns should be addressed at the wholesale level where it was possible. It further agreed with the Authority on the stance that some retail issues require regulatory intervention at the retail level and that an intervention up the wholesale value chain was likely to take a significant amount of time to be effective, necessitating regulation closer to the retail market.

[14] Telkom response to Discussion Document: Response to questions (Non-confidential), pg. 2.
[15] Ibid, pg. 3.
[16] Ibid, pg. 3-6.

In terms of the specific issues raised by the Authority in the Discussion Document:[17]

- Telkom maintained its view that the EU three-criteria test was a helpful framework to be applied in South Africa. It also agreed with the Authority's incorporation of the first criteria of EC three-criteria test (provided that concentration statistics and assessment of barriers are applied to correctly defined markets). It expressed concern that the second part of the EU three criteria test (assessing whether markets tend to competition) was not included as a screening measure;
- Telkom stated that the Authority was incorrect to argue that it need not establish ineffective retail competition before imposing wholesale regulation. It further argued that this approach was also inconsistent with established regulatory practice.

4.1.1.5. Liquid Telecom

Liquid Telecom stated that the Authority's prioritisation approach was reasonable. However, it stated that by excluding inputs that fall under existing regulations, the Authority excludes inputs such as co-location, wires, ducts, poles, masts and interconnection links and equipment that may require pricing remedies. It stated that this approach may therefore need to be reconsidered.[18]

Liquid Telecom noted that the Authority's present process was not a market inquiry process and further states it was not necessary to assess retail competition to initiate market reviews into wholesale markets.[19]

4.1.1.6. The Wireless Access Providers' Association of South Africa

WAPA stated that the approach taken by the Authority is appropriate and lawful. It agreed with the Authority that the process was a precursor to a Chapter 10 process of the ECA. It also agreed with the Authority's position on the EC's three criteria test.[20]

[17] Ibid, pg.7-8.
[18] Liquid Telecom response to the Discussion Document, par. 8.
[19] Ibid, par. 9.
[20] Wireless Access Providers Association of South Africa response to the Discussion Document, par. 2-4.

4.1.1.7. Internet Services Providers' Association

ISPA found that the approach taken by the Authority was appropriate and that it was not a market review.[21]

4.1.2. The Authority's response

The electronic communications sector comprises of a number of markets at various levels of the supply chain. The purpose of the Inquiry is to determine which of the markets within the broad electronic communications sector should be prioritised for a market review. A prioritisation exercise ensures that the Authority's resources are allocated efficiently and effectively. The Authority is of the considered view that it would not be efficient to conduct a market review for each and every market within the electronic communications sector in the instances where the likelihood of ineffective competition in a particular market was low, or the markets were not material to consumers and government objectives. The Authority does not consider this to be a duplication of effort as the prescribed components of a market review were not replicated in the Inquiry. Once a market review in terms of section 67 is initiated, relevant markets would need to be defined and the effectiveness of competition within those defined markets is determined. The Authority is not at the market definition stage of a market review.

The Authority did not consider it appropriate to determine the effectiveness of competition as part of the Inquiry, including the use of the EC's three-criteria test as has been proposed in some of the submissions received. The Authority recognises that during a market review, an assessment of competition that goes beyond the competition screening measures applied in the Inquiry will be required.

The Authority did not include telecommunication facilities as part of the identification of markets in the Discussion Document. Many of the submissions made in response to the Discussion Document suggest that facilities should be included. A number of reasons have been provided, including the importance of access to facilities for promoting competition and the perceived inadequacy of the existing Facilities Leasing Regulations. On the basis of the submissions

[21] Internet Service Providers of Association response to the Discussion Document, par. 3.1-3.2.

received, the Authority considers it appropriate to include facilities for certain markets. A market review process may find that the regulation of facilities needs to go further and remedies that implicate facilities, including competition remedies, may be required. However, the inclusion of facilities does not preclude the Authority from separately addressing facilities leasing obligations and regulations in terms of the existing Facilities Leasing Regulations under Chapter 8 of the ECA.

The relevance of the retail market has also been raised in a number of the responses. The submissions largely agree that competition concerns should be addressed at the wholesale level, but also suggested that competition at the retail level should be considered for a number of reasons summarised above. The Authority agrees that the consideration of the retail market may be relevant for a holistic assessment of competition, this is particularly in the case of products and services where a distinct value chain can be identified. A holistic assessment would enable the Authority to determine where along the value chain the competition issues arise and whether any regulations that are imposed have the desired outcomes for end users. To the extent that a market review establishes that regulations at the wholesale level would be inadequate, this approach would also enable the Authority to impose remedies at the retail level, if appropriate. However, the Authority maintains that it would have a preference to regulating at the wholesale level and that a lack of competition at the retail level is not required for initiating a market review at the wholesale level or in order to regulate wholesale markets.

In terms of some of the other criteria raised in the responses to the Discussion Document:

- The Authority agrees that the potential importance of particular markets should be considered and that to the extent that a market is small, like fixed access services, this may be an indication of underperformance of the market and should therefore not be excluded on this basis alone;
- In terms of identifying government policy objectives, the review was not limited to the NDP, but a range of other policies and directives as set out in Appendix 2 of the Discussion Document;
- In identifying likely competition concerns, the Authority not only considered the competition screening measures, but also the concerns raised by respondents in response to the

Authority's Questionnaire. Similarly, the Findings Document takes into account the competition concerns as raised in response to the Discussion Document.

4.2. Markets identified

The Discussion Document identified a list of broad markets as provided in the table below. The Authority also provided further potential market segmentations in Appendix 1 of the Discussion Document.

