

15 October 2014



THE POWER IS IN YOUR HANDS

**ICASA**

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Reg. no: 1999/007722/07

Dear Sirs

**RE: RESPONSE TO CONSULTATION ON THE VODACOM ACQUISITION OF SHARES IN NEOTEL**

Thank you for the opportunity to respond to this important consultation. As Cell C has recorded in correspondence to ICASA on several previous occasions, the consolidation in the industry taking place at present is unprecedented, and requires serious consideration by both ICASA and the Competition Commission (Commission), given the likely result for competition in the mobile market, and the mandate of both regulatory authorities. Cell C notes that the market is presently characterized by the dominance of each of Telkom, MTN and Vodacom. Cell C's share of revenue in the mobile market is approximately 11%, whilst MTN and Vodacom hold the balance. Vodacom's share of service revenue in the mobile market is more than 50%.

Cell C is concerned that no similar consultation process has been announced by ICASA in relation to the transaction between MTN and Telkom regarding Telkom Mobile's network assets and spectrum, which in our view is equivalent in effect to the transaction presently before us. Cell C urges ICASA to take action in relation to this transaction on the basis set out below, and to consult publicly on the likely effect of the transactions considered individually and collectively, on the market structure of this important market. Cell C considers the likely result if this transaction proceeds, will fundamentally change the market, and future interventions by ICASA may be more difficult.

Cell C would like to take part in any public hearings that are scheduled by ICASA in relation to this consultation. Cell C believes the likely effect of the transaction to be of such importance that public hearings should be held to ensure that the matter has been thoroughly ventilated and the opinions of stakeholders carefully considered.

**Executive Summary**

Cell C believes in all the circumstances, that ICASA's approval ought not to be given to this transaction because of the detrimental, indeed fatal, impact that this could have on competition in the electronic communications market.

The transaction is described in a letter from Neotel to ICASA dated 17 June 2014 (the Neotel letter) as *"the acquisition by Vodacom, of the entire issued share capital (100%) of and all of the Neotel shareholder's loan claims against, Neotel"* on page 1. On page 3, Neotel describes the effect of transaction in more detail, stating *"while control of Neotel will transfer [to Vodacom] as a result of the proposed Acquisition, the proposed Acquisition will not result in the transfer of any of the licences held by*

*Neotel to Vodacom or to any other person. As such, Neotel will remain the licence holder in respect of each of those licences. The proposed Acquisition will result only in the beneficial control of the licence holder, Neotel, being transferred from the Sellers to Vodacom."*

Cell C was provided with a non-confidential version of a report presented by Frontier Economics on behalf of Vodacom to the Commission entitled "*Analysis of the Competitive Impact of Vodacom's acquisition of Neotel in South Africa*", dated August 2014 (a copy of which is enclosed with this submission as Annexure A) (the Frontier report). We were provided with this report because of the paucity of information available on the transaction, to enable us to make more meaningful submissions. Page 1 of the Frontier report should be contrasted with the description of the transaction by Neotel, as it describes the effect of the acquisition of Neotel by Vodacom as "*Combining the businesses of Neotel and Vodacom will create a service provider with over [blanked out] in fixed revenues, long standing customer relationships in key channels, strong capabilities and key skills in fixed line, to compete more effectively and with enhanced credibility under the Vodacom brand. This combined scale will accelerate growth in unified communications products and services and expand and enhance the range of converged services available to South African corporates.*" On page 2, the Frontier report says further "*Neotel's spectrum assets will enhance the next generation network capabilities in South Africa by accelerating LTE rollout, improving network capacity and availability and reducing the cost to service customers. This will enable Vodacom to remain competitive in the provision of mobile broadband and at the same time support an ambitious national broadband policy in South Africa which requires rapid deployment and high coverage levels.*"

We examine both documents in more detail in section 4 below.

The rationale for the transaction is not consistently described, however on the face of it, the Frontier report would seem to reflect the more practical and factual results of such a transaction. This being the case, Cell C says the following:

1. "Licence" is not defined in the ECA but "licensee" is defined as "a person issued with a licence to provide services in terms of Chapter 3 or to use the radio frequency spectrum in terms of Chapter 5 of this Act". An "individual licence" is defined as "a licence that is granted by the Authority to a person in terms of section 5(2)". The nature of individual licences is such that ICASA may only accept and consider applications for these licences in terms of a policy direction issued by the Minister in terms of section 3 of the ECA, under section 5(6). These are therefore very special licences. Their shareholding and the identity of the person to whom they are awarded (juristic or natural) is a crucial aspect of the award and continued validity (and even renewal) of each such licence. A change in shareholding such as that described by Neotel has far-reaching consequences. It is not the mere change in beneficial control that results, but a significant change in the identity of the licence holder, their equity ownership credentials, their business proposition, financial status and service proposition that will fundamentally change.
2. ICASA is obliged to take account of the objectives of section 2 of the ECA. The objects of the ECA specifically require ICASA to promote competition in the sector in section 2(f). Other section 2 objectives that are specifically relevant here include:

*"(e) ensure efficient use of the radio frequency spectrum;  
(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; and  
(o) subject to the provisions of this Act, promote, facilitate and harmonise the achievement of the objects of the related legislation";*

ICASA is not constrained by the narrow focus of the Commission in this regard – ICASA may and in our view, should take account of the impact of the transaction on licensees as well as the sector;

