
SUMMARY OF MTN'S ORAL SUBMISSIONS

ICASA PUBLIC HEARINGS

19 SEPTEMBER 2024

INTRODUCTION

1. MTN is grateful to ICASA for the opportunity to make representations in respect of Cell C's applications for transfer of control of its licences.¹ The prospect of the transfer of control of Cell C's licences arises pursuant to a proposed transaction in which The PrePaid Company will increase its shareholding in Cell C to a controlling interest of 53.57%.

2. On 22 January 2024, MTN submitted written representations to ICASA on Cell C's applications. MTN's written submissions cover five topics which it considers relevant for the determination of the applications. For purposes of the oral hearings, MTN will address with two topics
 - 2.1. MTN will respond to Cell C's assertion that the transfer of control will have no adverse impact on competition or consumer interests, or any other negative implications, and will not adversely affect the rights of third

¹ Applications made in terms of section 13 and 31(2A) of the Electronic Communications Act 2005. The relevant licences are: 001/IECS/JAN/2009, 001/IENS/JAN/2009 and spectrum licence numbers 00-495-213-2 and 00-476-898-6.

parties.² MTN disagrees, and will make submissions in respect of the issue of partial customer foreclosure.

- 2.2. MTN will respond to the submissions of Vodacom and Telkom as they relate to the pooling arrangements concluded between Cell C and MTN.³ MTN takes the view that these issues have already been decided by ICASA, and that Cell C's competitors ought not to be allowed to delay or derail the determination of the applications with these irrelevant considerations.

SCOPE OF ICASA'S HEARING TODAY

3. The overarching question is whether ICASA should grant or refuse Cell C's applications for transfer of control of its licences.
4. For the purposes of the oral hearing, there are only two key questions of relevance:
- 4.1. **First:** Do any of the grounds for refusal set out in the Regulations exist?⁴

² Cell C application, paragraph 12.

³ Section F of Vodacom's written submissions. Part B, paras 3 – 6 of Telkom's written submissions.

⁴ See Individual Licensing Processes and Procedures Regulations 2010, regulation 11(3) and 12(1), and Radio Frequency Spectrum Regulations 2015, regulation 15(8).

The grounds for refusal:

- Have the applicants been found guilty of a contravention by CCC?
- Is there non-compliance with 30% HDG equity requirement?
- Are the applicants in arrears with fees (service licence)?
- Is there evidence that the transaction will not promote competition?

MTN's submissions are not focussed on this question. MTN does not contend that any of the submissions it advances are grounds to refuse the application.

4.2. **Second:** Is there additional information relevant to the evaluation criteria set out in the Regulations that is not yet before ICASA? The three evaluation criteria prescribed in the Regulations are:

4.2.1. Promotion of competition in the ICT sector;

4.2.2. Interests of consumers; and

4.2.3. Equity ownership by historically disadvantaged groups.⁵

MTN's submissions today fall within this second area of potential representations. MTN wishes to place before ICASA considerations that it believes are relevant to ICASA's determination of whether the transfer of control will indeed promote competition in the ICT sector.

⁵ The relevant criteria for evaluation are set out in regulation 11(4) of the Procedures and Processes Regulations, and regulation 15(5) of the Radio Frequency Spectrum Regulations.

COMPETITION ISSUES ARISING IN THE TRANSFER OF CONTROL APPLICATIONS

5. Cell C has asserted that the proposed transfer of control will not adversely affect competition or third parties in the ICT sector. MTN disagrees, and encourages ICASA to interrogate this position.
6. MTN wishes to draw to the attention of ICASA some of the potentially adverse impacts on competition of the proposed transfer of control of Cell C's licences. The competition concerns identified by MTN are not the kind of matters that would justify refusal of Cell C's applications, but constitute information relevant to ICASA's decision-making process, and relevant to any conditions that ICASA may impose should it be minded to approve Cell C's applications for transfer of control of its licences.
7. As explained in the written submissions, MTN is concerned about the possible partial customer foreclosure that may arise as a result of the proposed transfer of control.⁶ MTN submits that the analysis prepared by Acacia Economics is incomplete as it assesses only the issue of total foreclosure rather than partial foreclosure arising from the proposed transaction.
8. It is not necessary for ICASA to engage or determine the merits of that issue. The question of the impact of the proposed transaction on competition in the

⁶ MTN submissions, paras 3.11 to 3.24.

market is a matter that has been considered by the Competition Commission, and is presently before the Competition Tribunal.