Table 1. Summary of markets and vertical links between them

	Broad market	Downstream from	Upstream of
Retail			
R1	Retail supply of mobile services	W1, W2, W3	
R2	Retail supply of voice telephony at fixed locations	W4, W5	
R3	Retail supply of access to the internet from fixed connections	W6, W7	
R4	Retail supply of managed data network services	U1, U2, U3, U4	
Wholesale			
W1	Wholesale supply of mobile termination services	U1, U2, U3, U4, U5	R1
W2	Wholesale supply of international roaming services	U1, U2, U3, U4, U5	R1
W3	Wholesale supply of mobile network services	U1, U2, U3, U4, U5	R1
W4	Wholesale supply of fixed termination services	U1, U2, U3, U4	R2
W5	Wholesale supply of fixed call access, origination, and transit	U1, U2, U3, U4	R2
W6	Wholesale supply of asymmetric broadband origination	U1, U2, U3, U4	R3
W7	Wholesale supply of internet connectivity	U1, U2, U3, U4	R3
Upstream			
U1	International transmission services		All W, R4
U2	National transmission service		All W, R4

	Broad market	Downstream from	Upstream of
U3	Metropolitan connectivity		All W, R4
U4	Fixed access services		All W, R4
U5	Mobile radio access network services		W1-W3

4.2.1 Submissions received

4.2.1.1. Vodacom

Vodacom stated that the broad markets identified by the Authority represent a reasonable starting point for the prioritisation exercise.[22] However, Vodacom disagreed with some of the Authority's delineations and made the following submissions:[23]

- There should either be a separate upstream market for ducts and poles or duct and pole access should be included in the markets for wholesale local access, national transmission and metropolitan connectivity. The markets for metropolitan connectivity and fixed access services should be defined as national at this stage, and more localised markets should only be considered as part of a more detailed market review process;
- The upstream supply of mobile radio access network services (U5) and the wholesale supply of mobile network services (W3) should form part of the same market. In particular, there should be a broad mobile wholesale market that includes mobile network services, full Mobile Virtual Network Operators and national roaming. There should be a separate upstream market for the active Radio Access Network sharing as part of a broader facilities sharing market (notwithstanding the fact that active RAN sharing was not currently permitted in South Africa);
- It agreed with the Authority's separation of mobile and fixed retail markets, but indicated that Fixed Wireless Access should be excluded from fixed-line markets when it comes to a market review;

[22] Vodacom response to Discussion Document (Non-confidential), pg. 29.
[23] Ibid, pg. 20, 30, 34, 35, 38

- It stated that Over-The-Top services ("OTT") should be explicitly included in the downstream retail supply of mobile services, and that there should be a broad retail market for mobile services that includes different services.

In terms of the possible further market delineations identified by the Authority, Vodacom indicated that the Authority should not be suggesting market segments at this stage of the process as this should instead be considered as part of any market review.

4.2.1.2. MTN

MTN agreed with the Authority that there was no need to identify narrow markets, at this stage or even at a full market review. It indicated that the Authority had identified narrower market segmentations and that applying standard approaches to market definition would lead to broader and fewer markets. In particular, MTN stated that a market for wholesale RAN services should not be identified separately, but should be a component of a broader wholesale mobile services market.[24] It further indicated that there was potential for separate markets by voice, SMS and data at the wholesale level.[25]

Apart from stating that the markets identified by the Authority were potentially more numerous and narrower than they should be, MTN did not make specific submissions with regard to the other identified markets in its response to the Discussion Document.[26]

4.2.1.3. Cell C

Cell C stated that the Authority ought to have correctly defined markets in order to identify markets whose competition levels should be enhanced.[27]

[24] MTN response to Discussion Document, par. 3.2.5
[25] Ibid, par, 3.2.6.
[26] Ibid, par. 3.2.3
[27] Cell C response to Discussion Document, par. 4.1

Cell C provided the following points regarding the market segments identified by the Authority. It:

- disagreed with the Authority's approach of excluding facilities from the identification of markets;[28]
- suggested that the wide market for mobile radio access network services (U5), which includes active RAN sharing and RAN access, was not appropriate;[29]
- suggested that should the Authority intend on assessing the market for mobile data then the Authority should define a separate market for mobile data/broadband, and that such a market definition would be consistent with the EU.[30]

4.2.1.4. Telkom

Telkom provided high level concerns with the Authority's approach to the identification of markets.[31] In particular, it indicated that the Authority did not consider market definition sufficiently and that this was fundamental to the subsequent analysis in this prioritisation exercise, including the estimation of market shares. Telkom indicated that the list of markets identified by the Authority does not accurately reflect South African market conditions as they were based on European markets that were also outdated. It further indicated that the Authority's analysis was static and does not adequately take into account market dynamics.

Telkom's presentation to the Authority stated that the application of market definition methodology in South Africa should produce very different markets compared with Europe. It indicated that its fixed wireline network services face competitive constraints from both fixed wireless and mobile wireless[32].

[28] Ibid, par. 6.2.
[29] Ibid, par. 15.5.
[30] Ibid, par. 15.6.
[31] Telkom response to Discussion Document – response to questions (Non-confidential), pg. 9.
[32] Telkom Priority Markets, 7 June 2018

4.2.1.5. Liquid Telecom

Liquid Telecom stated that the Authority may not have sufficiently focused on the market where there were actual competition concerns, which were in markets for access networks.[33] Further, it stated that the upstream market for fixed access services (U4) should include facilities such as co-location, wires, poles and ducts. With respect to wholesale RAN access and the wholesale mobile network access services, Liquid Telecom does not agree with the exclusion of facilities from these markets as the evaluation access to passive infrastructure (including sites and co-location) is critical and it is of the view that it can lead to savings on passive infrastructure while promoting investments in active infrastructure.[34]

4.2.1.6. The Wireless Access Providers' Association of South Africa

WAPA agreed with the Authority's identification of the markets.[35]

4.2.1.7. Internet Services Providers' Association

ISPA agreed with the Authority's identification of the markets and indicated that these markets should be subjected to greater scrutiny during a section 67(4) market inquiry process.[36]

4.2.2. The Authority's response

Based on the submissions received in response to the broad markets proposed in the Discussion Document, the Authority finds it appropriate to include facilities in the broad upstream markets. This will allow for a complete review of the markets, including the identification of bottlenecks and the determination of whether or not regulatory interventions that go beyond the Facilities Leasing Regulations are required.

