



**Independent Communications Authority of South Africa**

350 Witch-Hazel Avenue, Eco Point Office Park

Eco Park, Centurion.

Private Bag X10, Highveld Park 0169

Telephone number: (012) 568 3000/1

**APPLICATIONS BY CELL C LIMITED ("CELL C") FOR THE TRANSFER OF CONTROL OF INDIVIDUAL ELECTRONIC COMMUNICATIONS SERVICE ("I-ECS"), INDIVIDUAL ELECTRONIC COMMUNICATIONS NETWORK SERVICE ("I-ECNS") AND RADIO FREQUENCY SPECTRUM ("RFS") LICENCES TO THE PREPAID COMPANY PROPRIETARY LIMITED ("TPC")**

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**REASONS FOR DECISION**

**APRIL 2025**

## 1. INTRODUCTION

- 1.1. Cell C is a mobile telecommunications provider offering a wide range of products and services, including voice, data, device and SIM deals across South Africa<sup>1</sup>.
- 1.2. On 26 September 2023, Cell C formally lodged the following applications with the Authority:
  - 1.2.1. an application for the transfer of control of its I-ECNS and I-ECS licences, which are hereinafter collectively referred to as the "**Service Licences**", to TPC in terms of section 13(2) of the Electronic Communications Act, 36 of 2005 ("**ECA**") ("**Service Licences Transfer Application**"); and
  - 1.2.2. an application for the transfer of control of its RFS licences ("**RFS Licences**") to TPC ("**RFS Licences Transfer Application**") in terms of section 31(2A) of the ECA.
- 1.3. The abovementioned applications (the Service Licences Transfer Application and the RFS Licences Transfer Application) are hereinafter referred to collectively as "**the Applications**".
- 1.4. The Authority, in accordance with its statutory mandate, considered the information contained in the Applications, the written representations submitted by various stakeholders and the responses thereto, and conducted public hearings on 19 September 2024. Following this process as well as the outcome of its own analysis of the Applications and relevant information, the Authority took a decision to approve the Applications on 29 November 2024, which decision was communicated to the Applicant on 4 December 2024.
- 1.5. This Reasons Document outlines the Authority's rationale for approving the Applications.

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<sup>1</sup> Cell C 'Who we are' available online at <https://worldofcellc.co.za/who-we-are>

## 2. THE PROPOSED TRANSACTION

- 2.1. The proposed transaction which gave rise to the Applications was for the acquisition by TPC, a wholly owned subsidiary of Blue Label Telecoms Limited ("**BLT**"), of an additional 4.04% of the issued shares in Cell C from Cedar Cellular Investment 1 (RF) (Pty) Ltd, an entity referred to as "**SPV1**" in the Applications, and thereby increasing TPC's shareholding from 49.53% to 53.57% i.e., giving TPC a controlling shareholding in Cell C ("**Proposed Transaction**").
- 2.2. In its accompanying submissions in respect of the Applications, Cell C contended that, following the implementation of the Proposed Transaction, TPC would be able to assert more strategic control over Cell C and that such control would thereby ensure that Cell C is a "*more sustainable and viable*" entity which is better able to serve its customers. The Applications further state that the Service Licences and RFS Licences will continue to be held by Cell C and the associated services will also continue to be provided by Cell C subsequent to the finalisation of the Proposed Transaction.
- 2.3. Cell C further submitted that, while there will be a reduction of black ownership of Cell C by 1.80%, the ownership of Cell C by black persons will be 34.41% which, it submitted, will comply with the required minimum 30% historically disadvantaged groups ("**HDG**") ownership threshold prescribed by the ECA.
- 2.4. Cell C is a mobile telecommunications provider and mobile network operator ("**MNO**"), offering a wide range of products and services, including voice, data, device and SIM deals across South Africa<sup>2</sup>.
- 2.5. Cell C is the holder of the Service Licences (i.e., I-ECS and I-ECNS) and the RFS Licences (radio frequency spectrum licences), which form the subject of the Applications to obtain the Authority's approval for the transfer of control of the aforementioned licences to TPC pursuant to the Proposed Transaction.

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<sup>2</sup> Cell C 'Who we are' available online at <https://worldofcellc.co.za/who-we-are>

- 2.6. On 26 September 2023, Cell C submitted the Applications to the Authority in terms of which it sought the Authority's permission for the transfer of control of both Cell C's Service Licences and RFS Licences to TPC.
- 2.7. The details of the Service Licences and RFS Licences which formed the subject of the Applications, respectively, are as set out in the table below:

**Table 1: Cell C's Licences**

<b>Service Licences</b>	<b>RFS Licences</b>
I-ECS licence No. 001//IECS/JAN/2009	Radio Frequency Spectrum Licence No. 00-495-213-2
I-ECNS licence No. 001/IECNS/JAN/2009	Radio Frequency Spectrum Licence No. 00-476-898-6

### **3. APPLICABLE LEGISLATIVE FRAMEWORK**

- 3.1. The Authority's primary objects and functions are set out in section 2 read with section 4 of the ICASA Act and include, for the purposes of the Applications, to:
- 3.1.1. regulate electronic communications in the public interest<sup>3</sup>;
  - 3.1.2. monitor the broadcasting, postal and electronic communications sectors to ensure compliance with the ICASA Act and underlying statutes<sup>4</sup>;
  - 3.1.3. control, plan, administer and manage the use and licensing of the radio frequency spectrum in accordance with bilateral agreements or international treaties entered by the Republic<sup>5</sup>;

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<sup>3</sup> Section 4 of the ICASA Act read with 2(a) of the ECA.

<sup>4</sup> Section 4(3)(b) of the ICASA Act.

<sup>5</sup> Section 4(3)(c) of the ICASA Act.

- 3.1.4. grant, renew, amend, transfer and revoke licences in accordance with the provisions of the ICASA Act and the underlying statutes<sup>6</sup>; and
- 3.1.5. achieve the objects contemplated in the underlying statutes as defined in section 1 of the ICASA Act<sup>7</sup>.
- 3.2. The “*underlying statutes*”, as defined, include the ECA, which assigns to the Authority additional responsibilities and obligations specifically pertaining to the regulation of electronic communications within the Republic of South Africa in the public interest.
- 3.3. As an organ of state, the Authority is bound by the principle of legality which enjoins organs of state to act within the confines imposed by their empowering statutes and other applicable legislation.
- 3.4. The principle of legality dictates that a public body or authority may not exercise a power not conferred upon it by statute or other law. In practice, this means that a public authority or body may exercise only those powers properly granted to it by the express or necessary implied provisions of an enabling statute<sup>8</sup>.
- 3.5. The principle of legality is a fundamental principle of the rule of law<sup>9</sup> and an important starting point for the Authority when examining the scope of its powers. The import of the principle of legality is that the Authority is obliged to act in strict compliance with the licensing regimes set out in the ICASA Act, the underlying statutes including the ECA and the applicable regulations made thereunder. If the Authority is desirous of departing from the prescribed processes, such departure must be in terms of an applicable statutory provision. Accordingly, the Authority is required to exercise any discretionary powers it may have pursuant to an empowering provision in the ECA or the ICASA Act.
- 3.6. Section 13 of the ECA governs the transfer of individual licences (of which the Service Licences are part) or transfer of control thereof or change of ownership and states, among others, as follows:

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<sup>6</sup> Section 4(3)(e) of the ICASA Act

<sup>7</sup> Section 2(c) of the ICASA Act.