3. There is no doubt that the larger the scale of an operator, the more investment that operator can attract, and the larger the economies of scale in building out network infrastructure and providing services. The increase in scale that will result for Vodacom from this transaction (which is mentioned several times in the Frontier report) is likely to result in the sort of anti-competitive behavior that Cell C has already complained about in relation to Vodacom, namely the differential pricing between on-net and off-net services, which constitutes an abuse of dominance under the Competition Act. This is also evident in the only slight reduction in retail prices by Vodacom since the introduction of the Call Termination Regulations, 2010, despite the comparatively large reductions in prices by both MTN and Cell C since March 2011;
4. Vodacom's competitive position will be further unfairly improved by its control over spectrum that should, if not being used by Neotel, be returned to the national plan for allocation as part of a co-ordinated allocation of high demand spectrum to all applicants in a fair and equitable manner. Spectrum is a scarce resource that confers a clear competitive advantage on the holder. It is clear that the fundamental purpose of the transaction is to permit Vodacom to access and use Neotel's spectrum and that Neotel will, for all intents and purposes, cease to exist despite representing that it will continue to operate as a separate company and a separate licensee;
5. The effective transfer of Neotel's shareholding to Vodacom will remove the ownership and control by black-empowered persons in Neotel, replacing this level of control by Vodacom's shareholding, which is not as empowered as that of Neotel. This is a significantly important aspect of the transaction even without any specific regulations in this regard having been published by ICASA;
6. Vodacom's acquisition of the fibre presently owned and leased by Neotel to other operators including Cell C will likely have the effect of foreclosing the use of that fibre to Cell C and other parties that are dependent on it for redundancy or primary leased lines, links or backhaul, because Vodacom is likely to retain that fibre for its own exclusive use. ICASA has historically failed or refused to enforce or investigate compliance with the Facilities Leasing Regulations, 2010, so the likelihood of access being granted to this fibre and associated facilities by Vodacom to any third parties on non-discriminatory terms and at a reasonable price, is very low. In any event, any regulatory process such as the referral of a dispute in this regard would take an inordinate amount of time which would have the result of frustrating licensees dependent on that fibre; and
7. Vodacom claims to want to use Neotel's spectrum and fibre to enhance its competitive position in the market and it already holds more than 50% of the service revenue in the mobile market. Vodacom's revenue compared to the revenue of Telkom is also significantly greater as indicated in the parties' most recent financial statements. For their Financial Years ended 31 March 2014, Telkom reported a group operating revenue of R32.5 billion, while Vodacom reported total revenues for South Africa of R61.8 billion and R75.7 billion at group level.
8. The transfer of shares to Vodacom will, along with the transfer of fibre and spectrum and the existing Neotel enterprise and corporate customer base, create Vodacom as a super-dominant operator. Vodacom will be able to leverage its increased scale across both fixed and mobile markets and in all probability have the effect of reducing Cell C's ability to compete and to



increase scale and market share in the foreseeable future. No new entrant will be able to compete against this super-dominant operator.

This submission has been divided into several sections, each of which addresses an important aspect of the proposed acquisition by Vodacom of the whole of the Neotel shares and loan accounts (we refer to this in aggregate as “Neotel”). These parts are:

- i. **Section 1:** The nature of a licence, the effect of the transaction as a licence transfer from Neotel to Vodacom, and the application of section 13 of the ECA, and relevant regulations;
  - ii. **Section 2:** The nature of spectrum, the effect of the transaction as a licence transfer from Neotel to Vodacom, and the application of section 13 and sections 31-34 of the ECA, and relevant regulations;
  - iii. **Section 3:** ICASA’s powers and duties in relation to competition and its relationship with the Commission; and
  - iv. **Section 4:** A general review of the arguments presented in the Neotel letter and the arguments presented in the Frontier report.
1. **The nature of a licence, the effect of the transaction as a licence transfer from Neotel to Vodacom, and the application of section 13 of the ECA and relevant regulations**

1.1 The cost of deploying a wireless network normally consists of the significant capital cost of base station sites (real estate costs, planning, maintenance, distribution network, energy, etc) and the cost of the leased lines (or fibre). Designing the network so as to build base stations to which antennae can be attached, involves consideration of how best to cover a certain area and avoid outage due to distortion, which is common to communications using radio frequency spectrum. The connection to other networks and points of presence is often managed by way of “leased lines” – literally the dedicated fibre links. Because mobile operators are not in the business of running fibre networks, they will tend to obtain the necessary routes of fibre from fibre providers or even fixed network providers. These routes are referred to as leased lines and are provided to a network operator on a dedicated use basis.

1.2 The effective take over by Vodacom of Neotel’s fibre network results in a considerable saving for Vodacom of the cost of deploying leased lines and also results in a de facto transfer of the Neotel licence to operate a network and provide network services.

1.2.1 The ECA defines an electronic communications network (ECN) as “*A system of electronic communications facilities – including satellite, fixed and mobile systems, fibre optic cables and other transmission systems*”. The ECA defines “*electronic communications facilities*” as wire, cable, antenna, mast, satellite transponder, circuit, cable landing station, international gateway, earth station, radio apparatus or other thing that can be used for or in connection with electronic communications – including collocation space, space on poles or ducts or manholes and conduits, associated support systems and services ancillary to electronic communications facilities or otherwise necessary for controlling connectivity of the various electronic communications facilities for proper

functionality, control, integration and use of such facilities. A licence is required for the establishment and operation of an electronic communications network service – i.e. the provision of an ECN “for sale, lease or otherwise”<sup>1</sup>.

1.2.2 An ECN deployed on a national basis requires an individual licence. The nature of this licence, as ICASA will be aware, is that it is granted to a specific entity based usually on that entity’s qualifications in an award process, as was the case with Neotel and even Vodacom. The licences of these entities were granted pursuant to an invitation being issued to apply for the licence and the assessment of the characteristics and qualifications of each applicant at the relevant time.

1.2.3 For this reason any transfer of an individual licence is carefully scrutinised by ICASA in terms of section 13 of the ECA, which has now been amended by the Electronic Communications Amendment Act of 2014 which commenced operation in May 2014 (Amendment Act), and prior to the notification of this transaction to ICASA<sup>2</sup>. We deal with this section in more detail below.

