MTN'S SUBMISSION ON THE ELECTRONIC COMMUNICATIONS AMENDMENT BILL [B31-2018]

20 November 2018

CONTENTS

Executive Summary

The proposed Bill is a dramatic and radical change to an industry that is critical to economic growth, jobs and bridging the digital divide.

To impose blanket cost-based open access on a competitive market is draconian and irrational. The stated objective is to abandon the current model of balanced infrastructure and service competition in favour of a purely service-based model.

This policy U-turn will have devastating effect on the model that delivered R100bn + of investment in the last decade. It will destroy the incentives that delivered over 98% 3G coverage, a world class 4G network (currently at 90% coverage, despite no LTE spectrum being released), and growing fibre investment, so will jeopardise South Africa's 5G future.

Why would MTN (or any other network player) continue to invest in its fixed and mobile network when it can get access to Telkom's or Vodacom's network at cost? In turn, why would Telkom and Vodacom continue to invest in network expansion and innovation if they get no competitive benefit from it, merely cost-based returns out of MTN (and other service providers)?

The cost-based open access remedies proposed in the Bill would be similarly unthinkable in any other industry. For example, consider forcing airlines to offer seats to their rivals at cost which airlines would ever invest in aircraft on that basis? Consider forcing automobile manufacturers to construct automobiles for its rivals at cost again, which automotive manufacturers would ever invest in a factory in South Africa again? Consider forcing all car owners in South Africa to always offer their vehicles to all comers, and only charge for fuel, who would ever invest in a new car, or even maintain their cars on that basis? Clearly there would be no incentive whatsoever to maintain your car if you could simply access anyone else's car and only pay for fuel. More importantly, South Africans would be excluded from any future innovations, forced to limp along forever in the current fleet of increasingly rusty and broken-down cars, while the rest of the world accelerated ahead in ever newer, more efficient models, and ultimately electric or even hydrogen powered vehicles.

In addition, MTN submits the Bill is unconstitutional. It violates the property clause in the Constitution, it fails to meet the rationality requirement imposed by section 1(c) and section 22 of the Constitution and it is impermissibly vague.

The abandonment of network competition in favour of a cost-based service model has no international precedent in telecoms. Despite a lengthy policy debate, the cost/benefit of this seismic shift has not been quantified, and MTN's concerns have been consistently ignored.

Similarly, the proposed WOAN is largely untested internationally. As configured, the WOAN risks reducing competition between networks and South Africa could become resigned to a common standard, low-quality network (the WOAN). While MTN is supportive of a level playing field hybrid model, a policy that ties the release of excess spectrum to the licensing of a contentious WOAN risks delaying the availability of much needed spectrum for South Africa.

This is unnecessary: ICASA has the powers today to do a simple set-aside for a future WOAN assignment, while at the same time immediately assigning the excess spectrum. ICASA should therefore, with haste commence with the process to assign sufficient high demand frequency spectrum. The aim should be to finalise the assignment process in quarter 1 of 2019 so that the operators will be able to continue to cater for the exponential growth in data demand.

These issues are as complex as they are critical to South Africa's economic future. MTN urges they be debated in a considered manner, not on the rushed timetable that is being proposed. Too much is at risk by experimenting with untested and unquantified policies for such an important sector and engine of growth.

SECTION A

1. Context of the Bill

1.1. ICT Policy

The ICT White Paper ("the ICT Policy") published on 28 September 2016 the objectives of the ICT Policy can be summarised as follows:

- Provide for a single wholesale broadband network or "Wholesale Open Access Network" (WOAN).
- All unassigned high demand spectrum will be set aside for the WOAN i.e. existing operators will never see more Spectrum.
- The regulator must conduct a public consultation process to determine how and by when high demand frequency will be returned.
- Structural change in the regulatory environment, ICASA will cease to exist and a new "economic regulator" and a content regulator will be established so that there is a clear constitutional independence of the content regulator but not the economic regulator.
- Open access and Net Neutrality firmly stated as a policy.
- Favours service-based competition rather than infrastructure-based competition.

MTN has had several engagements with the Department of Telecommunications and Postal Services ("DTPS") regarding the adverse impact of the ICT Policy on the economy. A submission was made together with 6 other operators proposing a model that will accommodate both service-based competition and infrastructure-based competition commonly known as the Hybrid Model.

In July 2017 a CSIR study was conducted to determine the amount of spectrum sufficient for the WOAN set-aside. In September 2018 the Minister published the Draft Policy and Policy Directions to the Authority on Licensing of Unassigned High Demand Spectrum[1] ("the Policy Direction") together with the abridged CSIR final report on spectrum requirements for the WOAN. This was the first time that anyone other than the DTPS and the CSIR had gained knowledge of what is in the CSIR report. That report had never previously been published for comment and the report published was only the abridged version.

[1] Draft Policy and Policy Directions to the Authority on Licensing of Unassigned High Demand Spectrum, dated 27th September 2018 Notice Number 1003 of 2018.

Although MTN is appreciative of the fact that the Minister finally acceded to the Hybrid Model based on the CSIR study, MTN has reservations and concerns regarding the outcome of the study under which informed the Minister's Policy Directive and the impact which it may have on the Bill.

1.2. The Policy and Policy Direction

The Policy Direction has two separate components: paragraph 1 deals with the WOAN and paragraph 2 deals with High Demand Spectrum not assigned to the WOAN. MTN is of the view that these two components should be uncoupled and ICASA should be directed immediately to commence a process to license High Demand Spectrum under the provisions of the current ECA and directed that it may set aside for future assignment such reasonably sufficient spectrum for a new operator such as a WOAN.

The size of such set aside should be done taking into consideration a more proper scientific approach. The reasons for this are as follows:

- Paragraph 1 of the Policy Direction could not be given effect to until such time as the Bill has been enacted into law and has commenced operation. That is because, in its current form, the ECA does not provide for the WOAN. The Policy Direction is in any event irrational and is likely to attract judicial review. MTN has made detailed representations on the Policy directive explaining the problems contained in the CSIR report and the Policy directive.

- The licensing of High Demand Spectrum not set aside for the WOAN (as envisaged by paragraph 2 of the Policy Direction) should not be delayed whilst the Bill is being finalised. ICASA should be directed immediately to commence a process to license the High Demand Spectrum.

- The allocation of spectrum would be by far the quickest and most effective way to allow operators to radically expand their capacity and improve the quality of their networks, thereby giving the possibility of substantially reducing costs in a way that would benefit pricing and affordability. Moreover, if the allocation of this spectrum is done efficiently (for example, through an ITA auction process), the competitive dynamic that has driven so much of the benefits for consumers over more than 20 years, would be preserved and even enhanced.

- The CSIR recommendation delivers a set aside that is hugely inefficient relative to the WOAN's stated objectives. MTN contends with the necessary justification in its submissions that the proposed quantity of radio frequency spectrum to be assigned to the WOAN is unjustifiably high.