In terms of mobile wholesale markets, the Discussion Document identified a separate market for the provision of mobile RAN services as distinct from the wholesale supply of mobile services

[33] Liquid Telecom response to Discussion Document, par. 11.
[34] Ibid, par. 13.
[35] Wireless Access Providers' Association of South Africa response to Discussion Document, par. 4.
[36] Internet Services Providers' Association, par.3.3

making use of the entire mobile network. Several of the responses received argued that separate markets should not be identified, and that wholesale RAN services should be a component of a broader wholesale mobile network services market. For the purposes of the Inquiry, the Authority finds that it is reasonable to identify a broad mobile wholesale market that includes mobile network services, full MVNOs and national roaming. However, it is noted that not all MNOs would be active in the provision of all wholesale mobile network services. In line with the approach of now including facilities, passive network infrastructure as well as active RAN sharing (albeit that this is not currently permitted) are also included. A market review would determine whether these should be distinct upstream markets and also whether there should be further market segmentations at the wholesale level as has been suggested in several of the submissions.

The Discussion Document identified broad markets and noted further possible segmentations. For the purpose of the Inquiry, and in line with the submissions received, the Authority does not consider it appropriate to further segment the broad markets, or to specify local geographic markets. The determination of relevant markets, including the possibility of narrower market segments or geographic markets should form part of a market review.

It is noted, however, that with respect to the mobile market, some responses suggest that separate markets could be defined by service type (e.g. data, messaging and voice). The Authority recognised in the Discussion Document that in the context of a market review, it may be appropriate to consider the retail mobile data or mobile broadband segment separately. Demand for mobile data may diverge from demand for mobile voice and SMS such that the three are not always demanded as a bundle at the retail level, or not demanded as a bundle to the same degree as they have been historically. This may be related to growth in the use of devices that are enabled for data only. In addition, differences in the speed, coverage and quality of data services across MNOs may result in differences of competitive conditions for data relative to voice services. The potential for OTT services to provide some competitive pressure on voice and SMS only, may reinforce differences in competitive conditions for data as distinct from the other services. The Discussion Document also noted that there was the potential for separate markets by network service at the wholesale level based on demand-side considerations.

For the purpose of the Inquiry, the Authority included all types of mobile services at the wholesale and retail level. However, this does not preclude the Authority from conducting a market review of mobile data separately and to consider whether or not the market should be broader when defining markets as part of the market review.

It has also been suggested that OTT services should be included in the retail mobile market. The Authority has previously determined that OTT services do not fall within the same market as retail mobile services.[37] These services are on top of an existing retail mobile service. In addition, OTT services cannot constrain mobile data services. However, in the context of a market review of a broad retail mobile market, the strength of any potential constraint on traditional voice and SMS services presented by mobile OTT services would be considered by the Authority. This would include an assessment of, amongst other factors, how many customers can access such services (e.g. this would exclude users of 2G-enabled handsets), the relative quality of such services (e.g. unmanaged VoIP is usually considered to be a separate market due to quality considerations) and the extent to which customers actually make use of such services in substitution to traditional mobile services (e.g. use of OTT for voice calls as opposed to messaging).

Telkom suggested a major departure from the list of markets identified in the Discussion Document as it argues that fixed wireline network services face competitive constraints from both fixed wireless and mobile wireless. The arguments presented by Telkom regarding the comparative speeds and pricing of fixed and mobile services in South Africa do not necessarily demonstrate that these are substitutes. Such outcomes are also consistent with an under-performing fixed network services market. The Authority maintains that for the Inquiry, fixed and mobile network services should be in separate markets for reasons already provided in the Discussion Document. In the context of a market review, substitutability between fixed and mobile services would be considered when defining relevant markets.

[37] *Gazette* No 41132; para. 3.1.1.1

4.3. Markets to be proposed to be prioritised market reviews

Following the Authority's assessment of possible markets, competition screening measures as well as the materiality of said markets, the following markets were preliminarily identified for prioritisation:

- Wholesale fixed access services, which refers to fixed access services (U4) and the wholesale supply of asymmetric broadband origination (W6);
- National transmission (U2) and metropolitan connectivity (U3); and
- Wholesale supply of mobile network services (W3) and RAN services (U5).

The following sections summarise the responses received from various parties on the Authority's prioritisation.

4.3.1. Wholesale fixed access services

4.3.1.1. Submissions received

4.3.1.1.1. Vodacom

Vodacom agreed with the Authority's prioritisation of wholesale fixed access services (U4 and W6), although Vodacom stated that fixed access services (U4) were of greater importance than the wholesale supply of asymmetric broadband origination (W6), given that fixed access services opens up a larger portion of the supply chain. Vodacom provided the following reasons:[38]

- Telkom was in control of critical infrastructure and will remain unconstrained regardless of whether fixed wireless access services forms part of the market. Vodacom further argued that fixed wireless should be in a separate market and provides only a limited constraint on fixed access services;
- There were significant barriers to entry and expansion in the market;

[38] Vodacom response to Discussion Document (Non-Confidential), pg. 46-49.

- Wholesale fixed access services were materially important. More specifically:
  - wholesale services are important inputs to the fixed and mobile sectors, particularly given the limited access to fibre backhaul and the long-standing concerns around local loop unbundling;
  - wholesale services are of importance to government policy objectives; and
  - poor fixed services outcomes indicate that there are likely to be competition problems in these markets.

4.3.1.1.2. MTN

MTN did not make any comments regarding the Authority's prioritisation of the market for wholesale fixed access services, save to say that it was not concerned with the prioritisation of these markets.[39]

4.3.1.1.3. Cell C

Cell C did not make any specific comments on the Authority's prioritisation of the market for wholesale fixed access services. It stated generally that the methodology adopted for the prioritisation exercise was not supported by international or national precedent and was likely to be a redundant exercise.[40]

4.3.1.1.4. Telkom

Telkom did not agree with the Authority's prioritisation of wholesale fixed access services for the following main reasons:[41]

- It disagreed with the manner in which fixed access has been defined. It argued that wireline services face strong competition from fixed and mobile services over wireless networks. It indicated that if these were included in the market definition, this would have significant implications for the analysis;

[39] MTN response to Discussion Document, par. 2.3.
[40] Cell C response to Discussion Document, par. 14.2.
[41] Telkom response to Discussion Document – response to questions (Non-confidential), pg. 11-27.