<sup>8</sup> *Masetlha v President of the RSA* 2008 (1) SA 566 (CC), at p 619. See *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* (CCT7/98) [1998] ZACC 17; 1999 (1) SA 374

<sup>9</sup> *Fedsure* *Ibid* at para 56.

- “(1) An individual licence may not be let, sublet, 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.*
- (3) The Authority may by regulation, set a limit on, or re-strict, the ownership or control of an individual licence, in order to-*
- (a) promote the ownership and control of electronic communications services by historically disadvantaged groups and to promote broad-based black economic empowerment; or*
- (b) promote competition in the ICT sector.*
- (4) The Authority may, subject to Chapter 9, by regulation, set a limit on, or restrict, the ownership or control of an individual licence for broadcasting services in order to promote a diversity of views and opinions.*
- (5) Regulations contemplated in subsection (3) and (4) must be made-*
- (a) with due regard to objectives of this Act, the related legislation and where applicable, any other relevant legislation; and*
- (b) after the Authority has conducted an inquiry in terms of section 4B of the ICASA Act, which may include, but is not limited to, a market study”.*

3.7. In terms of section 13(6) of the ECA, the provisions of sections 9(2) to 9(6) of the ECA apply, with the necessary changes, to applications made under section 13.

3.8. Section 9 (2) of the ECA states:

*"The Authority must give notice of the application in the Gazette and –*

- (a) Invite interested persons to apply and submit written representations in relation to the application within the period mentioned in the notice<sup>10</sup>;*
- (b) Include the percentage of equity ownership to be held by persons from historically disadvantaged groups, which must not be less than 30%, or such other conditions or higher percentage as may be prescribed under section 4(3)(k) of the ICASA Act;*
- (c) Set out the proposed licence conditions that will apply to the licence; and*
- (d) Give interested persons an opportunity to submit written responses to any representations submitted in terms of paragraph (a);*
- (e) May conduct a public hearing in relation to any application for an individual licence."*

3.9. The prescribed manner referred to in section 13(2) of the ECA is contained in Regulation 11 of the Licensing Regulations which states as follows:

*"(1) An application to transfer a licence must be –*

- (a) in the format as set out in Form G;*
- (b) accompanied by the applicable fee; and*
- (c) submitted by the prospective transferor.*

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<sup>10</sup> Government Gazette No. 47282 of 10 October 2022

- (2) *where in the opinion of the Authority, it is necessary as a matter of procedural fairness, the Authority may take any of the following steps:*
- (a) *publish a notice in the Gazette and the Authority's website of the application to transfer the licence;*
  - (b) *invite interested persons to submit written representations in relation to the application within the period specified in the notice;*
  - (c) *allow the applicant an opportunity to submit written responses to representations received in relation to the application within the period specified by the Authority; and*
  - (d) *conduct a public hearing in relation to the application.*
- (3) *The Authority will not consider an application if the Applicant is –*
- (a) *in arrears with respect to any fees due and payable to the Authority;*
  - (b) *found to be non-compliant by the Complaints and Compliance Committee ("CCC") with regards to the applicable regulations and/or the provisions of the Act and has failed to remedy the non-compliance.*
- (4) *A licence transfer or licence transfer of control application will be evaluated on the basis of the following criteria –*
- (a) *promotion of competition in the ICT sector;*
  - (b) *interests of consumers; and*
  - (c) *equity ownership by historically disadvantaged groups."*

3.10. Regulation 12 further governs applicable restrictions on the transfer of control or renewal of an individual licence. In this regard, it states that:



**"12. Restrictions on transfer and renewal of an individual licence—**

- (1) *The Authority may refuse to renew or transfer a Licence if the Licensee has not complied with one or more of the following—*
  - (a) *Where the Licensee has been found guilty of a contravention by the CCC and has not complied with the order by the Authority in terms of section 17 of ICASA Act; or*
  - (b) *where a Licensee is in arrears with respect to any fees; or*
  - (c) *where the ownership and control of the Transferee (in a transfer application) or an Applicant in (in a renewal application) does not comply with the HDG Equity requirement as prescribed in the Regulations in respect of the Limitations of Control and Equity Ownership by Historically Disadvantaged Groups (HDGs) and the application of the ICT sector code, 2021.*
- (2) *The provisions of paragraph (c) above do not apply where the Transferee (in a transfer application) or Applicant (in a renewal application) is—*
  - (a) *a wholly owned state entity, which is subject to the Public Finance Management Act, 1999 (Act No. 1 of 1999); and*
  - (d) *provides documentation proving either that the Transferee or the Applicant—*
    - (i) *has been granted broad-based black economic empowerment ("BBBEE") facilitator status; or*
    - (j) *has Management and Control by black persons which is no lesser than 60%."*

3.11. Section 31(2A) of the ECA governs the transfer of RFS Licences or control or change of ownership thereof, and provides, among others, that

*"a radio frequency spectrum licence may not be assigned, ceded or in any way transferred, and the control of a radio frequency licence may not be assigned, ceded or in any way transferred to any other person without the prior written permission of the Authority."*

3.12. Section 31(3) of the ECA states that the Authority may, taking into account the objects of the ECA, prescribe procedures and criteria for, among others, the amendment, renewal, suspension, cancellation, transfer, and transfer of control of an RFS Licence<sup>11</sup> or obtaining permission to assign, cede, share or in any way transfer or transfer control of an RFS Licence as contemplated in terms of section 31(2A)<sup>12</sup>.

3.13. Pursuant to the above provisions, the procedure for obtaining the prior written permission of the Authority is set out in Regulation 15 of the Radio Frequency Spectrum Regulations<sup>13</sup>. Regulations 15(1) to 15(6) read as follows:

- "(1) No licensee must assign, cede, or transfer control of a radio frequency spectrum licence without the prior written approval of the Authority.*
- (2) An application to assign, cede or transfer control of a licence must be:*
  - (a) in the format as set out in Form B;*
  - (b) accompanied by the prescribed fee; and*
  - (c) submitted by the prospective transferor.*
- (3) The applicant for the assignment, ceding or transfer control of a radio frequency spectrum licence that was or would have been subject to an*

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<sup>11</sup> Section 31(3)(b) of the ECA.