2. WOAN Discussion

The Bill proposes that ICASA must issue a wireless open access network service licence and a radio frequency spectrum licence to the WOAN, putting in place an open access regime whereby ***existing and new*** individual electronic communication network and radio frequency spectrum licensees will be required to share electronic communications networks and infrastructure with other licensees at prescribed wholesale rates.

The WOAN will be introduced into the market as an additional, artificial competitor favoured with advantages such as reduced or waived spectrum fees, delayed implementation of prescribed wholesale open access rates and high demand spectrum of more than what is required to achieve its objectives.

Consequently, the WOAN will have far-reaching implications for the ICT sector and the South African economy in general. The introduction of the WOAN at prescribed wholesale rates will not achieve the stated objectives of the Bill. On the contrary, it will harm incentives to invest, will harm competition and will harm consumers, in particular the poorest and most vulnerable consumers. Quality of service will also be affected since investment in infrastructure will slow down. Appropriate regulation should encourage economic transformation, promote competition, encourage investment, reduce unnecessary costs and remove obstacles for firms to compete. Unfortunately, the Bill in its current form will not achieve any of these objectives

Although MTN supports the Hybrid Model in principle, MTN is not in support of obligations imposed for the WOAN to function, such as open access principles at cost or at rates to be determined by ICASA.

The current proposed frequency assignment of the whole of the 800 MHz frequency band to the WOAN is not necessary or appropriate. Such frequency is imminently suitable for rural roll out and MTN and other operators are very well placed to use that frequency in its current networks which could bring better coverage to rural areas far quicker than a yet to be established WOAN could do.

Current plans as proposed in the recent Policy directive by the Minister are to also allocate 40% of the 2600 spectrum to the WOAN, leaving precious little for the rest of the industry to meet their demand and data cost challenge.

As the WOAN is an untested concept, there is a high likelihood of delays in licensing and operationalising it. Currently, the allocation of what little spectrum is left over after the WOAN allocation is tied to the existence of the WOAN, which could unnecessarily delay licensing of High Demand Spectrum to existing operators. A pragmatic approach could be to set an appropriate and efficient amount of spectrum aside for the WOAN and move

quickly to the ITA, while the shareholding, governance, and operationalisation of the WOAN is resolved.

2.1. Hybrid Model

In response to the suggested WOAN, the Operators Forum ("the Forum"), comprising of the 6 operators (Cell C, MTN, Vodacom, Multisource Telecom, Neotel, and Telkom) engaged with government on the proposals in the ICT Policy. The Forum made a presentation to the Director General of the Department of Telecommunications and Postal Services ("DTPS") on the 24th of February 2017. The Forum supported the transformation goals in the ICT Policy and urged that the policy be applied in a sustainable manner.

The Forum's submission included the following points:

- The WOAN should be privately owned, with a level of 30% to 51% BBBEE ownership, and no operator should acquire a controlling share.
- The operators should keep the spectrum that has already been allocated to them, at least until those licences expire.
- The operators would commit to collectively purchase at least 30% of the WOAN's capacity for the first 8-15 years.
- The operators should retain the right to compete on infrastructure, service and network services, and would be allowed to make available access to infrastructure and other required facilities to the WOAN at commercial and non-discriminatory prices.

An outcome of this engagement saw the Minister of Telecommunications and Postal Services acknowledging that the operators would keep their spectrum licences until they expire in 2029 during his budget vote in May 2017. The operators would collectively purchase at least 30 percent of the capacity created by the WOAN.[2]

The Bill deviates from the above position in that the incentives proposed for ICASA to consider when licensing the WOAN include an offtake i.e. a minimum of 30% national capacity is procured from the WOAN as soon as the WOAN is licensed, for a period of not more than three years, ***by <u>each</u> operator*** who acquires new High Demand Spectrum licensees.

[2] http://af.reuters.com/article/topNews/idAFKBN18K2RL-OZATP

3. Economic Considerations

From an economic perspective the WOAN is an untested concept, not based on objective economic research. Furthermore, the proposed open access regime is unprecedented world-over, in that regulators are struggling with the issue of how and if to regulate markets where significant investments are needed to achieve broadband access for all.

The open access pricing principle assumes that the cost of investment in telecommunications networks are fixed but not sunk which means that it can always be redeployed and used to provide an alternative service. This is not the case in telecommunication investments. Accordingly, the adoption of cost-based pricing provides limited economic incentives for new investment and innovation to licensees as there is no legal certainty that private firms will make an adequate return on investment. Therefore, the proposed amendment ignores the fact that South Africa is dependent on continued new capital investment. This inherent trade-off between cost-based access regulation and investment incentives means the incentive for required capital investments may no longer exist for private sector firms if implemented.

The ICT Sector is an industry based on ongoing huge investments in innovation. This is not a dam, or an airport, that can be built once, and then used relatively unchanged for 40 years or more. A mobile network in any given year is almost unrecognisable from the network even a year earlier. MNOs have invested tens of billions of Rand in developing their network infrastructure every single year, to meet the exponential growth in mobile connectivity. This has demanded continuous improvements in network quality and connection speeds, which have all resulted in substantial falls in average data prices every single year, and substantial improvements in access to data connectivity. This Bill will smother the incentives that delivered over 98% 2G coverage, 3G services from 2007 (currently at 98%+ coverage), a world class 4G network (currently at 90% coverage, despite no LTE spectrum being released), and growing fibre investment. The relentless growth in mobile data volumes demands the greater efficiencies that will only be delivered by further substantial investments in 5G networks. However, this Bill would now jeopardise any plans for these improvements.

The proposed regulatory interventions of wholesale open access will not achieve the stated objectives of the Bill, on the contrary, they will harm incentives to invest, will harm competition and will harm consumers, in particular the poorest and most vulnerable consumers.

3.1. The WOAN will Harm Investment

Most fundamentally, the WOAN, as currently envisaged in the Bill, will damage the incentives that have led to a pro-competitive wave of investment. The WOAN will harm investment incentives through two mechanisms.

First, requiring Operators to provide cost-based access to their networks for the WOAN will reduce their ability to invest in expanding their networks.

Although the nature of the WOAN still seems uncertain, its purpose appears to be to create an artificially advantaged competitor in the provision of wholesale network access, via a combination of advantages, including favourable spectrum access, required access to Operators' existing infrastructure and networks, access and pledged revenue streams from Operators. However, these advantages will directly harm Operators' incentives for investment, which will severely undermine the delivery of mobile networks that are capable of meeting South African consumers' needs.

While the terms for mandating access to existing networks and infrastructure are currently broad, there is a significant risk that the final terms of access will involve some degree of expropriation from the Operators. Any cost-based access would severely harm the incentives of the Operators to continue their substantial investments into network expansion, and quality improvements. Moreover, even the uncertainty around these terms of access is a substantial dis-incentive to further investment, as this raises the risk premium on any investments that might ultimately be affected.