9. Cell C and The PrePaid Company filed a joint merger application with the Competition Commission on 21 September 2023. The Commission recommended that Tribunal approve proposed merger with conditions on 2 April 2024.
10. MTN has been admitted as an intervening party in the merger proceedings in order to address the Tribunal on the issue of partial customer foreclosure. MTN does not oppose the merger, but has requested that the Tribunal consider and test whether proposed merger conditions adequately address the likely impact on the ICT sector.
11. ICASA and Competition Tribunal have concurrent jurisdiction in respect of competition issues arising in the electronic communications industry⁷ and have concluded a Memorandum of Agreement.⁸
12. The objective of the Memorandum of Agreement is the effective co-ordination, consistent interpretation and application of competition principles, and the sharing of information between the two authorities. Clause 4.2 provides that the Commission has primary authority to review mergers. ICASA may seek advice

⁷ Section 67 of the ECA.

⁸ Section4(3A)(b) of the ICASA Act.

and information from the Commission.⁹ The MOA recognises that ICASA and the Competition Commission's mandates are mutually reinforcing and both entities should "encourage the optimal utilisation of the most effective remedies available between the two institutions."

13. MTN submits that in these circumstances, ICASA should not accept Cell C's assertion that there are no competition issues arising in the proposed transaction. ICASA ought to take note of the issue of partial customer foreclosure in its evaluation of Cell C's applications.
14. However, ICASA need not finally determine the issue of partial customer foreclosure at this stage. This is because the merger proceedings before the Competition Tribunal is the appropriate forum to properly ventilate these issues with the assistance of full discovery, expert economic evidence, and cross-examination. The Tribunal will be in a position to specifically tailored conditions on the proposed transaction in order to address the adverse effects on competition. MTN is satisfied that its concerns will be appropriately addressed through the Tribunal proceedings.
15. In the circumstances, MTN submits that ICASA ought to proceed to make the necessary determinations on Cell C's applications, but urges ICASA to exercise its rights under the MOA and legislation to engage the Competition Commission

⁹ Clause 4.5.

so as ensure it has all relevant information to evaluate whether the proposed transfer of control will promote competition in the ICT sector.

NO FURTHER INTERROGATION OF CELL C'S SPECTRUM ARRANGEMENTS IS REQUIRED

16. Vodacom and Telkom seek to use ICASA's public hearings on Cell C's application as an opportunity to ventilate their commercial grievances about the spectrum pooling arrangements concluded between MTN and Cell C.
17. They urge ICASA to consider whether the spectrum pooling arrangements constitute a breach of the ECA, or Cell C's licence conditions, and whether there has been any de facto transfer of control of Cell C's spectrum through the implementation of these agreements.
18. These are not issues that can or should be ventilated in these public hearings:
 - 18.1. **Firstly**, ICASA has already decided these issues:
 - 18.1.1. ICASA has approved the applications for the spectrum sharing arrangements in the form of pooling. In considering the pooling applications, ICASA would have considered the issues of potential transfer of control, and compliance with the ECA and the parties' licences. There is no need for ICASA to re-consider these issues in this forum.

18.1.2. ICASA is, in any event, functus officio in respect of these issues.

18.2. **Second**, to the extent that there is any doubt on the matter, these issues are currently before the High Court to determine the lawfulness of ICASA's decision and decision-making process.

18.2.1. Vodacom has instituted urgent application proceedings to review ICASA's decisions to approve the pooling arrangements between MTN and Cell C, and MTN and Liquid.

18.2.2. The Court will make a decision with the benefit of evidence on affidavit and the record of decision. ICASA is a party to the High Court litigation, and should not risk conflicting decisions on these issues.

18.3. **Third**, to the extent that Vodacom alleges a breach of licence conditions or the ECA, the appropriate forum to consider the allegations is the Complaints and Compliance Committee.

19. MTN submits that these issues are not relevant and ought not to be entertained in this forum. ICASA is entitled to proceed to determine Cell C's applications:

19.1. Despite Vodacom and Telkom's protestations, ICASA's decisions to approve the various pooling and spectrum sharing arrangements stand as lawful until set aside.

- 19.2. There is no finding of the CCC or High Court that the pooling or and spectrum sharing arrangements are unlawful in any respect. The 'prima facie' evidence of non-compliance advanced by Vodacom in these public hearings is not a sufficient basis to hold up the process and/or refuse application.
- 19.3. To the extent that the pooling arrangements are relevant at all, ICASA already has all the necessary information about the pooling arrangements before it. There is no need for further 'investigations' or 'reports'.
- 19.4. The prejudice to the merging parties of delaying any determination of the applications far outweighs any prejudice that may arise in the unlikely event that the High Court ultimately finds that the pooling arrangements are unlawful. Even in that scenario, it remains open to ICASA to re-take decision to approve the pooling applications on new or different grounds, impose new conditions, amend licence conditions, or refer the matter to the CCC at that stage.

CONCLUSION

20. MTN trusts that these representations will assist ICASA in its decision-making process.