<sup>12</sup> Section 31(3)(c) of the ECA.

<sup>13</sup> GN279 of 30 March 2015: Notice regarding the Radio Frequency Regulations (GG 38641)

*extended application procedure in terms of Annexure E, must provide information as set out [in] Annexure E.*

- (4) The Authority will take the following steps regarding an application for assignment, ceding or transfer of control of a radio frequency spectrum licence that was or would have been subject to an extended application procedure:*

  - (a) Publish a notice in the Gazette of the application to assign, cede or transfer control of the licence;*
  - (b) Request any relevant information regarding the transaction to enable the consideration of the application;*
  - (c) Invite interested persons to submit written representations in relation to the application within the period specified in the notice;*
  - (d) Allow the applicant an opportunity to submit written responses to representations received in relation to the application within the period specified by the Authority; and*
  - (e) May conduct a public hearing in relation to the application.*
- (5) A radio frequency spectrum licence transfer of control application, in relation to licenses to which the extended application procedure applies, will be evaluated on the basis of the following criteria:*

  - (a) Promotion of competition and interests of consumers;*
  - (b) Equity ownership by HDPs; and*
  - (c) any other applicable criteria as provided for in the Act at the time of the award of the licence.*
- (6) An application for transfer of control of a radio frequency spectrum licence, in relation to licenses to which the standard application*

*procedure applies, will be evaluated based on the same criteria used in the standard application procedure”.*

3.14. Regulation 15(7) states that:

*“When applying for the assignment, ceding or transfer control of a radio frequency spectrum licence, both the transferor and transferee must ensure that the following conditions are met:*

- (a) Except where the radio frequency spectrum licence was issued according to the Standard Procedure found in Annexure D, the radio frequency spectrum licence must have been held for at least one year before an application for a transfer can be made;*
- (b) The transferee is capable of complying with the terms and conditions contained in the radio frequency spectrum licence;*
- (c) A duly completed application form is submitted by the transferor, with proof of payment of the prescribed application fee at any office of the Authority;*
- (d) In the case of liquidation or insolvency of the transferor, the liquidator/curator must give written consent in respect of the transfer;*
- (e) In the case of a deceased estate, the executor of the deceased estate must give written consent in respect of the transfer; and*
- (f) The transferee for the assignment, ceding or transfer control of the radio frequency spectrum licence that was subject to an extended application procedure, must have a score not less than that of the transferor.*

3.15. Regulation 15(8) provides that:

*"The Authority will not approve the assignment, ceding or transfer of control of a radio frequency spectrum licence;*

- (a) Whereby a licensee has been found, by the Complaints and Compliance Committee ("the CCC"), to have contravened the provisions of the Act, the ICASA Act, the Regulations, the Terms and Conditions of a radio frequency spectrum licence or a licence granted in terms of Chapter 3 of the Act, and has failed to comply with an order by the Authority in terms of section 17E (4) of the ICASA Act;*
- (b) If such transaction will not promote competition; or*
- (c) If such transfer will result in the reduction of equity ownership held by HDP to be less than 30%."*

3.16. The import of the above legislative framework, which necessitated the lodgement of the Applications, is that Cell C was required to obtain various regulatory approvals from the Authority in terms of the provisions of section 13 of the ECA read with its associated regulations in relation to the Service Licences and section 31(2A) of the ECA read with its associated regulations in relation to the RFS Licences.

3.17. Accordingly, in terms of the legislative framework outlined above, the Authority was required to approve:

3.17.1. the application in terms of sections 13(1) and 13(2), read with sections 9(2) to 9(6) of the ECA and further read with Regulations 11 and 12 of the Licensing Regulations for the transfer of control of the Service Licences held by Cell C to TPC pursuant to the acquisition by TPC of additional shares in Cell C, resulting in it holding a post-transaction majority shareholding stake in Cell C (the Service Licences Transfer Application); and

3.17.2. the application in terms of section 31(2A) of the ECA read with Regulation 15 of the Radio Frequency Spectrum Regulations for the transfer of control of the RFS Licences held by Cell C to TPC pursuant to the acquisition by TPC of additional shares in Cell C, resulting in it holding a post-transaction majority shareholding stake in Cell C (the RFS Licences Transfer Application).

#### **4. PROCEDURAL STEPS UNDERTAKEN BY THE AUTHORITY**

4.1. The Applications were lodged with the Authority on 26 September 2023 and were accompanied by a request by Cell C that certain information contained therein be treated as confidential information in terms of the provisions of section 4D of the ICASA Act.

4.2. Section 4D of ICASA Act governs the protection of confidential information submitted to the Authority and provides as follows:

*"(1) (a) When a person submits information to the Authority, such person may request that specific information be treated as confidential information.*

*(b) The request for confidentiality must be accompanied by a written statement explaining why the specific information should be treated as confidential.*

*(2) Within 14 days of receiving a request for confidentiality, the Authority must make a determination whether or not confidentiality will be granted and provide the person contemplated in subsection (1) with written reasons for such determination.*

*(3) Should the Authority determine that a request for confidentiality cannot be acceded to, the party providing the information must be given an opportunity to withdraw the information that is the subject of the confidentiality request.*

*(4) When considering a request contemplated in subsection (1), the Authority must treat the following information, as confidential information, namely—*

- (a) trade secrets of such person;*
- (b) financial, commercial, scientific or technical information, other than trade secrets, the disclosure of which is likely to cause harm to the commercial or financial interests of such person;*
- (c) information of which the disclosure could reasonably be expected—*
  - (i) to put the person at a disadvantage in contractual or other negotiations; or*
  - (ii) to prejudice the person in commercial competition;*
- (d) the names of prospective employees; and*
- (e) business plans of a licensee.*

*(5) A determination of confidentiality may not be made in respect of a document or information that is in the public domain or is required to be disclosed by operation of law or a court order”.*

4.3. Section 4D of the ICASA Act grants applicants the right to identify specific information they wish the Authority to treat as confidential. However, the granting of such a confidentiality request is subject to the provisions of section 4D(5), which provisions set out circumstances under which a confidentiality determination cannot be made.

4.4. Naturally, a provision such as section 4D(5) is necessary to ensure that confidentiality determinations do not contravene statutory obligations or hinder transparency, particularly where disclosure is required by law. It redounds to the delicate balance that must be struck by regulatory authorities between transparency and the protection of commercial interests.