Any attempt to provide some short-sighted advantages to the WOAN to try and drive service-based competition ignores the fundamental reality of competition in mobile data services, which has been driven by infrastructure competition – the necessary large scale and continuous investments that have allowed Operators to meet exponentially growing demand, to offer continuous improvements in network quality, to deliver universal coverage, and repeated and substantial price reductions. A focus on service-based competition will leave the vast majority of South Africans with poor access to data services, and will ultimately leave South Africa far behind, resigned to low quality networks in an accelerating digital world because the current investments by MNO's in a competitive environment will be left to a single entity, a monopoly provider. There is ample evidence which indicates that investments and service delivery in a monopolistic environment is far lower than in a competitive environment.

Secondly, Operators will have less incentive to invest in their networks if they are required to purchase capacity from the WOAN.

While the mechanics of the proposed operation of the WOAN are unclear, we understand that the Operators would be obliged to purchase substantial capacity from the WOAN, at regulated prices. This would again harm the investment incentives of the Operators and may reduce their incentives to invest in new network capacity, or even cause some Operators to avoid bidding for additional spectrum.

MTN believes that the incentive for Operators to invest will be harmed in this way, regardless of the success of the WOAN. In particular, in a "failed WOAN" scenario, the WOAN would not be successful in providing sufficiently efficient wholesale network services. In this scenario, Operators would be forced to rely on their own networks, despite the existence of the WOAN, and would therefore still need to make significant investments in order to meet growing demand. In this instance, pledged capacity effectively represents a dead cost to Operators, thereby reducing the amount Operators would be able to invest in improving and expanding their own networks.

In a "favoured WOAN" scenario, the WOAN may be so advantaged that it is able to provide network capacity at lower costs than the Operators might have been able to achieve on their own. In this scenario, Operators would have a reduced incentive to invest in their own networks, since they would be able to instead simply rely on accessing wholesale services from the WOAN at a regulated price. In this way, the WOAN as an additional, artificial competitor would not actually achieve its purpose of increasing competition in the relevant market. The WOAN does not need to be better quality, nor achieve better coverage than the Operators in order for it to be heavily favoured –merely for the artificial advantages of the WOAN to make it relatively unattractive for the Operators to invest in their own networks.

Thus, regardless of the outcome of the WOAN, it can be expected to damage Operators' abilities and incentives to invest.

3.2. The WOAN will Harm Competition

Competition in the provision of mobile data services is primarily characterised by intense infrastructure competition, which has led to the realisation of many beneficial and pro-competitive outcomes. Thus, by harming Operators' ability and incentives to invest, the WOAN will also harm competition. This would, in turn, stifle the advancement of many of the important outcomes, such as coverage, quality, affordability and access.

Even Operators' ability to compete at a service level will likely be limited as a result of the WOAN, since all competitors will face the same regulated wholesale cost (at the same common network quality). Consequently, Operators' ability to compete, through reducing costs and passing these savings on to consumers or offering continuous improvements in network quality will be restricted.

4. Legal Considerations

Against the background set out above, MTN submits that the Bill is unconstitutional in three respects:

- First, the Bill violates the property clause in the Constitution.
- Second, the Bill fails to meet the rationality requirement imposed by section 1(c) and section 22 of the Constitution.
- Third, the Bill is impermissibly vague.

MTN will elaborate on each of these submissions in turn.

4.1. Infringement of property rights

It is generally accepted that "property" in a constitutional sense includes a vast range of rights and interests (both real and personal) that have economic value.[3] This includes the MNO's network and facilities, and the rights arising from the issuing to the MNO of a spectrum licence. The Bill will interfere with the property rights of the Operators because the Operators will be required to provide other licensees (including the WOAN) with open access to their electronic communications facilities and networks.4 If an MNO is determined to be a deemed entity by the Authority in the wholesale open access regulations (which MTN assumes will be the case), then the MNO will also be required to comply with the wholesale open access principles (including wholesale rates as prescribed by the Authority in terms of section 47).5

For the reasons that follow, this interference with the property rights of an MNO will violate section 25 of the Constitution.

<u>Expropriation of property</u>

Sections 25(2) and 25(3) of the Constitution provide for the limited circumstances in which property may be expropriated:

> *"(2) Property may be expropriated only in terms of law of general application—*
>
> *(a) for a public purpose or in the public interest; and*
>
> *(b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.*

[3] See Minister of Defence, Namibia v Mwandinghi 1992 2 SA 355 (Nm SC) at 367E-F. Section 25(4)(b) states, for the purposes of section 25, "property is not limited to land." See also First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Services 2002 (4) SA 768 (CC) at para 51 where the Court said "[a]t this stage of our constitutional jurisprudence it is […] practically impossible to furnish – and judicially unwise to attempt – a comprehensive definition of property for purposes of s 25."

[4] Proposed section 43(1)

[5] Proposed section 43(1B)

(3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including—

(a) the current use of the property;

(b) the history of the acquisition and use of the property;

(c) the market value of the property;

(d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and

(e) the purpose of the expropriation."

In effect, the Bill envisages an expropriation of the property rights of the Operators. It does so without the payment of compensation, and in a manner that does not reflect an equitable balance between the public interest and the interests of those affected. The Bill is therefore unconstitutional.

Arbitrary deprivation of property

Even if there is no expropriation, the Bill permits arbitrary deprivation of property for the reasons that follow.

An interference or limitation with the use, enjoyment or exploitation of private property that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society is a deprivation of that property.[6] As explained above, the Bill will produce a deprivation of the property rights of the Operators. The next question is whether that deprivation is "arbitrary".

A "deprivation of property is 'arbitrary' when the 'law' does not provide sufficient reason for the particular deprivation in question or is procedurally unfair".[7] There must be a rational connection between the deprivation and the end sought to be achieved and, where the deprivation is severe, it must be proportionate.[8] The stronger the property interest and the more extensive the deprivation, the more compelling the State's purpose must be in order

[6] First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Services 2002 (4) SA 768 (CC) at para 57 ("**First National Bank**"); Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng, and Others (KwaZulu-Natal Law Society and Msunduzi Municipality as Amici Curiae) 2005 (1) SA 530 (CC) at para 32 ("**Mkontwana**")

[7] FNB at para 100. See also Reflect-All 1025 CC and Others v MEC For Public Transport, Roads and Works, Gauteng Provincial Government, and Another 2009 (6) SA 391 (CC) at para 39, where the Constitutional Court held that for applicants to ground a successful s 25(1) challenge "*they will have to show that the impugned provisions are either procedurally unfair, or that insufficient reason is proffered for the deprivation in question, in other words it is substantively arbitrary*" (emphasis added) .