1.2.4 The same is true of any licence amendment – an amendment can only be made on certain grounds which are set out in section 10 of the ECA. This is because of the need to make licence terms more or less consistent as between categories of licensee, and to ensure fair competition and the fair allocation of scarce resources. Importantly, where a licence amendment application is made, ICASA is required to consider, among other factors, subsections 10(1)(b)<sup>3</sup>, (c), (d) and (f):

1.2.4.1 Subsection 10(1)(b) provides that the amendment may be made “for the purpose of ensuring fair competition between licensees”;

1.2.4.2 Subsection 10(1)(c) provides “to the extent requested by the licensee provided it will not militate against orderly frequency management and will not prejudice the interests of other licensees”;

1.2.4.3 Subsection 10(1)(d) provides “to the extent necessitated by technological change or in the interests of orderly frequency management”; and

1.2.4.4 Subsection 10(1)(f) provides “where the Authority is satisfied that the amendment is necessary to ensure the achievement of the objectives of the Act”.

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<sup>1</sup> Section 1 of the ECA.

<sup>2</sup> This transaction therefore falls to be considered under the Amendment Act.

<sup>3</sup> Subsection 10(1)(b) provides “for the purpose of ensuring fair competition between licensees”.

- 1.2.5 It would be illogical that a licence amendment process would require more consideration than would a licence transfer or that the factors to be considered in a transfer would be any less important for a transfer than for an amendment. For this reason, Cell C considers that these factors are as important in the consideration of matters placed before ICASA under section 13 of the ECA, as amended.
- 1.2.6 In all the circumstances, the use by Vodacom of the Neotel fibre constitutes a transfer or at the very least, an amendment of the Neotel ECNS licence. We comment on the characterization of the transaction in the Neotel letter in section 4.
- 1.3 Section 13 of the ECA was amended by the Amendment Act so that subsections (1) and (2) now include reference to the transfer of the licence or control of that licence,  
*“(1) An individual licence may not be let, sub-let, assigned, ceded or in any way transferred, and the control of an individual licence may not be assigned, ceded or in any way transferred, to any other person without the prior written permission of the Authority.  
(2) An application for permission to let, sub-let, assign, cede or in any way transfer an individual licence, or assign, cede or transfer control of an individual licence may be made to the Authority in the prescribed manner.”*
- 1.4 When read with the General Licence Terms and Conditions Regulations of 2010<sup>4</sup> and specifically regulations 2 and 11(b) of the Regulations, it is clear that ICASA requires notice of and an opportunity to consider the transfer of any licence or control of any licence.
- 1.5 The intention of the legislature to empower ICASA to oversee ownership and control of licences is even more clear when one examines the provisions of each of the ICASA Act, 2000 (also amended in 2014 by the ICASA Amendment Act, 2014 which commenced in May 2014) and the ECA in relation to black economic empowerment:
- 1.5.1 Section 4(3)(k) empowers ICASA to make regulations on empowerment requirements in terms of the Broad-Based Black Economic Empowerment Act, 2003 (BBBEE Act);
- 1.5.2 The ECA provides a definition of “broad-based black economic empowerment” and “ICT Charter” which both reference the BBBEE Act ), which is foreseen in the preamble to the ECA Amendment Act;
- 1.5.3 The ECA provides a specific reference to ICASA’s powers to impose conditions in relation to ownership and control on individual licensees under sections 5(9)(b) which provides that ICASA “must” in granting a licence, promote broad-based black economic empowerment...”. Section 9(2)(b) of the Amendment Act also requires ICASA (“must”) to include a minimum of 30% equity ownership in terms of regulations under section 4(3) of the ICASA Act, as amended; and

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<sup>4</sup> Gazette 33294 of 14 June 2010.



- 1.5.4 Section 13(3)(a) of the ECA requires ICASA to promote the ownership and control of electronic communications services by historically disadvantaged groups and to promote broad-based black economic empowerment". Whilst ICASA has yet to promulgate regulations specifically under this section pursuant to the Amendment Act, the intention cannot be more clear – ICASA has the right to determine the criteria for ownership and control of a licence and to approve any amendment to a licence which may include a change in ownership and control or a licence transfer.
- 1.6 These provisions make it clear that ICASA's powers in relation to licensees extend beyond the consideration of transfers and changes in ownership of licences under section 13, to include considerations of compliance with and content of licence conditions. Both the ECA and the licence terms and conditions of the parties deal with ownership and control and require that a licence should be owned by parties with a historically disadvantaged background, which the Amendment Act has clarified, will be considered in terms of the BBBEE Act. Compliance is simply not possible if the ownership and control of Neotel changes, because the licensee will not be as empowered as it is required to be under the ECA.
- 1.7 The standard terms and conditions of licences are also governed by the regulations published in Gazette 33294 of 14 June 2010 (the Standard Terms and Conditions Regulations), which provide that changes in information, such as shareholding, must be notified to ICASA under regulation 2.
- 1.8 Regulation 8 empowers ICASA to request information to enable it to carry out its obligations in terms of the ECA. Of specific importance here is information which assists ICASA *"to facilitate the efficient use of scarce resources"*.
- 1.9 Section 13 of the ECA originally provided that *"an individual licence may not be assigned, ceded or transferred to any other person without the prior written permission of the Authority"*.
- 1.10 In its amended form, section 13 is even more prescriptive and more limiting, providing that *"an individual licence may not be let, sub-let, assigned, ceded or in any way transferred, and the control of an individual licence may not be assigned, ceded or in any way transferred, to any other person without the prior written permission of the Authority."* Subsection (2) provides that *"an application for permission to let, sub-let, assign, cede or in any way transfer an individual licence, or assign, cede or transfer control of an individual licence may be made to the Authority in the prescribed manner."*
- 1.11 It is quite clear from both the ECA and ICASA Acts, read with the relevant regulations we have noted above, that ICASA's permission is required for the transfer of ownership or control of any licence.

1.12 Vodacom's ownership and control by black persons constitutes on Neotel's version (in paragraph 9.3.2 of the Neotel letter) less than 5%, whilst Neotel's ownership and control by black persons appears on the face of it to exceed 25% and possibly even 30%. To permit a transfer of a licence or control of that licence to pass from an empowered entity to an entity which is not empowered would run counter to the fundamental provisions on ownership and control set out in the ECA.