4.5. Cell C and TPC requested confidentiality over the following information in the Applications:

4.5.1. The personal information and addresses of the directors, accounting officer, and senior management of TPC;

- 4.5.2. TPC's comprehensive business plan (March 2023);
  - 4.5.3. TPC's 5 year forecasted business plan financials;
  - 4.5.4. extracts of the independent competition analysis report commissioned by Cell C;
  - 4.5.5. TPC's audited financial statements for the financial years ended 2020, 2021 and 2022;
  - 4.5.6. Detailed network architecture layout plan and roll-out plans, including timeframes and roll-out targets;
  - 4.5.7. Explanation of Cell C's network architecture;
  - 4.5.8. Various commercial agreements pertaining to specific areas of Cell C's business operations; and
  - 4.5.9. Reasons for the Proposed Transaction.
- 4.6. Having considered the section 4D request from Cell C and TPC as set out above, the Authority addressed a letter to Cell C on 3 November 2023 where it granted confidentiality over the information identified by Cell C and TPC in the Applications.
- 4.7. On 6 December 2023, the Authority published a notice of the Applications in Government Gazette No. 49831<sup>14</sup> (the "**Notice**"). In terms of the Notice, the Authority invited interested parties to make written representations in response to the Applications within 14 working days from the date of publication thereof (i.e., 29 December 2023).
- 4.8. On 24 January 2024, Council established a committee in terms of section 17 of the ICASA Act ("**the Committee**") to:

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<sup>14</sup> GN 2216, Government Gazette 49831 published on 6 December 2023.



- "2.1.1 Consider and analyse the applications, for the transfer of control of the I-ECS, I-ECNS and the Radio Frequency Spectrum (RFS) licences from Cell C (Pty) Ltd to TPC ("the Applications");*
- 2.1.2 Analyse the written representations and responses thereto received by the Authority;*
- 2.1.3 Consider and decide on requests for confidentiality relating to the Applications;*
- 2.1.4 Conduct hearings on the applications for the transfer of control for service and RFS licences;*
- 2.1.5 Liaise with relevant and interested stakeholders;*
- 2.1.6 Draft Reasons for Decision; and*
- 2.1.7 Make recommendations for Council Decision on the Applications".*

4.9. Subsequent to the Notice, the Authority extended the deadline for submission of written representations to 22 January 2024 and then written responses thereto to 12 February 2024.

4.10. By the closing date of 22 January 2024, the Authority received written representations from the following stakeholders:

- 4.10.1. CellSaf Proprietary Limited ("**CellSaf**");
- 4.10.2. Mr Paul AH Hjul ("**Mr Hjul**");
- 4.10.3. Mr Robert Killigrew Sabine Pasley ("**Mr Pasley**");
- 4.10.4. MTN Proprietary Limited ("**MTN**");
- 4.10.5. Telkom SA SOC Ltd ("**Telkom**"); and
- 4.10.6. Vodacom Proprietary Limited ("**Vodacom**").

- 4.11. On 31 January 2024, the Authority further extended the deadline for the submission of Cell C's written responses to the representations by the above stakeholders to 15 March 2024, at the written request of Cell C.
- 4.12. On 15 March 2024, the Authority received Cell C's written responses to the aforementioned representations. The responses were accompanied by a request for confidentiality in terms of section 4D of the ICASA Act in terms of which Cell C requested that confidential status be granted by the Authority in relation to various information and/or documents identified therein.
- 4.13. The information over which Cell C sought confidentiality included the following:
- 4.13.1. Information relating to the value of TPC's excess Cell C airtime and/or data unsold stock;
  - 4.13.2. Information relating to the percentage of TPC's volumes and revenues from Cell C and/or Cell C's competitors;
  - 4.13.3. Information relating to the percentage of other MNOs pre-paid airtime distributed by means other than TPC;
  - 4.13.4. Information relating to circumstances applicable to Cell C's future funding; and
  - 4.13.5. Information relating to Cell C' spectrum licence.
- 4.14. On 4 April 2024, the Authority granted confidentiality over certain portions of the information identified by Cell C. However, the Authority declined to grant confidentiality over information relating to Vodacom, MTN and Telkom's alternative distribution channels to TPC ("**MNOs Information**") and Cell C's position in relation to the 10 MHz spectrum identified in the RFS Licences Transfer Application ("**Auction Spectrum Information**").
- 4.15. Cell C was requested to inform the Authority regarding whether it would be withdrawing the information that the Authority had declined to accord confidential status.

- 4.16. On even date, Cell C indicated to the Authority in a letter that it would not be withdrawing the MNOs Information. However, Cell C indicated that it would be withdrawing the Auction Spectrum Information. Cell C also confirmed that it would be withdrawing all references to the 10 MHz spectrum initially set out in the RFS Licences Transfer Application.
- 4.17. Following the receipt of the above representations from interested persons and Cell C's responses thereto, the Authority decided to convene public hearings in order to canvass various aspects of the written representations and Cell C's responses thereto with the stakeholders and also afford members of the public an opportunity to participate in the process. After informing all the stakeholders that the public hearings would be held on 25 July 2024, the Authority received a letter from Cell C requesting that the public hearings be postponed to either 16, 17, 18 or 19 September 2024. The Authority took a decision to postpone the public hearings to 19 September 2024.
- 4.18. The Authority proceeded to transmit letters to the various stakeholders requesting them to confirm their attendance at the public hearings scheduled for 19 September 2024. Telkom and Mr Pasley subsequently advised of their decision not to participate in the public hearings.
- 4.19. The notice for the public hearings was duly published in Government Gazette No. 51204 of 10 September 2024 under Government Notice No. 2721.
- 4.20. The public hearings were indeed held on 19 September 2024 and, in relation to certain aspects canvassed during the public hearings, stakeholders were requested to provide additional information to the Authority within seven (7) days of the public hearings.

## **5. REPRESENTATIONS AND RESPONSES**

- 5.1. As set out above, the Authority received written representations from six stakeholders. The representations and Cell C's responses thereto are dealt with below.

#### 5.1.1. Representations from Robert Pasley

In his written representations, Mr Pasley, an erstwhile employee and indirect shareholder of Cell C, submitted that:

- 5.1.1.1. The proposed transfer will adversely affect competition;
- 5.1.1.2. In this regard, he stated that the proposed transferee, TPC, which is a wholly owned subsidiary of BLT, has widely publicised entrenched commercial relationships developed over many years with both Vodacom and MTN. BLT is, through various companies within the BLT group, including the proposed transferee, one of the largest distributors of prepaid airtime for Vodacom and MTN and one of the largest connectors of prepaid SIM cards for Vodacom and MTN;
- 5.1.1.3. The proposed transfer is likely to have the effect of lessening competition in the industry by enabling Vodacom and/or MTN to access this spectrum in order to negatively influence competition, as it is likely to lessen the ability of Cell C to apply any form of pricing pressure on either Vodacom or MTN in the future and so further increase the gap between the dominant operators and the competition in terms of access to the sub-1Gb spectrum in particular (i.e. the 900 band);
- 5.1.1.4. Instead of the licences being controlled and operated by Cell C as an independent operator, the licences will, if the transfer of control is approved, be held by a transferee who is integrally involved in the distribution of the prepaid airtime of competitors, particularly Vodacom and MTN. There is the distinct danger that the operation of the licences will become subservient to the interests of BLT and its major commercial suppliers of airtime Vodacom and MTN, rather than operated robustly and independently as a competitor to Vodacom and MTN;
- 5.1.1.5. Should the transfer be approved, TPC, and in turn BLT, will effectively control the board of Cell C. The proviso to article 29.7

of the memorandum of incorporation ("MOI") of Cell C expressly provides for the transferee, TPC, once it holds more than 50% of the issued shares, to appoint such number of persons as directors as it so elects, disrupting the spread of control otherwise provided for in that article. In addition, the transferee, TPC, in holding more than 50% of the issued shares of Cell C will be able to remove any director, in terms of section 71 of the Companies Act, 2008. Indeed, this ability of TPC, and in turn BLT, to assert control over Cell C is the predominant motivation disclosed by Cell C and TPC for the transfer of control;

- 5.1.1.6. A further difficulty, according to Mr Pasley is the increased potential for conflicts of interests in the discharge by the directors of Cell C of their fiduciary duties in the best interests of Cell C and its stakeholders. The directors appointed to the board of Cell C at the instance of the transferee, TPC, will be placed in the invidious position of having to make decisions relating to the distribution of prepaid airtime, particularly as to what portion of that prepaid airtime emanates from Cell C and what portion emanates from its competitors MTN and Vodacom, which BLT distribute. BLT's directors, Mark and Brett Levy, previously served on the board of Cell C but resigned their directorship because of what they had publicly recognised as a conflict of interests that arises between the interests of Cell C and TPC (and BLT generally);
- 5.1.1.7. Mr Pasley further submitted that the transfer is likely to continue the pressure on Cell C to retrench staff and result in significant further job losses. It will be recalled that the staff complement has been reduced by some 50% since the initial investment made by TPC/BLT in August 2017. The reduction in staff complement continues notwithstanding two recapitalisations over the last six years;
- 5.1.1.8. Paragraph 2.8 of the "gazette notice" records that "HDPs" will hold 34.41% of the Transferee's equity. The Transferee is defined in paragraph 2.1 of the notice as TPC;

- 5.1.1.9. As appears from TPC's Broad-Based BEE Verification certificate dated 25 August 2023, there is only an 18.47% HDP interest. No explanation is given how that will nearly double, to the represented 34.41% in the gazette notice;
- 5.1.1.10. He, although a shareholder, was not given any notice, or even informed, that Cell C has applied for the transfer of control of the licences or even of the share transaction described in the application that would constitute the transferee TPC the controlling shareholder. There has been no consultation with shareholders;
- 5.1.1.11. It is not clear from the notice in the Government Gazette what the structure of the transaction is that will result in a change of control of the licences from Cell C to TPC as "Transferee";
- 5.1.1.12. Should the transaction be a transfer of the licences themselves, the licences constitute the greater part of Cell C's assets or undertaking and therefore the disposal thereof is required to be approved, inter-alia, in terms of section 112(2) of the Companies Act, 2008 ("the Companies Act"), which includes approval by a special resolution of shareholders;
- 5.1.1.13. Similarly, the MOI of Cell C expressly provides that an "Ordinary Reserved Matter" includes the disposal of any assets or business (and which expressly includes any licences) with a value which exceeds 10% of Cell C's previous annual revenue and which would include the transfer of the licences. Further, the MOI expressly provides that a "Special Reserved Matter" includes any matter that would require a special resolution under the Companies Act (which would include a disposal in terms of section 112 of the Companies Act) and any sale or disposal of all or a substantial part of the business or all or substantially all of the assets of the company. He further referred to Parts A and B of Schedule 1 to the MOI. These are all matters that in terms of article 27 of the MOI require to be placed before the shareholders for approval;

- 5.1.1.14. To the extent that the transfer is not of the licences themselves, but arises from change in the shareholding of Cell C, as appears from media reports, the transaction would be an affected transaction in terms of section 122(1) of the Companies Act as Cell C is a regulated company, and requires, at the very least, shareholder notification in terms of section 122(3)(b) of the Companies Act. In any event article 11.2.1 of Cell C's MOI requires shareholder notification;
- 5.1.1.15. As a minority shareholder, it is difficult to fully assess the impact of the proposed transfer of control as, since 1 August 2019, the business of Cell C appears to have been conducted with no regard for the minority shareholders. In particular, since August 2019:
- 5.1.1.15.1. no general shareholder meetings of the company have been held, including obligatory annual general meetings as required by both section 61(7) of the Companies Act and article 21.4 of Cell C's MOI;
  - 5.1.1.15.2. no audited annual financial statements have been presented to minority shareholders, including at annual general meetings as required by both section 61(8) of the Companies Act and article 21.5 of Cell C's MOI, although these have been requested on several occasions; and
  - 5.1.1.15.3. no information has been supplied to minority shareholders in respect of the resignation of KPMG as auditors, the subsequent appointment of SNG Grant Thornton as their replacements and the reportable irregularities notified by both sets of auditors to the Independent Regulatory Board for Auditors (IRBA), that may relate to various matters including the governance failures referred to above;
- 5.1.1.16. It cannot be in the interests of the stakeholders of Cell C and the public generally that a transfer of control of the licences takes place in circumstances where Cell C, as a public and regulated

company, is operated in the dark and with disregard to the necessary corporate governance;

- 5.1.1.17. Mr Pasley stated that he is a substantial creditor of Cell C, seeking payment in terms of an executive agreement concluded between him (as the then chief strategy officer of Cell C) and Cell C for substantial amounts. He further stated that this matter is now the subject of legal action between himself and Cell C;
- 5.1.1.18. Mr Pasley further stated that he is particularly concerned at “the intended transfer of the licences” in circumstances where Cell C on its own version is factually insolvent in that its liabilities significantly exceed its assets. In this regard, he referred to Cell C’s presentation of its financial performance for the financial year ended 2022 and for the financial year ended September 2023<sup>15</sup>;
- 5.1.1.19. Mr Pasley contended that the transfer of the licences, or the control thereof, may be a last major step before the liquidation and/or winding down of Cell C, without adequate provision being made for its creditors to be paid;
- 5.1.1.20. He further submitted that the above concern was compounded by the related-party nature of the proposed transfer of control, which may have the effect of preferring these related-party creditors, including the BLT group, over his claim(s). As appears from public statements, BLT is also a material creditor of Cell C;
- 5.1.1.21. Mr Pasley also expressed dissatisfaction with the amount of information provided by Cell C. Mr Pasley argued that “little information is provided in the gazette notice” and insufficient information has been provided to Cell C’s shareholders, creditors or customers concerning the rationale for the proposed transfer of the licences;
- 5.1.1.22. “What information has been provided in the Government Gazette notice is ambiguous and vague”. As appears above, the nature of

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<sup>15</sup> Mr Pasley submits that the factual insolvent position of Cell C appears from page 14 of the aforementioned presentation.



the proposed transaction resulting in the transfer is not disclosed, and, in certain instances, as appears in the anticipated HDP requirements, wrong, or at the very least inaccurate. Whether the Government Gazette notice served its purpose of adequately informing the public of the intended transfer is doubtful; and

5.1.1.23. At a minimum such information should include the structure of the proposed transaction, the full commercial basis of the transfer, the benefits to Cell C and its stakeholders, the comfort provided to Cell C's creditors, the benefits to the telecommunications market generally and the advantages to Cell C's customers. Rather it appears from the media reports that the transfer of control is predominantly in the interests of BLT.