[8] Reflect-All (supra) para 48; Shoprite Checkers (Pty) Ltd v MEC for Economic Development Eastern Cape 2015 6 SA 125 (CC) para 80

to justify the deprivation. In other words, where the deprivation is extensive, the test for non-arbitrariness does not merely have regard to considerations of rationality but also has regard to whether the means chosen are disproportionate to the purpose, with reference to the availability of less restrictive means. A proportionality analysis assesses the purpose of the law in question, the nature of the property involved, the extent of the deprivation and whether there are less restrictive means available to achieve the purpose. The Bill is not rationally connected to its stated objectives. A good illustration of this is provided by the vicious circle that will be created as between the WOAN and the Operators when it comes to network investment:

- The Bill envisages that the WOAN will be required to share its infrastructure with other licensees (such as the Operators) on the basis of wholesale rates prescribed by the Authority.[9]
- In order to discharge this obligation, the Bill provides that the WOAN may require the Operators to make their networks available to the WOAN on the basis of wholesale rates prescribed by the Authority if they are deemed entities in terms of the wholesale open access regulations (which MTN assumes will be the case).[10]
- What this means is that the WOAN may look to the Operators for electronic communications facilities on the basis of the prescribed wholesale rates, and the Operators in turn may look to the WOAN for electronic communications facilities on the basis of the prescribed wholesale rates. But this will create a situation of investment stasis: neither the WOAN nor the Operators would have any incentive to invest in their networks since each may look to the other for the provision of facilities on the basis of the prescribed wholesale rates. In short, there would be no incentive to invest in infrastructure at all – the very antithesis of what the Bill intends to achieve.

MTN submits that the test for arbitrariness includes considerations of proportionality, because the Bill will effect a far-reaching deprivation of property. Once regard is had to proportionality, the arbitrariness of the Bill becomes even more pronounced because there are less intrusive ways in which the legislature could have sought to achieve the stated objectives of the Bill.

MTN therefore submits that the Bill permits arbitrary deprivation of property, in violation of section 25(1) of the Constitution.

[9] Proposed section 19A(5)(b)(ii)

[10] Proposed section 43(1B) (b)

4.2. Rationality

A key constitutional constraint upon Parliament's legislative powers is that there must be a rational relationship between the scheme which it adopts and the achievement of a legitimate governmental purpose. The absence of a legitimate government purpose, or the absence of a rational relationship between the measure and that purpose, will result in the measure being unconstitutional.[11]

The objects of the Bill

The objects of the Bill are recorded in the wording of the Bill itself and in the Memorandum on the Objects of the Electronic Communications Amendment Bill, 2018.

The list of objects in the Bill retains many of the objects listed in the existing ECA. If the Bill were to come into force, section 2 would provide for the following objects:

> *"(cA) redress the skewed access by a few to economic and scarce resources such as radio frequency spectrum, to address the barriers to market entry;*
>
> *(cB) promote serviced-based competition and avoid concentration and duplication of electronic communications infrastructure;*
>
> *(cC) promote an environment of wholesale open access to electronic communications networks on terms that are effective, transparent and non-discriminatory;*
>
> *(cD) redress market dominance and control;*
>
> *(d) encourage investment, including strategic infrastructure investment, and innovation in the communications sector;*
>
> *(e) ensure efficient use of the radio frequency spectrum;*
>
> *(f) promote competition within the ICT sector;*
>
> *…*
>
> *(i) encourage research, development and innovation within electronic communications and broadcasting sectors;"*
>
> *…*

[11] New National Party of SA Government of RSA and others [1999] JOL 4904 (CC) at para 19.

(m) *ensure the provision of a variety of quality electronic communications services at reasonable prices;*

(n) *promote the interests of consumers with regard to the price, quality and the variety of electronic communications services;*

(y) *refrain from undue interference in the commercial activities of licencees while taking into account the electronic communication needs of the public;*

(z) *promote stability in the ICT sector."*

(our underlining)

The Memorandum describes the current regulatory framework, and the overarching policy framework that was set out in the National Integrated ICT Policy, 2016:

> *"1.6 The National Integrated ICT Policy White Paper outlines the overarching policy framework for the transformation of South Africa into an inclusive and innovative digital and knowledge society. The White Paper outlines government's approach to providing cross-government leadership and facilitating multi-stakeholder participation; interventions to reinforce fair competition and facilitate innovation in the converged environment; policies to protect the open Internet; policies to address the digital divide and new approaches to addressing supply-side issues and infrastructure rollout including managing scarce resources." (*our underlining*)*

The memorandum also discusses the objects of the Bill and provides a summary:

> *"2. OBJECTS OF BILL*
>
> *The objects of the Bill are to amend the Act, so as to align it with the National Integrated ICT Policy White Paper approved by Cabinet on 28 September 2016; to provide for transformation of the sector through enforcement of broad-based black economic empowerment; to provide for lowering of cost of communications, reducing infrastructure duplications and encouraging service-based competition through a wireless open access service; to provide a new framework for rapid deployment of electronic communications facilities; to provide for new approaches on scarce resources such as spectrum including the allocation of high demand spectrum on*

*open access principles; to create a new framework for open access; to provide for the regulation of international roaming including SADC roaming to ensure regulated roaming costs, quality of service and transparency; to provide for regular market definition and review to ensure effective competition; to provide for improved quality of services including for persons with disabilities; to provide for consumer protection of different types of end-users and subscribers, including persons and institutions; to provide for enhanced cooperation between the National Consumer Commission and Authority as well as the Competition Commission and the Authority; and to provide for matters connected therewith." (*our underlining*)*

"Amendment of section 2 of Act 36 of 2005

*3.2 Section 2 is amended to align the objects of the Act with amendments in the Act emanating from the White Paper. The role that ICTs play in socio-economic development and effective participation of all South Africans in the affairs of the Republic is emphasized." (*our underlining*)*

At paragraph 3.27, the Memorandum explains the purpose of the introduction of a wholesale open access framework. It provides:

"3.27.2 In order to realise South Africa's developmental objectives, transform society and the economy, encourage broadband deployment, and preserve and promote the open and interconnected nature of the Internet, a wholesale open access regime will be implemented in South Africa along the entire infrastructure and services value chain.

3.27.3 To support this new approach, a wholesale open access framework has to be created and therefore Chapter 8 is amended to convert it from facilities leasing to wholesale open access to give effect to Chapter 9.1 of the White Paper. Chapter 8 of the Act is amended to provide how networks should be shared between all licensees for the benefit of society, including through a Wireless Open Access Network Service."