- In terms of a policy priority, it stated that the fixed access market was unlikely to meaningfully contribute to the country's policy priorities of promoting accessibility and affordability of telecommunication services. It indicated that the majority of the population relies on mobile services, which should be the priority for South Africa. This was also emphasized in its presentation to the Authority[42];
- It stated that multiple operators have entered and developed networks that directly compete with Telkom. It indicated that the Authority's finding of high barriers to entry was therefore incorrect. Telkom's presentation to the Authority in particular highlighted that metro consumers have a choice of fibre and wireless providers in addition to DSL;[43]
- In terms of materiality, it stated that fixed access markets only serve a small share of the population and were therefore not material inputs into services delivered over other networks.

4.3.1.1.5. Liquid Telecom

Liquid Telecom agreed with the prioritisation of wholesale fixed access services (U4 and W6), but stated that upstream access market should include access to fixed line access network facilities, including co-location, wires, poles and ducts.[44]

4.3.1.1.6. The Wireless Access Providers' Association of South Africa

WAPA stated that the market for wholesale fixed access had relatively low priority as ADSL services had a limited footprint and is slowly diminishing.[45] WAPA attributed this decline to a lack of investment, the growth of fibre and the demand for bandwidth intensive services and applications.[46] It was of the opinion that ADSL will no longer be a significant component of ICT in the future and that addressing competitive concerns was unlikely to yield significant benefits.[47] WAPA further stated that its members have provided fixed wireless alternatives to stolen or unmaintained copper lines and that there had been an aggressive roll-out of fibre optic networks on an open access basis.[48]

[42] Telkom Priority Markets, 7 June 2018
[43] Ibid.
[44] Liquid Telecom response to Discussion Document, par. 11.
[45] Wireless Access Providers' Association of South Africa response to Discussion Document, par. 6.1.
[46] Ibid, par. 6.1.
[47] Ibid, par. 6.2.
[48] Ibid, par. 6.3-6.4

4.3.1.1.7. Internet Services Providers' Association

ISPA supported the prioritsation of all of the markets identified by the Authority. It was of the view that all of the markets identified for prioritisation by the Authority have characteristics of long term market failure and that pro-competitive interventions in these markets will reduce the cost of communication.[49]

4.3.1.1.8. Project Isizwe

Project Isizwe stated that the investment ensuring last mile access into low income and rural areas should be a high priority as these areas have never had copper infrastructure. It further stated that users in townships/rural areas were necessarily dependent on relatively more expensive, mobile services. Project Isizwe is of the view that the failure by the Authority to address the need for fixed line services will widen the inequality gap.[50]

4.3.1.2. The Authority's response

The Authority's preliminary identification of wholesale fixed access services as a priority for a market review is supported in several of the responses to the Discussion Document as summarised above. However, the responses also highlight that passive infrastructure, previously excluded by the Authority, should be included. Facilities such as ducts and poles are now also included in the identification of the market, on the basis that this would allow the Authority to intervene at this level of the market, should a market review determine that a regulatory intervention is warranted.

Whilst the wholesale supply of asymmetric broadband origination is regarded as less important in some of the submissions, the Authority considers it appropriate to include this in the context of a market review into wholesale fixed access services that would include all relevant wholesale services with respect to last mile fixed access. The Authority is concerned with access outside of metros, where the rollout of last mile services is limited and ADSL remains the main fixed line access option. The Authority also considers it appropriate to identify services further down the value chain below passive infrastructure to ensure that any regulatory intervention, if warranted, would impact on as much of the value chain as possible. However, the Authority does not consider

[49] Internet Services Providers' Association, par, 3.4.
[50] Project Isizwe, pg. 1-2.

it appropriate to include any associated retail markets in the case of fixed access services as these serve as inputs for a range of retail markets, including mobile.

Despite Telkom's argument against the inclusion of wholesale fixed access markets, the Authority considers it appropriate to include fixed access markets for the reasons already provided in the Discussion Document. In terms of some of the specific arguments raised by Telkom:

- The suggestion that fixed services should be excluded on the basis that the majority of the South African population relies on mobile services is rejected by the Authority. The low penetration of fixed services in South Africa was likely to be symptomatic of competition problems in the fixed sector, which would be considered more fully in any market review. Further, wholesale fixed access services, including leased lines, were important inputs into a range of mobile and fixed services further downstream;
- Telkom raised alleged significant competitive constraints from fixed-wireless solutions, which in line with defining broad markets, was included in the fixed access market for the purpose of the Inquiry. However, the extent of the constraint imposed by fixed-wireless access technologies would need to be considered in the context of market review, as well as Telkom's own position in respect of fixed-wireless where it is a large provider itself. This is also in the context where other submissions have argued that fixed-wireless solutions impose a limited constraint on fixed line services. Telkom also raised competition issues from mobile, which the Authority had included in a separate market. The extent of substitutability with mobile, particularly where data heavy applications become more prevalent going forward, would be considered further in the context of a market review;
- Telkom had focused on demonstrating competition and entry in the metro areas, where there has been rollout of fibre by Telkom as well as other wholesale providers. Despite rollout of fibre in metros by other network operators, Telkom still holds a significant position as indicated in the Discussion Document. Further, whilst there is roll out in dense metro areas, this is not necessarily occurring outside of the metro areas, where it is less likely that providers will invest in last mile access and Telkom remains the only provider. The Authority is not only concerned with fixed line access for metro consumers, but also for consumers outside of the metros where there is less choice.

4.3.2. National transmission and metropolitan connectivity

4.3.2.1. Submissions received

4.3.2.2.1. Vodacom

Vodacom agreed with the Authority's prioritisation of upstream infrastructure markets, which comprises of national transmission (U2) and metropolitan connectivity services (U3). It argued that a separate upstream market for ducts and poles should also be included and prioritised for market review.[51]

With respect to national transmission and metropolitan connectivity services, Vodacom proposed the following reasons why national transmission and metropolitan connectivity services should be prioritised:[52]

- It agreed that Telkom had the largest share of national transmission and metropolitan connectivity by a considerable margin and that its position of market power should also consider control over access and ducts;
- It stated that the key barriers to entry include the high costs of duplicating duct and pole networks, long lead times to rolling out infrastructure and that some municipalities have single trench policies. Vodacom further stated that entry had typically occurred in high traffic routes, but rollout on low to medium traffic routes is more difficult. It is for this reason that it had sought access to Telkom's poles. The inability to conclude a leasing agreement had been the subject of a dispute between the parties. Vodacom indicated that the benefit of duplicating duct and pole networks was likely to be exceeded by the benefit from sharing the facilities as there was limited scope to differentiate or innovate a pole and duct network. Vodacom's oral presentation to the Authority noted further that there was sufficient capacity to accommodate new cables and equipment[53];
- It agreed that national transmission and metropolitan connectivity services were important for all retail services and that this importance will grow as future data usage increases.