5.1.2. However, on the eve of the public hearings, Mr Pasley's legal representatives delivered correspondence to the Authority stating, inter alia, that:

*"Having considered Cell C's response to the submissions, my client's view is that paragraphs 25 - 27 of Cell C's response to the submissions, if that response does correctly reflect the factual and legal position, adequately address my client's concerns. My client would simply ask that ICASA ensures that Cell C's response remains the factual and legal position."*

### 5.1.3. **Representations from Mr Hjul**

In his written representations, Mr Hjul (in his capacity as a private stakeholder) submitted that:

5.1.3.1. A number of the documents provided by Cell C and over which it had requested confidentiality in terms of section 4D of the ICASA Act did not qualify for such protection. Mr Hjul cited, inter alia, Cell C's and TPC's business plans as well as TPC's audited financial statements as documents which should have been disclosed and not afforded confidential status;

- 5.1.3.2. TPC may acquire the means to act as bad faith actor in the market but will lack the incentive to do so;
- 5.1.3.3. The Authority may and should require that both BLT and TPC make undertakings to preserve Cell C as a going concern; and
- 5.1.3.4. The matter of TPC and BLT recognising Cell C as a distinct going concern is of significance in the scheme of interconnection agreements and facilities leasing, both of which are vital components in the overall scheme of telecommunications infrastructure. To view it differently: Vodacom, Telkom, Liquid, Rain and MTN are all in a state where complex agreements with Cell C to collaborate and compete are inevitable. These agreements will by regulation frequently introduce obligations on the parties to those agreements – such as a non-discriminatory access obligation to competitors. It will be gravely problematic if a situation emerges in which all of the obligations arising from participation in the licensing system are carried by Cell C whilst its shareholders are undertaking activities which defeat this very framework. Whilst the present circumstances in the industry may suggest that the large firms honour their obligations under the ECA in the breach rather than the norm, progress in the industry can only sustainably be reached by a rules-based approach. Part of that means that a controlling shareholder of a participant in the system must be as committed to that participant playing by the same rules as licenced entity is.

#### 5.1.4. Representations from Telkom

In its written representations, Telkom stated that:

- 5.1.4.1. According to media reports and their own understanding, MTN effectively controls or manages Cell C's spectrum. Telkom suspects this may amount to spectrum trading, leasing, sharing, sub-letting, or an effective transfer of control of the licences without proper investigation and oversight by the Authority, as required by the Radio Frequency Spectrum Regulations;

- 5.1.4.2. It urged the Authority to investigate the roaming agreements between MTN and Cell C, as well as any other arrangements involving Vodacom, to clarify how Cell C' spectrum is being used. Telkom argued that without this investigation, the full implications of Cell C's application cannot be assessed;
- 5.1.4.3. Cell C's pre-paid customers appear to use MTN's network through a virtual network, while Cell C's post-paid customers roam on Vodacom's network. This leaves questions about the remaining portion of Cell C' spectrum, which Telkom believes is utilised by MTN to service its own customers; and
- 5.1.4.4. Cell C's application should comply with section 31(2A) of the ECA and Regulation 15 of the Radio Frequency Spectrum Regulations, which require written approval for spectrum control transfers. Telkom contended that this process must follow the extended application procedure as it involves high-demand spectrum, which impacts public interest and competition.

#### 5.1.5. Representations from MTN

In its written representations, MTN submitted that:

- 5.1.5.1. BLT, as the primary distributor of prepaid airtime and data for MTN and others, now has the ability to influence competition by preferring Cell C, impacting relationships between BLT/TPC and other MNOs. MTN believes that there are potential risks for "partial foreclosure," where BLT might not completely exclude but could disadvantage competing MNOs, making it more challenging for them to access the market effectively;
- 5.1.5.2. MTN suggested that the Authority consider the potential market influence of BLT, given its extensive distribution network. MTN raised a concern that BLT could use its position to control prepaid and SIM card distribution, affecting other distributors and MNOs' market access;

- 5.1.5.3. MTN questioned Cell C's claim that changes to consumer services will be minimal, arguing that the stated intent of strategic direction contradicts the claim. MTN urged the Authority to demand more transparency on how BLT's control will affect Cell C's business model and consumers;
- 5.1.5.4. MTN further highlighted a reduction in Cell C's black ownership by 1.80% post-acquisition and requested the Authority to evaluate whether the loss is offset by clear benefits to Cell C; and
- 5.1.5.5. Lastly, MTN noted that Cell C may owe the Authority R288 million for new spectrum fees and urged the Authority not to approve control transfers for non-compliant applicants.

#### 5.1.6. Representations from CellSaf

In its written representations, CellSaf submitted that:

- 5.1.6.1. CellSaf was not informed about the transaction and that appropriate corporate governance procedures were not followed;
- 5.1.6.2. Cell C may no longer be the licence holder and that TPC may assume control, which raises regulatory and operational issues;
- 5.1.6.3. CellSaf pointed to a history of what it considered to be unlawful de facto acquisitions that it claimed violate both the ECA and the Competition Act, 89 of 1998 ("the Competition Act"). Reports of these issues were allegedly submitted to the Authority in 2017 and 2018, with no action taken in response thereto; and
- 5.1.6.4. The transaction would reduce the role of historically disadvantaged persons in the ICT sector. CellSaf asserted that the Authority's approval would effectively condone a reduction of HDP shareholding in Cell C, which CellSaf believed contradicts empowerment goals.