The Bill will not achieve its stated objectives or the broad objectives of the ICT Policy. That is because the Bill will reduce competition; will reduce investment and employment; and will harm consumers, in particular the most vulnerable consumers. This submission has in detail dealt with the aforementioned arguments in the preceding section however the main reasons for this may be summarised as follows:

- Some of the key objects of the Bill, such as the promotion of investment, innovation, research and development,[12] cannot possibly be achieved by legislation that adds massive uncertainty and permits the deprivation of property of the Operators. Moreover, the WOAN will not have incentives to invest efficiently, or efficiently to utilise the high demand spectrum that will be licensed to it.[13]
- The Bill will directly harm competition amongst Operators[14] and will thereby directly hinder the pursuit of the most important objects of the Bill, which are (*a*) to promote the universal provision of electronic communications networks and electronic communications services and connectivity for all,[15] and (*b*) to promote the interests of consumers with regard to the price, quality and the variety of electronic communications services[16]. Harming competition will also directly harm the efficiency with which radio frequency spectrum is used.
- The Bill will disproportionately harm consumers, in particular the most vulnerable rural consumers, through harming investment in higher capacity, higher quality, and more efficient mobile networks.
- Given these failures, the Bill fails to achieve a further object, which is to refrain from undue interference in the commercial activities of licensees while taking into account the electronic communication needs of the public.[17] The Bill permits extensive interference in the commercial activities of licensees, while directly harming the public. Such direct and harmful intervention cannot achieve the final object of the Bill, which is to promote stability in the ICT sector.[18]

The Bill is therefore unconstitutional because it is not rationally related to a legitimate governmental objective.

[12] Section 2 (d) of the ECA and proposed section (i).

[13] Section 2 (e) of the ECA.

[14] Section 2 (f) of the ECA

[15] Section 2 (c) of the ECA

[16] Section 2 (m) and (n) of the ECA

[17] Section 2 (y) of the ECA

[18] Section 2 (z) of the ECA

For the same reason, the Bill violates section 22 of the Constitution.[19] Section 22 provides that the state may regulate the manner in which activities have to be conducted, provided always that such regulations are not arbitrary.[20] As explained above that the means adopted in the Bill cannot achieve the stated objectives. The Bill therefore infringes on the rights in section 22 in an arbitrary and impermissible manner.

4.3. Vagueness

The Constitutional Court has held that "*[i]t is an important principle of the rule of law that rules be stated in a clear and accessible manner*."[21] It is essential that those who are affected by a law can ascertain the extent of their rights and obligations.[22]

The Bill does not clearly define or explain a number of terms and concepts forming part of the WOAN scheme. For example:

The first example involves the proposed section 19A (2), which provides that "an applicant for a wireless open access network service licence" must comply with certain requirements. Section 19A (2) envisages that there will be only one "applicant". However, the Bill does not explain how this "applicant" will come into existence and what will occur if more than one applicant chooses to apply for a wireless open access network service licence.

The second example involves the proposed section 19A(5)(b) and the proposed section 43(1B). These sections oblige certain entities to engage in "active infrastructure sharing", but do not explain what that term means. Moreover, these sections oblige certain entities to comply with "specific network and population coverage targets" but do not indicate what those targets are or who will determine them.

[19] Section 22 provides: "Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law."

[20] *S v Lawrence; S v Negal; S v Solberg* 1997 (10) BCLR 1348 (CC) at para 33 – 34.

[21] Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others 2000 (3) SA 936 at para 47. President of the Republic of South Africa v Hugo1997 (4) SA 1 (CC) at para 12.

[22] Savoi and Others v National Director of Public Prosecutions and Another [2013] 3 All SA 548 (KZP) at para 31.

5. Conclusion

MTN supports the objectives of the Bill in respect of economic transformation and meaningful participation in the economy as well as expanding access to networks in rural and underserviced areas. However, we believe that these objectives will not be achieved by a WOAN, as currently contemplated in the Bill. Such a WOAN would destroy investment incentives, and eliminate infrastructure competition, which has been the engine behind quantum improvements in mobile coverage, quality and consumer value.

MTN submits that the Bill will not achieve its stated objects but will produce the very opposite result. This renders the Bill unconstitutional because the Bill in its present form is not rationally connected to its stated purpose and permits an arbitrary deprivation of property.

MTN submits that the Bill should clarify the constitution and requirements of the WOAN. Moreover, uncertainty exists regarding the Bill providing artificially created incentives for the WOAN and how these suggested incentives are aligned to the objects of the ECA.

International practice has shown that where private sector firms have been permitted to invest and innovate in the ICT wholesale market, this has best suited the dynamic nature of the ICT industry. South Africa should follow and the proposed excessive allocation of spectrum to a single wholesale network as the monopoly is not prudent for South Africa's advancement.

Cost-based open access devalues past investment and undermines any network advantage. Service-based competition on the basis of a common wholesale input means all players are competing on the same basis of price, product and are only differentiating themselves on their distribution strategy. This raises concerns for industrial policy towards a monopoly operator forcing competition only on the basis of its single cost, coverage and quality position.

MTN submits that the WOAN and cost-based open access should be reconsidered to only be done on a basis of and include the elements of hosting on commercial terms and not predetermined cost based outcomes or costs that are to be determined by ICASA.

The Amendments in the Bill give substantial leeway for highly intrusive legislation and regulations which MTN believes may be short-sighted and unprecedented world-over.

SECTION B

6. Specific Comments on the Bill

6.1. Chapter 1 - Introductory Provisions

The addition of the new definition of "*sector specific agencies*" does not cater for all agencies and should be amended as follows:

> *"sector-specific agencies' means the South African Maritime Safety Authority, Department of Defence, Security and Emergency Services and the Civil Aviation Authority;*

6.2. Chapter 2 - Policy and Regulations

Chapter 2 introduces amendments which may erode the independence of ICASA, for example: section 3 (1) (e), 3 (2) (d) and the insertion of section 4(1A) (a) and (b). The removal of the text "*guidelines for*" and "control of" removes ICASA's discretion to regulate independently. The ICT sector requires a strong and independent regulator to carry out its mandate.

6.3. Chapter 3 - Licensing Framework

The insertion of new subsection 8(6):

> *"The Authority must, by regulation, make provision for obligations applicable to electronic communications network service licensees for the rapid deployment of electronic communications networks or facilities and must prescribe additional terms and conditions for such licences."*

It is not clear what is contemplated by "*additional terms and conditions for licences*". MTN believes that the proposed terms and conditions should be clearly defined to ensure regulatory certainty and to provide clear guidelines regarding the ambit of the terms and conditions.

What is indeed more worrisome is that more terms and conditions are to be given to licensees. Roll out of networks are not stifled by Licensees but by bureaucratic and incredibly long administrative approvals which can be rectified by the adoption of rapid deployment guidelines. Rather than placing more obligations on licensees, the Bill should make provision for the unlocking of delays at administrative bodies, local authorities and or various governmental departments that are required to give approvals. MTN submits that the focus on licensees is incorrect in that there is a

willingness to roll out more equipment however licensees cannot do so as a result of various levels of approvals to be obtained.