[51] Vodacom response to Discussion Document, pg. 50.
[52] Ibid, pg. 50-51.
[53] Vodacom presentation to ICASA (7 June 2018)

4.3.2.2.2. MTN

MTN did not make any comments regarding the Authority's prioritisation of the markets for national transmission and metropolitan connectivity, save to say that it was not concerned with the prioritisation of these markets.[54]

4.3.2.2.3. Cell C

Cell C did not make any specific comments on the Authority's prioritisation of the market for national transmission and metropolitan connectivity. It stated generally that the methodology adopted for the prioritisation exercise was not supported by international or national precedent and is likely to be a redundant exercise.[55]

4.3.2.2.6. Telkom

Telkom stated that there were some aspects of the leased lines market that would meet the criteria for prioritisation, as they are important inputs to all telecommunication services and can be considered to satisfy the materiality criteria. It disagrees with the view that there are significant competition issues in this market for the following reasons:[56]

- Whilst historically Telkom has had a strong position with respect to leased lines, it argued that this changed significantly. It indicated that leased line services were under pressure from MNOs, who have substituted Telkom's services through self-provision of network infrastructure, as well as by entrants who operate wholesale open-access fibre networks;
- The impact of the Competition Commission Settlement Agreement resulted in price reductions and Telkom's vertical separation had resulted in a positive impact on competition;
- The impact of competition had resulted in significantly reduced market prices for leased line connections. Telkom indicated that prices of leased line connections have been reduced beyond the settlement undertakings, which was an indication of the competitive pressure on Telkom. It further indicated that competitive pressure on some routes and parts of the country have affected pricing in other parts of the country where there was less choice of networks.

[54] MTN response to Discussion Document, par. 2.3.
[55] Cell C response to Discussion Document, par. 14.2.
[56] Telkom response to Discussion Document – response to questions (Non-confidential), pg. 28-32

4.3.2.2.5. Liquid Telecom

Liquid Telecom suggested that the Authority should make the market for national transmission and metropolitan network connectivity the last priority in its list of priority markets. It indicated that this market had evolved significantly where a number of providers have built substantial networks, particularly between Johannesburg, Durban and Cape Town. It further indicated that Telkom was the only service provider in certain rural and low-income township areas but suggested that this market segment should be allowed to evolve in the coming years.[57]

4.3.2.2.6. The Wireless Access Providers' Association of South Africa

WAPA supported the Authority's prioritisation of the upstream markets, comprising of national transmission and metropolitan connectivity services as these markets relate to all service provision in South Africa.[58] However, it indicated that there was increasingly a greater choice of providers along national long-distance routes and for metropolitan connectivity services. It further indicated that although prices were 'distorted' where OpenServe had no competing operators, there was competitive pricing on crucial routes.[59]

4.3.2.2.7. Internet Services Providers' Association

ISPA supported the prioritsation of all of the markets identified by the Authority. It was of the view that all of the markets identified for prioritisation by the Authority have characteristics of long term market failure and that pro-competitive interventions in these markets will reduce the cost of communication.[60]

[57] Liquid Telecom response to Discussion Document, par. 12
[58] Wireless Access Providers' Association of South Africa response to Discussion Document, par. 6.5.
[59] Ibid, par. 6.6.
[60] Internet Services Providers' Association, par, 3.4.

4.3.2.2.7. Project Isizwe

Project Isizwe agreed with the Authority's prioritisation of upstream infrastructure markets. It also stated that OpenServe charged exorbitant fees in areas where there were no competing providers.[61]

4.3.2.2. The Authority's response

The Authority's preliminary prioritisation of national transmission services and metropolitan connectivity for a market review was supported in several of the responses to the Discussion Document, as summarised above. However, the responses also highlight that passive infrastructure, which was previously excluded by the Authority, should be included. In line with the approach taken with respect to wholesale fixed access services, facilities are now also included in the identification of the market.

The Authority acknowledges the entry of providers along national long-distance routes and for metropolitan connectivity services. This was raised by Telkom as well as in several other responses. However, as already noted in the Discussion Document, it was unlikely that any network provider will be able to replicate the coverage and density of Telkom's national and metropolitan networks. While national transmission along major routes (such as Johannesburg to Cape Town and Durban) may have a number of providers, for a large number of routes the national lines are unlikely to support a number of alternative suppliers. One would expect to find a number of operators on the high-traffic routes, however there are significant number of routes that are only served by Telkom.

A number of submissions, including Telkom's submission, recognise that competitive conditions vary by geographic area and route. It is recognised that entry on low to medium traffic routes is more difficult and this would affect pricing on these routes, particularly in rural areas which is a concern for the Authority. It is also not clear that pricing on the main national routes and high value metro areas would have a positive spill over into pricing on other routes where there is less choice for customers.

[61] Project Isizwe response to Discussion Document, pg. 2.

For reasons provided in the Discussion Document, the Authority finds that national transmission services and metropolitan connectivity markets satisfy the factors identified for prioritisation and should remain priority markets. The Inquiry does not seek to rank the prioritised markets, but the Authority notes the views provided in some of the submissions that national transmission and metropolitan network connectivity should be the last priority in the Authority's list of priority markets.