1.13 We have addressed the arguments of Neotel in relation to regulations which it claims continue to have effect under the now repealed Telecommunications Act of 1996, in section 4 of this submission.

## 2. Section 2: The nature of spectrum, the effect of the transaction as a licence transfer from Neotel to Vodacom, and the application of section 13 and sections 31-34 of the ECA, and relevant regulations

2.1 From the report presented by Frontier it is clear that this transaction is about spectrum and specifically enhancing Vodacom's access to important, business-critical and high demand spectrum that will enable it to gain a head start in the provision of high speed broadband services over LTE.

2.2 Cell C believes that this transaction will enable the merging parties to further capitalise on the current duopolistic structure in the access market by granting them more control over scarce spectrum and land, and will confer an undue and unlawful benefit to those entities who receive it outside of the regulatory process. We expand on the reasons for saying this below.

2.3 Spectrum is also known as frequency, radio or radio frequency spectrum, and is necessary for radiocommunications (wireless or mobile communications). Spectrum, land, numbers and rights of way are all known in telecommunications as "scarce resources". These things cannot be duplicated and they are finite in nature. As a result, the use of or access to spectrum, land, numbers and rights of way is typically subject to specific authorisation by the government as the custodian of scarce resources.

2.4 Historically, South Africa's commitment to the international World Trade Organisation Treaty and General Agreement on Trade and Services (1997) committed (and still commits) South Africa to a number of internationally accepted obligations which are binding at national Government level and therefore on ICASA, including:

### *"6. Allocation and use of scarce resources*

*Any procedures for the allocation and use of scarce resources, including frequencies, numbers and rights of way, will be carried out in an objective, timely, transparent and non-discriminatory manner. The current state of allocated frequency bands will be made publicly available, but detailed identification of frequencies allocated for specific government uses is not required."*

### *2.5 International treatment of spectrum*

2.5.1 The effective management of spectrum (by regulatory authorities including competition authorities) requires more than a purely technical consideration of spectrum efficiency. Functional and economic





considerations must also be taken into account, including the extent to which the utilisation of spectrum meets a user's specific needs and the social and economic value that can be derived from it<sup>5</sup>.

2.5.2 ComReg, the Irish Communications regulatory authority, notes that its objectives in spectrum management include to *"ensure that spectrum is used to promote competition and not misused to restrict or distort competition"*<sup>6</sup>. ComReg has even created a formula to calculate the contribution to GDP of a given company making use of radio spectrum.<sup>7</sup>

2.5.3 Furthermore as noted by the European Regulators Group (ERG), *"Many of the issues on the agenda for the Radio Spectrum Policy Group (RSPG) are directly or indirectly competition related and the reverse is also true, many of the issues on the European Regulators Group (ERG) agenda are spectrum related. Spectrum management and market regulation will increasingly intertwine in the future.<sup>8</sup> ...Radio spectrum is an essential input for electronic communications. Spectrum available for electronic communications services is a limited resource with a limited number of license holders in each frequency band. Due to certain characteristics of frequency bands and regulatory constraints such as limitations on allowed usage, relatively few licenses may be available for a particular type of electronic communications service. A limitation of the amount of spectrum available and the number of players who have access to spectrum may also create market power in the electronic communications markets. However, market power in upstream spectrum usage rights does not necessarily imply market power in downstream markets. But it should be noted that spectrum access is an essential input for many communication services."<sup>9</sup>*

2.5.4 Although the paper considers the hoarding of spectrum specifically as an anti-competitive activity, the paper also considers the more general nature of spectrum in the context of competition. The paper acknowledges that *"Access to radio spectrum is a prerequisite for operators wanting to deliver wireless electronic communications services to end-user markets. Access to certain "high value" frequencies<sup>10</sup> are particularly important for such operators. Limiting competitors' access to spectrum can inhibit their ability to perform on end-user ("downstream") markets. This depends on, inter alia, to what degree wireless services to end users in one band are viewed by those users as substitutable by*

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<sup>5</sup> ComReg. *Strategy Statement: Strategy for Managing the Radio Spectrum*. Document No 11/89. 22 November 2011.

<sup>6</sup> *Ibid.* Page 20.

<sup>7</sup> *Ibid.* Appendix A.

<sup>8</sup> ERG RSPG. *Report on radio spectrum competition issues (ERG-RSPG report on the management of radio spectrum in order to avoid anticompetitive hoarding)*. June 2009. Page 1.

<sup>9</sup> *Ibid.* Page 11.

<sup>10</sup> Cell C notes that this would include the bands in which Neotel's spectrum can be found, as set out by the Frontier report.

*services delivered through the use of another band, or by fixed-line alternatives. If there is sufficient substitutability between those services, they belong to the same relevant downstream market. If the entire spectrum that can be used to deliver a particular service on a downstream market is held by one or a small number of players – and there is no fixed-line alternative – new entry to that downstream market becomes impossible. If one or a small number of market players holds a large share of the spectrum, competitors may not be able to provide the same type of service in terms of inter alia the quality of service level or price. A monopoly-like situation in some frequency bands could lead to a similar competitive structure on the down-stream markets. For example when the entire 900 and 1800 [MHz] spectrum is held by incumbents, new entry as a network operator on the GSM service market is not possible. ....”<sup>11</sup>*

2.5.5 The ERG further notes that “an arrangement where competitors commit between themselves to dividing up a limited resource between them could constitute such a concerted practice whose object or effect is the prevention, restriction or distortion of competition, and which would therefore be prohibited by EC law”.<sup>12</sup> This illustrates that spectrum is an issue over which there could be competition in an unregulated environment, and that the impact of approval of such sharing arrangements would facilitate effects that are similar to the effects of collusive and / or exclusionary conduct.