Proposed amendment to section 13 (5) of the Act:

> *"The regulations contemplated in subsection (3) must be made with due regard to the objectives of this Act, the related legislation and, where applicable, any other relevant legislation."*

The proposed amendment has deleted subsection 13(5) (b) which requires an inquiry in terms of section 4B of the ICASA Act[23] which may include, but is not limited to, a market study prior to the Authority making regulations on ownership or control of an individual licence or individual licence for broadcasting services.

MTN believes that the proposed amendment removes the importance of conducting a market inquiry. MTN submits that market intervention should always be premised on a market inquiry to ensure the equitable allocation of resources otherwise any intervention contemplated will not be borne out by fact and may as a result be arbitrary. A market inquiry will empower the Authority to understand the fundamental objectives of efficiency and welfare maximisation including highlighting issues that may not be apparent if a market inquiry is not conducted.

In any event, the policy maker or regulator is required to make "evidence based" regulations. The removal of an obligation to conduct a section 4B inquiry goes directly against the objectives of the ICT Policy [24] and against good regulatory practice.

6.4. Chapter 3A - Licensing Framework for Wireless Open Access Network Service

Chapter 3A of the Bill has been renamed "*Licensing Framework for Wireless Open Access Network Service*".

The amended Chapter section 3A provides that an applicant for a WOAN license may not include members in a consortium that "*either separately or collectively possess a market share of more than 50% in electronic communications services*."[25] This provision effectively disallows most of the current licensees, since the provision also provides for collective market share. Furthermore, it is not clear which market is referred to or how this market should be defined prior to a determination of market share. It is therefore very difficult to

[23] Act no 13 of 2000

[24] National Integrated ICT Policy White Paper, 28 September 2016. Paragraph 1.4 "Approach" 2.2 "Principles and Values" and paragraph 5.3 "Objectives"

[25] Section 19A(2)(g) of the ECA Amendment Bill

interpret as to what exactly is meant and which market needs to be interrogated. Consequently, the provision may be void for vagueness.

Moreover, functional separation is required for any operator currently providing electronic communications services should they participate in the WOAN.

Section 19A (4) of the Bill provides for the WOAN to charge wholesale rates as prescribed by the Authority in terms of section 47 of the ECA. It is not clear how this pricing regime will affect the rest of the ICT sector, including the wholesale rates applicable to existing operators.

In terms of section 19A (8) of the Bill:

> *"(8) The Authority must determine–*
>
> *(a) the terms and conditions, including universal service and access obligations; and*
>
> *(b) incentives, such as–*
>
> *(i) reduced or waived spectrum fees;*
>
> *(ii) refraining, for a specific period, from prescribing the wholesale rates that can be charged by the wireless open access network service licensee, notwithstanding the provisions of subsection (5)(b)(ii), which will apply to the wireless open access network service licensee, in accordance with policies or policy directions issued by the Minister responsible for Telecommunications and Postal Services, if any."*

The Authority must determine incentives for the WOAN including reduced or waived spectrum fees and refraining, for a specific period, from prescribing the wholesale rates that can be charged by the wireless open access network service licensee. These incentives will create an artificially advantaged competitor in the provision of wholesale network access. Moreover, it is of concern that the Authority may refrain from prescribing wholesale rates for a specific period. It is not clear how long the "*specific period*" could be. Firstly, and as explained in section 2 above, MTN submits that such incentives to create a competitor is artificial and will in fact harm competition. It is even more problematic where there is no definite end to such incentives or even mention of any criteria that should be applied to determine a "specific period". This would create legal uncertainty.

MTN is of the view that wholesale rates should not be prescribed by ICASA. If wholesale rates are determined through commercial negotiation, competition and market forces will drive down the wholesale rates. Prescribed rates will be treated as a ceiling and there will

be no incentive to further reduce rates or charge below the prescribed rates, which may be possible or viable because of market forces.

These issues must also be seen in the context of the Draft Policy Direction, where the Minister proposes to impose a sizeable WOAN capacity offtake obligation on licensees wishing to access excess high demand spectrum. This capacity offtake obligation, at any price, could easily turn into a "WOAN tax" on spectrum acquisition. The WOAN has no incentive to set market-related prices if its business is guaranteed by Policy intervention. The WOAN will likely see this as an opportunity to maximise profits while rates are unregulated (and then hope to influence future rate regulation to continue to maximize offtake profits). This DTPS-granted monopoly rent would eventually be passed on to all users of excess high demand spectrum, increasing the costs to communicate.

6.5. Chapter 4 - Rapid Deployment of Electronic Communications Networks and Electronic Communications Facilities

MTN supports the Rapid Deployment Framework and the establishment of the Rapid Deployment National Co-ordinating Centre. The Rapid Deployment Framework and enhanced coordination between all role players is positive and will benefit the ICT industry. MTN notes some concerns which need to be addressed as set out below:

In terms of section 20C (1) (a), 20C (3) (a) and (b), (c) and (f)

> *"(1) The Authority must prescribe rapid deployment regulations, which must include–*
>
> *(a) the structure of the geographic information system database contemplated in section 20B(3)(b), its security and the manner in which it can be accessed, determined in consultation with the Rapid Deployment National Co-ordinating Centre;"*
>
> *"…The Authority must ensure that electronic communications network service licensees–*
>
> *(a) provide information on existing and planned electronic communications networks and facilities, including alterations or removal thereof, as contemplated in this Chapter, to the Rapid Deployment National Co-ordinating Centre for inclusion in the geographic information system database: Provided that information on existing electronic communications networks and facilities must be provided within 12 months of the coming into operation of the Electronic Communications Amendment*

Act, 2018, and that information on planned electronic communications networks and facilities, including alterations or removal thereof, must be provided within 30 days of such planning, alteration or removal;

(b) provide information on existing and planned electronic communications networks and facilities to the Authority;

… (c) seek out alternatives to new deployment of electronic communications networks and facilities, notably through the sharing or leasing of existing facilities;

… (f) advise landholders, in writing, of their right to recourse through the Authority."

The power to prescribe the structure of the geographic information system ("GIS") database, its security and the way it can be accessed lies with ICASA who must consult with the Rapid Deployment National Co-ordinating Centre. This amendment fails to include safeguards in terms of whom may access the GIS and for what purpose. ICASA would need to define clear criteria for access to, and the utilisation of information for planned deployment in consultation with the Competition Commission.

Furthermore, in terms of 20C(3)(a) operators must submit past as well as planned infrastructure to this database. The sharing of planned infrastructure rollout may fall foul of the Competition Act of South Africa[26] which prohibits an agreement or concerted practice between horizontal competitors. It is not clear who will access the GIS data. Whilst the exchange of information is intended to be a pro-competitive process, the Authority will need to put in place safeguards to guard against the appearance of collusive conduct.