4.3.3. Wholesale supply of mobile network services and RAN services

4.3.3.1. Submissions received

4.3.3.1.1. Vodacom

Vodacom disagreed with the prioritisation of wholesale mobile network services and RAN services. Vodacom further provided a number of reasons for why, in its view, the Authority's analysis that resulted in the prioritisation of wholesale mobile services was incorrect. Its reasons were as follows:[62]

- The mobile market in South Africa was no more concentrated than those in other markets (EU countries and OECD countries not part of the EU), where there was no ex ante wholesale regulation of mobile markets (besides mobile call termination);
- The Authority did not appropriately assess the distribution of spectrum for a number of reasons such as:
  - The lack of sufficient spectrum was due to constant regulatory delays in the release of high demand spectrum;
  - While spectrum would limit the number of operators, the number of MNOs in South Africa was not uncommon and was at a similar level to countries with no ex ante regulation;
  - Other authorities view some form of spectrum asymmetrical holdings as beneficial and other EU countries have more spectrum asymmetry than in South Africa.

[62] Vodacom response to Discussion Document (Non-Confidential), pg. 53-67

- The release of 700MHz, 800MHz and 2.6GHz will positively change the competitive dynamics in South Africa;
- National roaming services allow Telkom, which does not have access to sub-1Ghz spectrum, and Cell C, the opportunities to match the coverage of other operators.

- National roaming is competitive. The number of national roaming providers in South Africa was similar to, if not more than, other countries and yet their markets were considered competitive. In countries where there was regulation on national roaming, it was typically for reasons that do not apply in South Africa, such as a regional licensing regime or a new operator has entered the market.
- The threat of switching and a competitive bidding process for national roaming ensures competition between Vodacom and MTN for national roaming. Vodacom also indicated that Cell C's new wholesale roaming agreement with MTN demonstrated that competition in respect of the provision of wholesale national roaming service is effective.[63] In this regard, Vodacom disagreed with the claims made by Cell C regarding the price it pays for national roaming as well as the complaints about seamless handover;
- MNOs were prevented from offering access to MVNOs as a result of spectrum constraints. In addition, MVNOs do not significantly improve the level of competition in a market and the upcoming spectrum auction/assignment should increase capacity and MVNO access;
- High levels of investments indicated that the presence of competition and investments in mobile markets is crucial. In this regard, Vodacom has had to increase investments in order to increase available network capacity (particularly given the spectrum constraints) and to improve consumer outcomes. If further argued that national roaming afforded the smaller MNOs the opportunity to invest less in their own networks, whilst maintaining national coverage;
- There is extensive site and tower sharing in South Africa through commercial agreements and this lowered the barriers to entry in the mobile market;
- Cell C and Telkom Mobile exerts a competitive threat to the other MNOs. Vodacom indicated that Cell C's market share was similar to market shares for operators that entered the mobile market 10 years ago in other countries. It further indicated that the constraint imposed by Telkom Mobile and Cell C was stronger than their market shares alone would suggest.

[63] Vodacom Presentation to ICASA (7 June 2018)

Vodacom's presentation to the Authority stated that prioritisation of wholesale mobile access was not in line with international precedent and did not find any reason for the Authority to diverge from this precedent in South Africa. It indicated that prioritisation must be forward-looking and the possible introduction of a WOAN complicates a forward-looking assessment aspect of the prioritisation exercise.

In response to a request from the Panel during Vodacom's oral presentations, Vodacom provided information on how prices for data compare to prices in other relevant countries. It stated that price comparisons are complex and require a detailed analysis to come to any meaningful conclusions. Whilst recognising this complexity, Vodacom stated that differences in income was likely to be an important factor when comparing prices across countries. Further, the evidence shows that in respect of mobile data, South Africa did not have high prices compared to other countries, after taking into account differences in income. Vodacom stated that the OECD countries have lower mobile prices generally and for this reason, a direct comparison to OECD countries would be misleading. It further stated that other factors were likely to affect market outcomes and a more detailed analysis would be required to take these into account.

4.3.3.1.2. MTN

In terms of the competition screening measures identified by the Authority, MTN noted the following[64]:

- While market concentration may be a preliminary indicator of competition, it alone cannot be used to determine whether there was effective competition in a market. Two firms can drive effective competition and there is evidence to suggest that MTN and Vodacom were competitive. The state of competition was emphasized in MTN's presentation to the Authority, with it noting that mobile services were highly competitive and over-regulation would lead to poor consumer outcomes;[65]
- MTN identifies two key barriers to entry in the electronic communications sector, namely: spectrum and investment costs to develop in RAN. MTN stated that spectrum was the highest barrier to entry, but investment costs were not insurmountable. According to MTN

[64] MTN response to Discussion Document, par. 3.3.3 – 3.3.9
[65] ICASA Priority Market Oral Hearings MTN South Africa, 7 June 2018

there were incentives for Telkom Mobile and Cell C to expand their RAN and supply wholesale services if they received wholesale services at inflated prices. MTN and Vodacom continuously invest in infrastructure to remain competitive;

- MTN also indicated that there were competition constraints in the form of continuous threats of expansion by Cell C and Telkom Mobile, as well as threats of entry by operators such as Rain and Liquid Telecom.

With regard to materiality[66], MTN agreed with the Authority that mobile telecommunication services were key to government objectives. However, regulations that disincentivises investment would harm competition and the ability to achieve the broader government objectives. MTN further noted that materiality to government objectives did not equate to materiality in terms of prioritisation for an inquiry and that a full cost benefit analysis should be done in a subsequent stage.

Whilst regulation at the upstream level is sound, in the case of the mobile market, MTN stated that the retail market is competitive and a highly competitive retail market is indicative of a competitive market at the wholesale level. It is therefore relevant to consider competition at the retail level according to MTN[67].

Overall, MTN stated that the Authority should focus on markets where there is market failure, and this is unlikely to be the case in respect of the wholesale market for mobile services. MTN's presentation to the Authority emphasized that site acquisition processes should be standardised across South Africa and infrastructure sharing should be encouraged[68].