2.5.6 In an article in the New Zealand press in November 2013, the same sentiments as are being expressed by Cell C regarding spectrum for dominant operators as a competitive advantage, were published by the director of small mobile operator, 2degrees. The comments were made on the notification by the regulatory authority that awards of spectrum would be made by way of auction. He said, “*“If the government intentionally or unintentionally gives a competitive advantage to a hugely well financed company like Vodafone<sup>13</sup>, that disadvantages us and Telecom... The little guy sees the government as a source of protection from the big guy. We are looking for them (Vodafone) not to get an unfair advantage by having more spectrum at a particular band... Both Telecom and Vodafone have sought clearance from the competition regulator for the right to acquire more spectrum, and the outcome of the auction will depend on the Commerce Commission's view of the potential for unfair commercial advantage to any party of owning substantially more 700Hhz spectrum than competitors.”*<sup>14</sup>

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<sup>11</sup> Ibid. Page 14.

<sup>12</sup> Ibid. Page 22-23

<sup>13</sup> Vodafone NZ Ltd is reported in public sources as holding approximately 47% of the New Zealand mobile market in mid-2013.

<sup>14</sup> <http://www.nbr.co.nz/article/second-spectrum-auction-favours-vodafone-says-new-2degrees-director-bd-149058>

- 2.5.7 An even more recent article<sup>15</sup> indicates that the Federal Communications Commission (FCC) (the regulatory authority in the United States) also considers the acquisition of spectrum by two operators to have potential for anti-competitive results. The Chairman of the FCC is quoted online as follows *"FCC Chairman Tom Wheeler circulated on Friday new rules for the auction, which proposes banning the four nationwide wireless carriers from teaming up to bid at the auction. The Wall Street Journal previously reported that Sprint and T-Mobile were working on a planned joint venture that would raise roughly \$10 billion to spend at the auction ahead of a possible merger. "If two of the largest companies are able to bid as one combined entity in the auction, their combined resources may have the effect of suppressing meaningful competition. Therefore, the item tentatively concludes that joint bidding arrangements between nationwide providers should not be allowed," FCC Wireless Bureau Chief Roger Sherman wrote in a blog post on Friday."*

## 2.6 The licensing and award of spectrum in South Africa

- 2.6.1 Holding scarce resources on behalf of the public and in the public interest is strictly governed by Chapter 5 of the ECA which deals with ICASA's powers in relation to radiocommunications.
- 2.6.2 Section 30(1) makes it clear that "in carrying out its functions under this Act and the related legislation, the Authority controls, plans, administers and manages the use and licensing of the radio frequency spectrum except as provided for in section 34."
- 2.6.3 Section 31(1) provides that "no person may transmit any signal by radio or use radio apparatus to receive any signal by radio except under and in accordance with a radio frequency spectrum licence granted by the Authority to such person".
- 2.6.4 Under section 31(2) of the former ECA (which is now section 31(2)(a) of the ECA, as amended), "a radio frequency spectrum licence is required in addition to any service licence contemplated in Chapter 3, where the provision of such service entails the use of radio frequency spectrum."
- 2.6.5 Section 31(2)(b) of the ECA provides that the opposite is also true, namely that "a service licence is required in addition to any radio frequency spectrum licence where the provision of such service entails the use of radio frequency spectrum."
- 2.6.6 Section 31(2A) of the ECA provides further that "a radio frequency spectrum licence may not be assigned, ceded or in any way transferred, and the control of a radio frequency spectrum licence may not be

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<sup>15</sup> <http://online.wsj.com/articles/fcc-proposes-banning-joint-bids-by-wireless-companies-at-spectrum-auction-1406921552>

assigned ceded or in any way transferred, to any other person without the prior written permission of the Authority”.

2.6.7 Section 31 also provides that ICASA may prescribe procedures and criteria for various activities in relation to radiocommunications licences and the use of spectrum, such as the amendment, transfer, transfer of control, renewal, suspension, cancellation or withdrawal of such a licence.

2.6.8 In addition to outright control changes, section 31(4) of the ECA deals with licence amendments. That section provides at subsection (d) that the Authority may amend a radio frequency spectrum licence if requested by the licensee concerned to the extent that the request is fair and does not prejudice other licensees. This criterion (on which licence amendments are based), along with the other legislative directions set out above, provide a useful standard on which to base considerations for the approval of a transfer of a spectrum licence.

2.6.9 In terms of regulation 10 of the Radio Frequency Spectrum Regulations of 2011 (Radio Regulations), *“no person must transfer spectrum licences”* except with ICASA’s approval. The procedure for applying for a transfer is set out in detail in the Radio Regulations.

2.6.10 Other important provisions governing spectrum in those regulations include:

2.6.10.1 a spectrum licence endures for only one year and the grant of a licence must not be construed as conferring a monopoly over the use of spectrum on the holder (regulation 15);

2.6.10.2 applications, renewals, amendments or transfers of spectrum licences will not be permitted if the required fees are not paid (regulation 19);

2.6.10.3 spectrum licences may only be amended in terms of section 31(4) of the ECA (read with regulation 8); and

2.6.10.4 an application for a spectrum licence will only be considered if historically disadvantaged persons are the direct owners of at least 30% of the applicant.

2.6.11 Whilst paragraph 7 of the accompanying explanatory note to the Radio Regulations provides that sharing of spectrum is to be encouraged, it also notes that ICASA may impose sharing in the interests of efficiency. Paragraph 8 provides that ICASA may take spectrum away from a licensee “in order to allow it to be used for another purpose of greater benefit to society as a whole”.