Section 20E provides for access to high sites as follows:

"20E. Access to high sites for radio-based systems

(1) For the purpose of this section 'high site' means any structure or feature, constructed or natural, including buildings, whether used for public or private purposes, which is suitable for radio-based systems.

(2) An electronic communications network service licensee may access and use any high site for the deployment of electronic communications networks and facilities that promote broadband,

[26] Act 89 of 1998

except for high sites that are not technically feasible for this purpose, as may be prescribed by the Authority.

(3) An owner of a high site may not refuse access to an electronic communications network service licensee for the installation of electronic communications networks and facilities that promote broadband: Provided that such installation must be in accordance with any reasonable requirements of the owner."

MTN submits the amendment should also cater for circumstances where additional work, such as re-enforcement of a mast to cater for wind-loading is required. These costs must be borne by the requesting operator by the addition of 20E (4):

(4) If access to a high site is conditional upon the reinforcement of a high site to cater for wind loading and any other safety requirements, the Licensee requesting access should bear the costs of the additional work."

6.6. Chapter 5 - Radio Frequency Spectrum

The proposed amendments to section 30 removes the power of the Authority to control radio frequency spectrum and reduces the Authority to an administrator. This dilutes the independence of the Authority, as a Chapter 9 Institution and may be in contravention of section 192 of the Constitution of the Republic of South Africa[27].

Section 31A (1) of the Bill requires that universal access and service obligations be imposed on existing and new radio frequency spectrum licenses.

"(1) In addition to any universal access and universal service obligations contemplated in section 8(2)(g), the Authority must impose universal access and universal service obligations on existing and new radio frequency spectrum licensees, determined by the Authority."

MTN submits that the Authority should only impose universal access and universal service obligations for spectrum bands that have been allocated as International Mobile Telecommunications ("IMT") bands or high demand spectrum (i.e. access spectrum). The Point To Point ("PTP") licences should be excluded from universal service obligations because it will increase the regulatory burden and will be impractical to implement due to the number of PTP licenses held by licensees.

[27] Act no 108 of 1996

The Bill introduces the requirement for ICASA to approve spectrum refarming.

MTN welcomes the definition of spectrum refarming in the Bill. There is no universal definition for spectrum refarming. The International Telecommunications Union's (ITU) Radiocommunication Assembly has recommended the following definition:

> *'Spectrum redeployment* [spectrum refarming] *is a combination of administrative, financial and technical measures aimed at removing users or equipment of the existing frequency assignments either completely or partially from a particular frequency band. The frequency band may then be allocated to the same or different service(s). These measures may be implemented in short, medium or long time-scales.*[28]*'*

In the Radio Frequency Migration Plan (2013), the term re-farming is defined as follows*:* [29]:

> *"'Radio Frequency Spectrum Re-farming" means the process by which the use of a Radio Frequency Spectrum band is changed following a change in allocation, this may include change in the specified technology and does not necessarily mean that the licensed user has to vacate the frequency.*[30]*'*

The Bill defines spectrum refarming as follows:

> *"'radio frequency spectrum refarming' means the re-use of an assigned frequency band for a different application, and 'spectrum refarming' has a similar meaning."*

The definitions in the Radio Frequency Migration Plan (2013), the ITU Recommendation[31] and the Bill are misaligned.

Section 31D (1) and (2) of the Bill requires that spectrum may only be refarmed subject to the approval of the Authority and that the Authority may not approve spectrum refarming if it will have a negative impact on competition. MTN is concerned with the introduction of regulatory intervention for spectrum re-farming, especially since spectrum re-farming has never resulted in any harm or competition concerns in the South African market. In fact, if it

[28] 'Spectrum redeployment as a method of national spectrum management', Recommendation ITU-R SM.1603-2 (08/2014)

[29] The Radio Frequency Migration Plan (2013), notice 353 of 2013, Government Gazette No. 36334

[30] Section 1.2.2 of the Radio Frequency Migration Plan (2013), notice 353 of 2013, Government Gazette No. 36334

[31] Spectrum redeployment as a method of national spectrum management', Recommendation ITU-R SM.1603-2 (08/2014)

had not been for spectrum refarming as done by MTN and other MNO's, the quality of service of the mobile networks would not be what it is today. Because of no further access to frequency assignment to the MNO's in more than a decade, MTN had to find innovative ways to cater for the exponential increase in demand from its customers. MTN has practiced spectrum refarming without any regulatory intervention and it is therefore unclear what the reason is for introducing regulatory approval for spectrum refarming at this time.

MTN believes that spectrum re-farming as currently practised puts into effect the objects of the ECA of promoting innovation, investment in infrastructure and the efficient use of scarce radio frequency spectrum resources. The introduction of regulatory approval for spectrum re-farming will cause delays and encumber innovation which is necessary to keep up with technology advances. Refarming also fully aligns with the concept of technology neutrality licensing that underpinned the original ECA.

Spectrum re-farming aligns with the technological neutral licensing framework. The band plan and the assignment plans have been beneficial to the South African society, for example, refarming has enabled LTE rollout. This would have been hampered if an administrative approval process was mandated especially considering the fact that no high demand frequency spectrum has been licenced in more than a decade.

Spectrum re-farming is currently not regulated. Operators are able to redeploy a portion of their existing spectrum with speed to establish LTE networks while awaiting the licensing of new high demand spectrum that can be dedicated to LTE. Consequently, MTN is of the view that there is no need for the regulation of spectrum re-farming as it currently functions effectively and efficiently to ensure that operators can respond rapidly to advances in technology while ensuring interoperability of systems and avoiding harmful interference.

Imagine where South Africa would be today if refarming of spectrum to LTE had been tied-up in regulatory proceedings in the same way that the licensing of desperately needed and long-promised 4G spectrum has been delayed by regulatory issues. South Africans would still be stuck with 2G and 3G technology at a time when the world is actively preparing for 5G. MTN submits that the dangers of delays introduced by the regulation of refarming is a significant and totally unwarranted risk for South Africa. It is also not aligned with best practice, which has sought to move away from technology specific spectrum licensing for the very reasons explained above.

6.7. Chapter 7A - International Roaming

Chapter 7A of the Bill proposes regulation of wholesale and retail international roaming. International Roaming wholesale rates are determined via commercial negotiations between a local operator and an international operator considering the volume of traffic

flowing between the two operators. The payment mechanism between the two operators is based on the balancing of traffic between the two operators. Other factors affecting the cost of international roaming include foreign exchange rates and additional costs of production to provide the roaming services for example; signalling, clearing services (data and financial), forward cover for fluctuations in foreign exchange rates etcetera.

The proposed regulation of international roaming in the Bill will depend on the cooperation of a foreign operator's country imposing similar regulations for the provisions to be effective. This is not feasible and would be very difficult to achieve without the necessary cooperation. It is vitally important that other countries would reciprocate otherwise South African operators may be the only ones that may be detrimentally affected. MTN submits that as a starting point, a detailed regulatory impact assessment is necessary to ascertain the benefit for South Africa, if any, before Chapter 7A is included in the ECA.