4.3.3.1.3. Cell C

Cell C provided a number of points regarding the Authority's prioritisation of wholesale mobile network services and RAN services. Such points include:[69]

[66]Ibid, par. 3.3.10 – 3.3.12
[67] Ibid, para. 3.3.13 – 3.3.16
[68] ICASA Priority Market Oral Hearings MTN South Africa, 7 June 2018,
[69] Cell C response to Discussion Document, par. 14.1 – 15.9

- RAN services have not been raised as a priority for competition[70];
- The inclusion of voice, data, SMS and APN services together at the wholesale level is likely to be too broad;
- The Authority was initiating a review process for markets currently under review. In addition, some markets are also under review by the Competition Commission and the current prioritisation is likely to create regulatory uncertainty in the market;
- While mobile communications are expensive and scare resources and licensing requirements are barriers to entry, to suggest that a review would consider all MNOs to be similarly situated is incorrect;
- In the circumstances, Cell C did not agree with the prioritisation of either market. The Authority would be able to derive pro-competitive results without a market review. However, in its presentation to the Authority, Cell C noted that the wholesale mobile access market could be suitable for a market review, but it is inaccurate to base a market definition on network services and RAN services. Typically, the market would consist of call origination and access[71];
- Roaming is an initial remedy that can enable a retail or wholesale market for infrastructure access and call origination. Cell C disagreed with the Authority's decision to exclude infrastructure markets from the prioritisation assessment.

4.3.3.1.4. Telkom

Telkom agreed with the prioritisation of the wholesale supply of mobile network services and RAN services. However, it is of the view that upstream regulatory interventions need to be paired with downstream regulation, as both markets have structural features leading to competition concerns.

According to Telkom, the likely remedies for the wholesale mobile markets are regulating RAN access or domestic roaming and MVNO access. Telkom indicated that the benefits of such regulation will take a significant amount of time and the scale of the intervention is uncertain.[72]

As such, Telkom suggested that the retail market for mobile services should be a focus for the Authority for the following reasons:[73]

[70] Ibid, par. 14.1
[71] ICASA investigation into priority markets, 7 June 2018, slide 25
[72] Telkom response to Discussion Document – response to questions (Non-confidential), pg. 33.
[73] Ibid, pg. 33 - 40.

- The majority of South Africans rely on mobile services for communication and internet services. In particular, this dependence is high in rural areas of the country and still significantly high in major metro area, despite the fact that fixed networks are available. Therefore, the price, quality and choice of mobile services are of importance to South Africans;
- Many of the mobile market competition concerns relate to the retail market and regulatory intervention at a wholesale level is unlikely to address them. In particular, according to Telkom:
    - MTN and Vodacom have maintained stable subscriber and revenue market shares despite aggressive competition from Telkom Mobile and Cell C;
    - MTN and Vodacom have high and sustained levels of profitability compared to mobile operators in other jurisdictions;
    - The evolution of prices shows that data prices for a representative 1GB pre-paid data bundle is largely unchanged, despite the fact that Telkom Mobile significantly reduced prices. The pricing structure is also regressive in that Vodacom and MTN charge more for pre-paid data and small data bundles;
- The majority of South African broadband connections are mobile and the government had identified the broadband cost as a policy priority.

Telkom's presentation to the Authority noted the source of competition problems in mobile as being the first mover advantage enjoyed by incumbents as well as the existing pricing and access arrangements, including high MTRs, on-net/off-net pricing differentials, control of the retail distribution channels and wholesale access and site sharing arrangements[74].

4.3.3.1.5. Liquid Telecom

Liquid Telecom agreed with the prioritisation of the markets for wholesale RAN access and the wholesale mobile network access services. However, Liquid Telecom did not agree with the exclusion of facilities from these markets as the evaluation access to passive infrastructure

[74] Telkom Priority Markets, 7 June 2018

(including sites and co-location) is critical and can lead to savings on passive infrastructure while promoting investments in active infrastructure.[75]

4.3.3.1.6. The Wireless Access Providers' Association of South Africa

WAPA agreed with the Authority's prioritisation of the market for the wholesale of mobile services. It is of the view that of all the priority markets identified by the Authority, the market for the wholesale of mobile services should be the first priority for a number of reasons, which include[76]

- There are obvious competitive failures in this market and since most South Africans use mobile services, a market inquiry into this market was the most efficient use of resources;
- In the Ministerial policy directive issued in March 2015, the Authority is directed to prioritise this market to ensure affordable broadband;
- Bulk purchases of data in the downstream market are considerably cheaper than smaller purchases. Thus, WAPA is of the view that this price differential cannot be justified by savings from volume commitments.

4.3.3.1.7. Internet Services Providers' Association

ISPA supported the prioritisation of all of the markets identified by the Authority. It is of the view that all of the markets identified for prioritisation by the Authority have characteristics of long term market failure and that pro-competitive interventions in these markets will reduce the cost of communication.[77]

4.3.3.1.8. Project Isizwe

Project Isizwe agreed with the prioritisation of the market for wholesale mobile services and indicates that this market should receive the highest priority.[78] Project Isizwe showed that there is a considerable differential in the data costs for prepaid and contract users and highlighted that since the poor were unable to access these contracts, they are effectively forced to purchase the more expensive prepaid data offerings.[79]

[75] Liquid Telecom response to Discussion Document, par. 13.
[76] Wireless Access Providers' Association of South Africa, par. 7.
[77] Internet Services Providers' Association, par, 3.4.
[78] Project Isizwe response to Discussion Document, pg. 3.
[79] Ibid.

4.3.3.2. The Authority's response

The wholesale provision of mobile services meets the criteria for prioritisation as outlined in the Discussion Document. The preliminary prioritisation of wholesale mobile services is supported in several of the responses to the Discussion Document, which also note that facilities should be included. In line with the responses received, the Authority has identified a broad wholesale market for the supply of mobile network services and finds that facilities should also be included as part of the assessment in the context of a market review.

Consistent with the submissions received that have argued it is important to understand competition at the retail level, the Authority finds it would also be relevant to include the retail mobile market as part of the assessment in a market review. This would enable the Authority to examine competition at all levels of the supply chain and to determine precisely whether and to what extent competition concerns at the wholesale level are important drivers of retail market outcomes. The inclusion of retail for mobile is particularly relevant in respect of mobile services where a distinct value chain can be identified.

A review of the retail market also provides scope for intervening at the retail level, if warranted. However, this does not necessarily imply that remedies would be imposed at that level. The Authority maintains that it would have a preference to regulate at the wholesale level. However, there may be some retail competition issues that cannot be addressed at the wholesale level and in those circumstances a retail market focus may be appropriate (for example, on-net/off-net pricing differentials).