- 2.6.12 This principle is espoused in section 31(8) of the ECA, which provides that “subject to subsection (9), the Authority may withdraw any radio frequency spectrum licence or assigned radio frequency spectrum when the licensee fails to utilise the assigned radio frequency spectrum in accordance with the licence conditions applicable to such licence.”
- 2.6.13 ICASA has indicated that it is preparing for a process in terms of which it will allocate “high demand” spectrum – spectrum falling in either or both of the 2600MHz and 800MHz bands. This process first began towards the end of 2011 and the delay is testament to the complexity and importance of making an equitable award in the interests of competition, and promoting national goals.
- 2.6.14 Section 8(2)(e) of the ECA provides in relation to licence conditions that standard terms and conditions of licences may take account of the public interest in ensuring service interoperability, non-discrimination and open access, interconnection and facilities leasing. Subsection (f) provides that licence conditions may also take account of the public interest in securing the efficient functioning of electronic communications networks including, but not limited to, preventing or restricting harmful interference within the radio frequency spectrum.
- 2.6.15 Section 8(2)(m) of the ECA is an important section dealing with licence conditions in the context of the public interest in facilitating and maintaining a competitive electronic communications environment and in regulating and controlling anti-competitive practices. Subsection (n) specifically relates to licence conditions regarding the efficient use of the radio frequency spectrum.
- 2.7 International literature confirms that access to additional spectrum via the proposed transaction will enable Vodacom to increase its dominance and further exclude Cell C from the relevant retail market.
- 2.8 The process by which Vodacom has sought to increase its share of spectrum is not permitted by the ECA without ICASA’s approval. ICASA is required to take account of the objects of the Act and relevant regulations as set out above in sections 1 and this section 2, prior to granting such approval.
- 2.9 Transfers of control or of the radiocommunications licences themselves are subject to the same requirements on ownership and control as are the ECNS and ECS licences, and we have dealt with this above in section 1.
- 2.10 Furthermore and perhaps most importantly, we note the characterization of the transaction in the Frontier report clearly states that Vodacom will use the spectrum of Neotel. For all intents and purposes, Vodacom will therefore “control” the spectrum of Neotel. On any interpretation (and as we will consider

in section 4), this constitutes a de facto transfer of the licence or at a minimum, control of the spectrum, requiring ICASA's approval.

### 3. Section 3: ICASA's powers and duties in relation to competition and its relationship with the Competition Commission

3.1 ICASA's jurisdiction to undertake inquiries into prohibited practices and mergers which have already been notified to the Competition Commission is limited in terms of sections 4B(8) and (9), which were introduced by the ICASA Amendment Act. However, such limitation applies only to ICASA's evaluation of a merger's effects in terms of the Competition Act, and does not restrict ICASA's ability to review a merger with reference to the impacts of that transaction with reference to the ECA.

3.2 The Vodacom/Neotel transaction was notified to the Commission (and, by extension, to ICASA by virtue of the MoU between the two regulatory authorities).

3.3 The relevant provisions of the ICASA Amendment Act are:

*"(8) Before the exercise and performance of any of its powers and duties in terms of this section, the Authority must-*

*(a) consider whether or not, in terms of any concurrent jurisdiction agreement concluded between the Authority and any other authority or institution, it would be appropriate to refer an inquiry to such authority or institution; or*

*(b) subject to section 67 of the Electronic Communications Act and the terms and conditions of any concurrent jurisdiction agreement concluded between the Authority and the Competition Commission, bear in mind that the Competition Commission has primary authority to detect and investigate past or current commissions of alleged prohibited practices within any industry or sector and to review mergers within any industry or sector in terms of the Competition Act."*

*(9) Subject to the terms and conditions of the concurrent jurisdiction agreement or unless otherwise agreed to by the Authority and the other authority or institution in question, the Authority may not take any action where a matter has already been brought to the attention of and is being dealt with by that other authority or institution".*

3.4 The international literature cited above in section 2 suggests that such conduct gives rise to numerous competition law concerns in those jurisdictions. Such conduct would also constitute contraventions of the Competition Act, 1998, including exclusionary conduct in terms of section 8(c) of the Act, or refusals to provide access to essential facilities or scarce goods in contravention of section 8(b) or 8(d)(ii) of the Act. Cell C's complaint against Vodacom and MTN (2013Oct488) to the Commission (which has been provided to ICASA) illustrates that dominance in this sector has been abused by Vodacom, and this severely restricts Cell C's ability to compete effectively. The entrenchment of Vodacom's dominant position through the proposed transaction, as well as the access to spectrum which the proposed transaction seems to envisage, provides further opportunity, ability and incentive for Vodacom to engage in such exclusionary practice.

3.5 It is therefore important for ICASA to note to the Commission (if it has not already done so) that if they were to allow a merger in a market where another regulator is considering the level of competition and how to maximise the allocation of a scarce resource in order

not to distort the market, it could have unforeseen and unfortunate consequences for that market and all the other operators in it.

3.6 The Commission is explicitly empowered, in terms of section 12A(3) of the Competition Act, to consider the impact of a merger on public interest issues. In this case, the high cost of communication has been identified by government as a significant impediment to growth and the level of competition directly impacts the cost to communicate and the terms on which communications services are provided to consumers. The effect of the proposed transaction is thus to be felt not only on the electronic communications sector, but on the economy as a whole.

3.7 ICASA has the power to allocate spectrum, and any decision by the Commission, without careful and thorough engagement with ICASA, would undermine any efforts to allocate spectrum in the public interest, and potentially would result in distortion of the market. Cell C submits that ICASA's powers in relation to spectrum would require it to prevent the transaction for the reasons set out below, read with the argument in relation to licence transfers in section 1 above.

#### **4. Section 4: A general review of the arguments presented by Neotel in the Neotel letter, and the arguments presented in the Frontier report**

##### *4.1 The Neotel letter*

4.1.1 We have set out the way in which Neotel contextualizes the proposed Acquisition in the introduction to and in section 1 of this letter. This differs considerably from the description given to the competition authorities by Vodacom's consultants, Frontier Economics. As we say above, the practical implications of the proposed Acquisition would seem to support the version set out in the Frontier report.

4.1.2 Furthermore, Neotel seeks to argue that the Regulations in respect of the Limitation of Ownership and Control of Telecommunications Services (Gazette 24288 of 2003) take precedence when considering the transfer of shares. We have set out above in sections 1 and 2 the long list of regulations and sections of the relevant legislation that clearly indicate the process for considering a transfer. To suggest that a regulation that may well still be in force, would trump the requirements of the current legislation and regulations passed in terms of that legislation, just doesn't seem sensible.