6.8. Chapter 8 - Wholesale Open Access

Section 43 of the Bill (previously facilities leasing) requires operators to provide wholesale open access, upon request, to any other person licensed under the ECA under a wholesale open access agreement.

The Bill defines Wholesale Open Access as follows (our emphasis):

> *" 'wholesale open access' means the sale, lease, or otherwise making available, of* ***an electronic communications network service*** *or electronic communications facility by an electronic communications network service licensee on a wholesale basis on general open access principles, and, to the extent applicable, the additional wholesale open access principles provided in sections 19A(4)(b), 20H(2)(a)(ii) and 43(1A) and (1B);*

This definition represents a major shift from previous facilities leasing provisions. The Bill not only proposes to make available existing communications facilities to third parties (poles, cables, masts, etc.), it now extends to making available existing communications network services (fixed and mobile bandwidth, airtime, etc) on a regulated basis. All communications networks and services of scale will now be forced open to service providers and network competitors. This represents a very radical and contentious move, which embeds the stated policy of favouring service-based competition over infrastructure-based competition.

While previous facilities leasing provisions were focused on reducing unnecessary duplication of infrastructure, the new provision are marking a paradigm shift in the ICT

sector's competitive model; the end of a business case for network competition and its associated multi-billion Rand investments. This is driven by two complementary factors:

- Much of the business case for network investment and innovation incentives is delivered by the promise of differentiated retail and wholesale positions. MTN invested in excess of R40billion over the last 5 years to deliver superior coverage, a state of the art 4G network and best in class download speeds to win retail and wholesale customers from its competitors on the basis of network quality. If all service providers, retail and wholesale competitors can now access that (and any other) network on an equal basis, the competitive benefits of this investment are reduced to zero and the R40billion network differentiation business case is simply destroyed. Note this investment was not simply driven by retail considerations. MTN's network quality and 4G investment was indeed key in winning Cell C's roaming business from Vodacom.

- The Bill now proposes to reduce this competitive investment to cost-based returns. Not only does this undermine the profit incentive behind network investment, it also massively skews make/buy signals across the industry. Why would MTN (and any other network player) continue to invest in its fixed and mobile network when it can get access to Telkom's or Vodacom's network at cost? In turn, why would Telkom and Vodacom continue to invest in network expansion and innovation if they get no competitive benefit from it, merely cost-based returns out of MTN (and other service providers)? In a single move, this Bill promises to bring a R10's of billion per annum investment industry to a standstill with huge jobs, growth and digital divide implications.

By destroying infrastructure-based competition incentives and putting its sole focus on service-based competition, the Bill will put an end of to the investment incentives that delivered high speed 4G networks in spite of significant spectrum scarcity, 99% 3G coverage and it will fatally jeopardises South Africa's 5G future.

The Bill does so through blanket application of remedies that are normally reserved for the most extreme forms of market failures.

The proposed inclusion of subsections 43 (1A) of the Bill require any vertically integrated operator to do accounting separation. Accounting separation is an intrusive regulatory requirement only implemented where an operator is found to have significant market power ("SMP"). It is only imposed as a pro-competitive remedy to address the abusive behaviour of a vertically integrated firm with SMP. The accounting separation imposed on a vertically integrated operator with SMP where there is no market failure could result in a distortion of competition on the retail markets in question. The proposed amendments should be read

together with section 67 and the market review process in Chapter 10 of the ECA. The process is crucial to follow before imposing any pro-competitive conditions or determining that an operator has SMP. In the Bill, this remedy is being applied in a blanket and matter-or-fact manner.

In addition, subsection 43 (1B) of the Bill proposes that "deemed entities" also provide access to their networks on an active sharing basis. MTN understands this to mean that such entities would not only be required to provide access to their facilities, but also to their communications equipment – such as switches, routers, radios etc, and provide wholesale open access to their facilities, network and network services on a cost-oriented basis. Section 47 of the Bill states that the Authority must prescribe regulations establishing a framework for wholesale rates applicable to deemed entities which must be cost-oriented.

A deemed entity is defined in Section 44 by the insertion of subsection (3A):

> *'For purposes of the determination of deemed entities, as contemplated in subsection (3), the Authority must—*
>
> > *(a) following the definition of markets, as contemplated in section 67(3A), determine in respect of infrastructure markets, which electronic communications network service licensee, if any, has significant market power in such market or has an electronic communications network that constitutes more than 25% of the total electronic communications infrastructure in such markets, following which such electronic communications network service licensee is regarded as a deemed entity; or*
> >
> > *(b) determine which electronic communications network service licensee, if any, controls an essential facility or a scarce resource, such as radio frequency spectrum that is identified for International Mobile Telecommunications, following which such electronic communications network service licensee is regarded as a deemed entity.'';*

In other words, a deemed entity could be:

- A player with Significant Market Power in a relevant market;
- A player that controls an essential facility;
- A player that owns more than 25% of the infrastructure in a relevant market; and/or
- A player that controls a scarce resource.

It is standard practice that significant market power or the control of (properly defined) essential facilities may attract the type of remedies contemplated in the Bill (accounting separation, access obligations, non-discrimination and cost-orientation). It is important to note, however, that best practice is also for such remedies to be applied in a manner that is *proportionate*, i.e. linked to the degree of distortion such market power or control has on the market (the market failure). The least intrusive mix of remedies sufficient to address the actual, or potential market failure is then applied. Here, the bill does away with proportionality concepts and proposes to deploy *all* remedies regardless of market conditions. This is clearly arbitrary.

What is more extraordinary and further misaligned with international best practice is the extension of these blanket provisions to entities whose only "sin" is to hold a scarce resource, have made an investment of reasonable scale in infrastructure or happen to have been granted a license to operate a mobile network. In fact, a 25% threshold is introduced which means that any market participant that has made a commitment to South Africa and actually invested in infrastructure will now be punished for having done so. Clearly, that is irrational.

A scarce resource could be a generic concept that could encompass capital, skilled human resources, Intellectual Property, etc. Furthermore, infrastructure markets are typically concentrated so the 25% threshold appears unremarkable.

This moves the Bill from arbitrary to outright irrational. Deploying the full battery of some of the most aggressive tools available in regulation to a whole industry such as mobile is unheard of and will surely destroy investment, jobs and confidence in South Africa's regulatory framework.

The Bill appears to pre-empt the risk to investment by proposing that deemed entities be forced to fulfil specific network and population coverage targets as proposed in the insertion of subsection (1B) (c) of the Bill as a response to the risk. These obligations, combined with the cost based open access proposals further undermine the business case of network investors in South Africa and exacerbates the risk.