The largest two MNOs, Vodacom and MTN, have argued that the mobile market should not be prioritised for reasons summarised above. The Authority remains of the view that it is appropriate to prioritise mobile markets for a market review. In terms of some of the specific arguments raised by the MNOs:

- The Authority agrees that market concentration and barriers to entry are only preliminary indicators of competition and cannot alone be used to determine whether or not there is

effective competition in a market. The Authority disagrees with MTN's claim that mobile services are highly competitive based on the high-level indicators MTN had provided. An assessment of the effectiveness of competition can only be done in the context of a market review;

- The mobile market is not over-regulated – only the price of mobile termination rates has been regulated up to now. Further pro-competitive remedies would only be determined in the context of a market review where competition is found to be ineffective. Any determination of remedies would take into account the impact of the remedy on competition as well as all relevant factors, including investment in the industry. The Authority disagrees with the suggestion by MTN that further regulation would necessarily impact negatively on investment and result in poor consumer outcomes;
- Vodacom's comparison of concentration in the mobile market in South Africa to concentration levels in other countries does not imply that there are no competition concerns in mobile in South Africa. The structural features of the market are applied as competition screening measures for the purpose of this Inquiry, but it is recognised that a market review would need to go beyond the screening measures to determine the effectiveness of competition. Similar levels of concentration may lead to different market outcomes. It is therefore overly simplistic to argue that because South Africa is no more concentrated than other countries where there is no ex ante regulation (beyond call termination), there should be no further ex ante regulation in South Africa. Vodacom also fails to recognise that ex ante regulation of mobile markets, including at the retail level, is not uncommon in Africa;
- The pricing comparisons that have been provided by Vodacom do not demonstrate a competitive market. Vodacom recognises that such comparative exercises are complex and require a detailed analysis to come to any conclusions. A range of factors impact on market outcomes. The Authority finds that comparisons across countries that may not necessarily be competitive are not meaningful benchmarks for prices in South Africa. Further, while Vodacom argues that the OECD have lower mobile prices taking into account their higher income levels (and for this reason, a direct comparison to OECD countries is misleading), a concern for South Africa is precisely the relatively high prices for low income consumers who rely on mobile as their primary means of communication. In addition, a consideration of average prices does not take into account the large dispersion in prices depending on the volume of data purchased and the contract type. As Vodacom shows, as the volume of data included in bundles increases, the price per

megabyte of data falls. Low income consumers are unable to purchase large bundles of data/contracts and for these consumers, data prices per megabyte would be higher than for the consumers who can afford larger bundles or are able to commit to a contract.

4.4. Markets not to be prioritised for market reviews

4.4.1. Submissions received

4.4.1.1. Vodacom

Vodacom agreed with the Authority that the following markets should not be priority markets:[80]

- International transmission services (although Vodacom noted that significantly more capacity will be required for international transmission due to projected growth in fixed and mobile data usage. Therefore, Vodacom recommended that the Authority continue to monitor whether this market remains competitive.);
- The supply of mobile termination services;
- The supply of international mobile roaming services;
- The supply of fixed termination services;
- The supply of internet connectivity;
- The retail markets which include the supply of mobile services, voice telephony at fixed locations, access to the internet from fixed locations and managed data network services.

With respect to the supply of fixed call access, origination and transit, Vodacom stated that there are competition problems in this market, which is underperforming. Despite the competition problems for fixed voice services, Vodacom agreed that fixed call access, origination and transit services are a lower priority compared to the other fixed markets prioritised by the Authority.

[80] Vodacom response to Discussion Document (Non-Confidential), pg.71-72.

4.4.1.2. Cell C

Cell C had no comments on the non-prioritisation of the wholesale markets but stated that the Authority's arguments for the non-prioritisation of markets are in conflict with its arguments for the prioritisation of other markets.[81]

Cell C also did not make comments on the non-prioritisation of the retail markets but agreed that wholesale markets should generally be reviewed, and if necessary, regulated prior to regulating retail markets.[82]

4.4.1.3. Telkom

Telkom stated that no additional wholesale markets should be prioritised but was concerned that intervention in the wholesale mobile market may not be sufficient to remedy concerns in the mobile sector. As such, Telkom recommends that the Authority also prioritises mobile services.[83]

4.1.1.4. Liquid Telecom

Liquid Telecom largely agreed with the Authority's exclusion of the other markets for prioritisation. However, Liquid Telecom stated that the Authority should consider how to ensure that wholesale interconnection facilities and services were upgraded to ensure competitive outcomes for voice services.[84]

4.4.2. The Authority's response

As outlined above, the Authority is now including facilities in the upstream markets and the retail mobile market. Besides these additions, the Authority does not find it appropriate to prioritise any other market or market segments previously excluded. This is consistent with the responses to the Discussion Document.

[81] Cell C response to Discussion Document, par. 16.2.
[82] Ibid, par. 16.3.
[83] Telkom response to Discussion Document – response to questions (Non-confidential), pg. 41.
[84] Liquid Telecom response to Discussion Document, par. 14

5. The Authority's findings and way forward

After taking into consideration written submissions on the Discussion Document and the oral presentations, the Authority's finding is that the following markets (not in order of importance) should be prioritised for potential market reviews:

- Wholesale fixed access, which includes wholesale supply of asymmetric broadband origination, fixed access services and relevant facilities;
- Upstream infrastructure markets incorporating national transmission services and metropolitan connectivity and relevant facilities;
- Mobile services, which includes the retail market for mobile services and the wholesale supply of mobile network services, including relevant facilities.

The above markets were identified on the basis of the screening measures applied, which considered the likelihood of competition concerns as well as materiality of the market to government policy objectives and consumers. [85]

The Authority intends to conduct a market review with a specific focus on the aforementioned priority markets. It should be noted that the priority markets exercise does not preclude the Authority from identifying markets or market segments susceptible to ex ante regulation and from conducting a market review process on a market-by-market basis. The Authority will announce which of the prioritised markets will be subject to a market review first and possible regulatory intervention in terms of section 67(4) of the ECA.

[85] See sections 4.1.2, 4.2.2, 4.3.1.2, 4.3.2.2, 4.3.3.2 and 4.4.2 of this Findings Document for the Authority's responses and reasons thereof