4.1.3 This is particularly so in that Neotel recognises that ICASA has not yet published regulations under section 31(3)(c) of the ECA but that there is no duty on ICASA to do so. This argument cannot avoid the statement by Frontier in the Frontier report that Vodacom intends to use the fibre and spectrum of Neotel. Since spectrum is assigned by individual licence and since fibre constitutes an ECN, regardless of the existence of new or old regulations, the provisions of the ECA state that spectrum may not be transferred, ceded, leased nor may control be changed without ICASA's

approval. Similarly, no ECNS licence may be transferred nor may control be changed without ICASA's approval.

- 4.1.4 Neotel has two ECNS and two ECS licences according to paragraph 8 of the Neotel letter, and some 9 spectrum licences. Without these licences, Neotel cannot operate its business, which it categorises as "*voice and data services*". As Vodacom intends to use the very assets that require licensing under the ECA which licences were issued to Neotel, owned as it is by its current shareholders, Neotel is unable to continue to provide services under its licences if it no longer has control over its assets. We addressed this point in section 1 in our analysis of a "licence".
- 4.1.5 The contents of paragraphs 1 to 7 of the Neotel letter are therefore incorrect in law.
- 4.1.6 Cell C's advisors have previously engaged with ICASA on the requirements of regulation 10 of the Standard Terms and Conditions regulations. It has been made clear that ICASA requires more than notice in relation to a change in shareholding, ICASA must in fact approve the change. This was the case specifically in relation to the change in shareholding of Kagiso Media<sup>16</sup> in East Coast Radio. Since the same obligations apply to both ECNS, ECS, radiocommunications and BCS licensees under these regulations, there would seem to be no reason why ICASA would treat licensees differently. Accordingly a notice such as referred to in paragraph 10 of the Neotel letter is insufficient, particularly since a change of this magnitude amounts – at the very least – to an amendment of the licence, which strictly speaking, ought to take place under section 10 or 31 of the ECA.
- 4.1.7 Paragraph 11 of the Neotel letter deals with the confidentiality of the Sale Agreement between the parties. Although Cell C has no difficulty in principle with the request, it is difficult to properly review and consider the implications of the transaction without at the very least, an indication of the key elements of the transaction. If we are to assume that the Frontier report contains an accurate assessment of the transaction, then it is clear that Neotel cannot exist as a separate licensee if the transaction were to proceed, as if ICASA and the competition authorities were to approve the transaction (which Cell C says they ought not to do), the assets of Neotel would be subsumed for use in the Vodacom business. Furthermore as regards confidentiality, we do not consider the grounds advanced in paragraph 11.2.3 to justify confidentiality as it is unclear how competitors to the parties (and we note that Frontier does not consider Cell C to be a competitor to Vodacom<sup>17</sup>) would be able to gain "an unfair competitive advantage" simply by gaining knowledge of the mechanics of the proposed Acquisition. Given the clear discrepancy between public statements by Vodacom and Neotel and the contents of the Frontier

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<sup>16</sup> In this case, the change in shareholding was within the same group, but ICASA still required a formal notice and consultation procedure.

<sup>17</sup> Pages 2 and 4 of the Frontier report, read with paragraphs 4.41, 4.113 and 4.116.



report, which was prepared on the instructions of Vodacom in support of the proposed transaction, it is submitted that the parties are seeking to rely upon confidentiality concerns to frustrate the efforts of potential objectors by ensuring that they are not well-informed.

- 4.1.8 Similarly paragraph 11.2.5 refers to the right of privacy of past employees, which Neotel argues must be protected. However this is similarly not correct on its face. The obligation only arises in relation to past employees if Neotel committed itself to such an obligation in relation to those people, since no privacy legislation has yet taken effect in South Africa and it is not Neotel's common law responsibility to protect the privacy of past employees.
- 4.1.9 We have not seen any public document that evidences ICASA's agreement to the confidentiality request by Neotel, and would ask that this be provided to us, if such a document exists.
- 4.1.10 Finally in relation to the Neotel letter, we wish to draw an important distinction between a corporate entity which may hold for itself certain obligations that are separate from its shareholders, and the control of a corporate entity, which may vest in and usually does vest in, entirely different entities. The undertaking given by Neotel in Annexure A constitutes an undertaking by a licensee that is currently owned and controlled by an entirely separate set of shareholders from those that will control and own the licence if the transaction is approved. Therefore it is not competent for Neotel to give the undertaking in paragraph 4, when the control of the licensee will change, on Neotel's own version. Such an undertaking ought to be given in the circumstances, by Vodacom.

#### 4.2 *The Frontier report*

- 4.2.1 In addition to the characterization of this transaction which we have dealt with in the introduction to this submission and in section 1 above, we note that Vodacom claim that this transaction is necessary as otherwise they (Vodacom) can't compete with Telkom. Cell C finds this unlikely given the revenue market share of Vodacom (and even its revenue even compared to Telkom's revenue, as set out in paragraph 7 of the Executive Summary). In this regard, Vodacom claims it needs Neotel's spectrum "*to remain competitive*" which is somewhat disingenuous but nonetheless confirms that it is not likely that Neotel can remain a licensee and a separate company when it is Vodacom's intention to use Neotel's spectrum (despite the legal restrictions on this, which we have examined in sections 2 and 3 above).<sup>18</sup>

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<sup>18</sup> "The rationale for the present transaction is that it will help to remedy some of these difficulties in both markets, by increasing the credibility of the competitive challenge to Telkom in fixed markets and by alleviating the spectrum constraints that Vodacom now faces in the mobile market, that are likely to become more acute in the future without this transaction", paragraph 2.8 at page 11 of the Frontier report.