#### 5.1.7. Representations from Vodacom

In its written representations, Vodacom submitted that:

- 5.1.7.1. Regulation 11 of the Licensing Regulations provides the criteria for evaluating applications for transferring control of individual service licences;
- 5.1.7.2. In the event that the CCC has not yet made a finding against Cell C but there is evidence to support such a finding, an investigation should be conducted and resolved before processing the application. Vodacom further contended that the Authority lacks the power to process and grant relief to an applicant if there is prima facie evidence of the applicant's non-compliance with the ECA or regulations;
- 5.1.7.3. If aspects of the application raise concerns about promoting competition in the ICT sector, consumer interests, or equity ownership by historically disadvantaged groups, the Authority may either refuse the application or impose conditions before approving it to address these concerns;
- 5.1.7.4. Cell C's application for the transfer of control of its Radio Frequency Spectrum licences is based on Cell C being the only party and sole licensee controlling the specified spectrum. Vodacom contended that if this premise (that Cell C solely controls the identified spectrum) is inaccurate, then the application cannot be granted as it would be based on incomplete or incorrect information. If the spectrum is controlled or licensed to other parties, these facts must be disclosed as they are material to the application's evaluation;
- 5.1.7.5. If Cell C has engaged in conduct that breaches section 31 of the ECA, specifically, by allowing others to transmit or receive signals on its spectrum without a licence granted by the Authority, then the application cannot be granted due to non-compliance with the ECA and Cell C's licence conditions. Vodacom insisted that Cell C would need to rectify any unlawful conduct before its transfer of control applications could be approved;

- 5.1.7.6. MTN's significant advantage in data download speeds is notable, considering that MTN has similar spectrum assignments to Vodacom and Telkom following the 2022 IMT Auction and largely shares sites with Vodacom. Additionally, a drive test conducted by the Authority in Limpopo, shared with licensees in October 2023, showed a similar trend in MTN's data download performance. Vodacom claimed that MTN's enhanced performance appears to result from its use of spectrum outside its declared holdings, as the additional spectrum MTN utilises was not obtained through the auction process; and
- 5.1.7.7. Cell C and MTN's spectrum sharing arrangement was concluded at the start of 2022, with the Authority confirming that any such agreements could not continue after the ICT Covid Regulations were repealed.

## 5.2. **Responses by Cell C to the written representations**

In its responses to the various representations submitted to the Authority, Cell C provided the responses set out below.

### ***Mr Hjul***

- 5.2.1. Cell C in its response to Mr Hjul, indicated that TPC and BLT have a vested interest in Cell C's success and as a result, the undertakings proposed by Mr Hjul are unnecessary.
- 5.2.2. Cell C further argued that the Authority's powers are limited to the powers set out in the ECA and ICASA Act and thus the Authority cannot impose undertakings on non-licensees.

### ***Mr Pasley***

- 5.2.3. In its response to Mr Pasley, Cell C argued that Mr Pasley's submission reflects confusion about the historically disadvantaged persons ("HDP") equity ownership of Cell C "as the transferee" of the licence, particularly in his questioning of how Cell C's post-transaction shareholding structure

can reflect 34.41% black equity ownership when TPC's black equity ownership is only 18.47%. Cell C contended that Mr Pasley's representations in this regard lack an explanation in respect of his assertion to the effect that Cell C's black equity ownership will nearly double to 34.41%.

- 5.2.4. Furthermore, Cell C stated that Mr Pasley's concern should not be entertained as it is based on a fundamental misunderstanding of how the HDP equity ownership requirement is satisfied in such applications.

***CellSaf***

- 5.2.5. Cell C argued that the concerns raised by CellSaf do not justify rejecting the Applications, which meet all requirements in the relevant regulations. Cell C further argued that despite the two recapitalisations since 2017 aimed at improving its operations and financial stability, Cell C remains technically insolvent and has not achieved its desired revenue growth.
- 5.2.6. Cell C contended that although TPC held 49.53% in Cell C, as a non-controlling shareholder, TPC could not direct Cell C's strategic decisions critical for its recovery and protection of TPC's investment.
- 5.2.7. Cell C asserted that its fragmented shareholding structure has hindered its financial improvement due to the lack of a controlling shareholder to provide necessary direction. As a result, the Proposed Transaction is essential for Cell C's continued operation and financial recovery, enabling it to compete in the mobile market, secure jobs, and offer returns to shareholders. Cell C argued that the Proposed Transaction will also facilitate cost savings and efficiencies, allowing Cell C to maintain lower consumer prices.
- 5.2.8. In relation to the HDGs concern raised by CellSaf, Cell C maintained that the Proposed Transaction would cause a negligible 1.8% reduction in black equity ownership, maintaining above the 30% legal threshold and retaining level 1 B-BBEE status. Cell C further argued that CellSaf's doubts about the authenticity of Cell C's B-BBEE Verification Certificate are unfounded.

- 5.2.9. Cell C contended that CellSaf's allegations of governance failures and lack of consultation are irrelevant, as Cell C was not required to seek CellSaf's approval for the Proposed Transaction, although CellSaf was informed prior to the submission of the Applications.

***Telkom***

- 5.2.10. Cell C refuted the concerns raised by Telkom on the following grounds:

- 5.2.10.1. the CCC has not found any non-compliance on the part of Cell C regarding the issues raised by Telkom;
- 5.2.10.2. the arrangements between Cell C and MTN are lawful and fully compliant with the ECA and regulations, having received the Authority's approval following an application by Cell C and MTN;
- 5.2.10.3. Cell C has implemented the spectrum arrangements according to the Authority's decision;
- 5.2.10.4. the arrangements between Cell C and MTN bring significant benefits, including improved network performance, quality of service, network efficiencies, customer experience, reduced operational complexity, enhanced competition, and support for the ECA's objectives; and
- 5.2.10.5. Cell C's new network strategy will generate substantial cost efficiencies, helping it to provide best-in-class service and keep prices lower for South African consumers.

***MTN***

- 5.2.11. Cell C asserted that Acacia Economics (Cell C's economic experts) found that the Proposed Transaction would provide pro-competitive benefits, strengthening Cell C's ability to compete effectively, thereby benefiting consumers.



5.2.12. Cell C further argued that the Proposed Transaction does not significantly alter existing incentives or abilities. Given Cell C's 10% market share in the retail market for pre-paid airtime, the combination with TPC is unlikely to foreclose other MNOs or materially impact market dynamics.

### **Vodacom**

5.2.13. TPC has no ability to affect demand for the products sold by the various MNOs which are almost exclusively driven by price and quality of services (i.e. coverage, connectivity and speed). The MNOs determine demand because they have sole responsibility for developing, marketing and promoting their own prepaid airtime products. They do this by developing new product offerings, expanding their reach and coverage, advertising campaigns, promotions, discounting and the like<sup>16</sup>.

5.2.14. The largest MNOs account for 87% of the market for pre-paid airtime, while TPC's commercial viability and ability to compete in the market for the distribution of prepaid products depends on its ability to satisfy retail demand for the MNOs' products. If TPC is unable to meet the demand of Vodacom, MTN and Telkom, it runs the risk of losing sales of airtime to end consumers<sup>17</sup>.