- 4.2.2 Frontier seem to acknowledge that Cell C's ability to compete is limited (see pages 2 and 4 and paragraphs 4.41, 4.113 and 4.116) - even now - so clearly it will be worse if the transaction proceeds. Therefore the transaction will have a negative effect on competition because it may result in the elimination of an already weak competitor, with associated issues for the consumer. We also note that Frontier suggests that even MWeb and IS are stronger competitors to Vodacom than Cell C.
- 4.2.3 Frontier recognises that the transaction will result in "elimination of overlapping elements" which seems to point to rationalisation of fibre assets but potentially also sites, which directly affects access by Cell C and competition in the fibre market, which remarks appear at paragraphs 4.21, 4.30, 4.32, 4.129 and 4.131. Competition in the markets in which Frontier finds there to be some overlap seems to be entirely overstated in Cell C's view. ICASA cannot in any event consider this point except insofar as the market for sites and networks is likely to become less competitive if Neotel exits this market and Vodacom's market power in this regard is likely to increase.
- 4.2.4 Whilst the document seems to point in places to the existence of two markets it is interesting that in a number of places, Frontier recognise at least impliedly, that the market must be one market, as they say for example that Vodacom as a standalone business "*lacks the fixed network to pose a serious competitive threat to Telkom*". Paragraph 4.103 must therefore be irrelevant. What is perhaps more concerning in the context of what ICASA's powers and duties are (as we have set them out above) is that Neotel is not likely to remain a licensee if it is the case that Vodacom's experience in mobile distribution will be applied to the fixed market, through Neotel.
- 4.2.5 If it is really Vodacom's intention to run Neotel as a separate licensee then Vodacom would not in any event be competing with Telkom, because Neotel would continue to do so as a separate licensee. Conversely, how can Vodacom use Neotel's spectrum (which point occupies a lot of pages), if Neotel is going to remain a licensee? The executive summary read with paragraphs 4.6, 4.19, 4.20, and 4.74 are relevant here (and see footnote 18 above).
- 4.2.6 On page 5, the last paragraph states "*any network without access to sufficient radio spectrum will struggle to offer quality-competitive services*" which would tend to support Cell C's view that this spectrum is preferentially and unlawfully being taken out of the market by Vodacom and Neotel, which prejudices other possible applicants. Paragraph 2.28 is also relevant in this regard.
- 4.2.7 Cell C finds it somewhat incredible that Frontier (or Vodacom) considers that the "*merged parties*" will continue to face MWeb and IS who will be "*strong competitors*" to the merged entity (at the top of page 7, and at paragraph 4.113). The parties do not even operate in the same markets

nor are MWeb and IS radiocommunications licensees or the owners of sites and fibre to the same or even a similar extent as either Neotel or Vodacom. This also contradicts the later statement (at the top of page 12) that "*MWeb and IS can only compete in a limited fashion by cherry-picking high value customers that justify customer-specific network roll-out*". Frontier seems to have moved on to consider peripheral markets in which some sort of enterprise competition can be considered to have existed with Neotel. If Vodacom and Neotel are "merged", the super-dominant operator is likely to be able to leverage its market power into several different markets, which suggests that it is not intended that Neotel will be operating on a standalone basis at all.

- 4.2.8 There are factual errors in the document for example, the statement in paragraph 2.16 and 5.5 that the ECA requires unbundling. The ECA does not in fact require unbundling, this is not mentioned at all in Chapter 8.<sup>19</sup> Cell C also takes issue with the measure of market share as the number of SIMs. This is not a measure of market share that ICASA has ever used, nor is it a common measure in South African competition law. Many SIMs are activated and not used, and the measurement of active SIMs is not accurate – each operator calculates this differently. Paragraph 2.24 on Cell C's coverage (at 35%) is also factually incorrect. These errors cast the transaction in a different light if not corrected.
- 4.2.9 There is substantial reliance on the SA Connect national broadband policy of December 2013 to support the need for the transaction. It is imperative that we distinguish policy goals which are high level goals, from what the reality is, and that we also note that this policy has not been in force for even a year yet, nor has it been implemented by any authority at all nor is it clear how many of the high level policy objectives are to be achieved – therefore basing a transaction of this magnitude on this rather thin foundation would not seem appropriate for either a listed company or companies with foreign shareholders whose preference is always for regulatory certainty.
- 4.2.10 Cell C notes that because of the strong leaning of all European and US regulatory authorities and operators towards convergence, the trend is to consider markets in a converged world, not separately unless it is absolutely clear that there is no overlap<sup>20</sup>. This report seems to consider the markets as separate and as unified. It is not clear that ICASA has adopted one over the other, but Cell C notes that this is in any event irrelevant for a finding in relation to a licence transfer, licence amendment, or other regulatory process that might apply in this context.

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<sup>19</sup> Frontier seems to be confusing the ECA with the Telecommunications Act, 1996, now repealed.

<sup>20</sup> The only case recently that has been cited in this regard is the Facebook/Whatsapp merger where the Commission found that the two overlapped a bit in terms of subscribers, but otherwise had few commonalities.

- 4.2.11 Cell C notes that although this is not strictly speaking relevant for ICASA, the EU has recently reduced the number of markets which it considers could be relevant markets even below the 7 markets that it established after 2007, and there are several more recent transactions than those listed by Frontier in footnotes 17 to 20.
- 4.2.12 Finally, the Frontier report contains data that seems to suggest that Cell C's assumptions about the effect of the transaction are accurate, and that in fact the transaction will result in a de facto transfer of networks and spectrum that are presently the subject of licences granted to Neotel and not to Vodacom. This being the case, the transfers fall to be considered by ICASA in the context of Chapters 3 and 5 of the ECA, bearing in mind the objectives of the ECA in section 2.

Cell C contends that in all the circumstances, granting approval of the change in shareholding is not what this transaction is all about. This transaction requires ICASA to initiate the proper process for a licence transfer. In all cases, Cell C believes that the transaction should not proceed because it will result in a circumventing of the proper process for spectrum allocation that will result in a skewing of the competitive landscape in Vodacom's favour, where Vodacom is already a dominant operator.

Yours faithfully



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