5.2.15. In fact, it is an astounding assertion to make that, through control of the smallest of the four main MNOs (with a pre-paid airtime market share of approximately 10%), TPC could engage in any successful foreclosure strategy that would pose any risk of material harm to Vodacom and MTN's competitive positions<sup>18</sup>.

5.2.16. Cell C noted that Vodacom has never raised the compliance issues it now raised, with the CCC nor lodged any formal complaints against Cell C.

5.2.17. Cell C argued that mere allegations of non-compliance made in response to an application are insufficient grounds for refusal. Without a prior finding of non-compliance and a subsequent failure to address it, the

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<sup>16</sup> Paras 53 to 62 of Cell C's response to the representations

<sup>17</sup> Para 57 of Cell C's response to the representations

<sup>18</sup> Para 62 of Cell C's response to the representations

Authority lacks the basis to reject or even consider rejecting the application.

5.2.18. Cell C reiterated the above submissions during its oral representations at the public hearings conducted on 19 September 2024.

5.3. Further details of the representations by the stakeholders and Cell C's responses thereto are dealt with under paragraph 6.17 below.

## **6. ANALYSIS AND FINDINGS**

6.1. In relation to CellSaf, the Authority requested it to provide additional information to substantiate its representations on the Applications.

6.2. However, having considered the additional representations and purported evidence, the Authority is of the view that there is no basis for CellSaf's submissions and the Authority, in any event, is precluded by the doctrine of *functus officio* from reconsidering its initial decision taken in 2018 to approve the recapitalisation transaction involving Cell C. In this regard, the Authority was not persuaded by CellSaf's submissions regarding its shareholding and the attendant requirement to be furnished with notice of certain significant transaction information.

6.3. Further to the above, the Authority considered Vodacom's submissions regarding Cell C's alleged non-compliance and its alleged relinquishment of control over the spectrum in question.

6.4. The Authority is not persuaded by Vodacom's submissions in this regard as the spectrum sharing arrangement was, in the Authority's view, concluded pursuant to an application process whereby relevant documentation was placed before the Authority for it to consider and determine whether to provide its *imprimatur* for the impugned spectrum sharing arrangement. Such approval was duly granted by the Authority and thus, unless its decision is set aside, it is entitled to rely upon its determination and resultant approval of the spectrum sharing arrangement. Further, the dispute regarding spectrum sharing is the subject of litigation between the Authority and Vodacom. In addition to the foregoing, the Authority was not

persuaded by the information submitted by Vodacom before and after the hearings as evidence of the alleged transfer of control of Cell C's spectrum licences to MTN.

- 6.5. The Authority also considered Vodacom's complaints regarding potential foreclosure and was not persuaded that the alleged harm would occur as, in its view, there is no basis or incentive for TPC and/or Cell C to act in the manner alleged by Vodacom. In addition to the above, the Authority determined that Vodacom's complaints regarding switching are overstated as it is already on record stating that there are several competitors of TPC to which it would be willing to switch should TPC attempt to impose unfavourable terms on Vodacom.
- 6.6. Having set out the above preliminary aspects, the Authority turns now to its detailed analysis of the Applications.
- 6.7. The Authority evaluated the Applications based on the following criteria, *inter alia*, as prescribed in terms of the ECA read with the Licensing Regulations and Radio Frequency Spectrum Regulations:
- 6.7.1. promotion of competition in the ICT sector;
  - 6.7.2. interests of consumers; and
  - 6.7.3. equity ownership by HDGs.

### **Independent Competition report and Consumer Interest report of the Proposed Transaction.**

- 6.8. As required in terms of paragraphs 9.2 and 9.3 of Form G of Regulation 11 of the Licensing Regulations<sup>19</sup>, the parties in respect of the Applications filed the competition and consumer reports which were both prepared on behalf of them by Acacia Economics.

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<sup>19</sup> the Processes and Procedures Regulations for Individual Licences, 2010 published in Government Gazette No. 33293 of 14 June 2010 as amended by the Amendment Individual Processes and Procedures Regulations 2015 published in Government Gazette No. 39871 of 30 March 2016 and Individual Processes and Procedures Regulations 2023 published in Government Gazette No. 48331 of 30 March 2023 ("Processes and Procedures Regulations"), read with sections 13 (1), (2) and (6) of the Electronic Communications Act No. 36 of 2005 ("the ECA"), as amended.

6.9. The Authority will in the following section analyse:-

- 6.9.1. the relevant commercial activities of Cell C and TPC;
- 6.9.2. the material relevant concerns raised by specific stakeholders in respect of the Proposed Transaction,
- 6.9.3. Cell C's responses to such concerns; and
- 6.9.4. the Authority's views in respect of the Proposed Transaction.

6.10. **The Applicant and the Transferee in respect of the Applications and their activities**

- 6.10.1. The activities of Cell C and TPC as described in the Applications are explained below.

***The Applicant/Licensee***

- 6.10.2. The Applicant/licensee is Cell C, a mobile network operator ("**MNO**"). Cell C entered the mobile market in 2001 and at that time it was the smallest MNO to be issued with electronic communications service and electronic communications network services licences. It is currently the second smallest MNO, with Rain (Pty) Ltd ("**Rain**") being the smallest.
- 6.10.3. Cell C's involvement in the telecommunications sector involves providing mobile services to businesses and consumers. Through its subsidiary, namely, Cell C Service Provider Company Proprietary Limited ("**Cell CSP**"), it also retails a variety of products and services including handsets, sim cards, accessories as well as prepaid and postpaid subscriptions.
- 6.10.4. In relation to prepaid airtime, Cell C sells its own airtime directly to dealers and retailers as well as to end-consumers (although this activity

currently forms a small part of its business). The sale of airtime directly to dealers and retailers is done via the Cell C app and retail stores (own and franchise). SIM cards and mobile devices are sold in Cell C retail stores (own and franchise). However, the vast majority of Cell C's airtime and SIM cards, much like that of the other MNOs, are distributed via wholesale distributors.

- 6.10.5. In terms of its prepaid customers, Cell C has a Radio Access Network ("**RAN**") sharing agreement with MTN. Apart from the RAN sharing agreement which uses MTN's network, Cell C submitted that it has not outsourced to MTN any of the remaining services that Cell C provides to its prepaid customers.
- 6.10.6. In relation to its post-paid customers, Cell C has a roaming agreement with Vodacom in terms of which Cell C's post-paid customers use Vodacom's network. In this regard, Vodacom is responsible for providing network connectivity and services, recording and logging network services used per customer as well as issuing invoices to customers for those services on an outsourced basis (a Cell C invoice is billed to customers).
- 6.10.7. In 2022, Cell C had a subscriber base of approximately 10.6 million, 9.6 million of which are prepaid and 1 million of which are postpaid and hybrid. According to Cell C's 2023 financial results presentation<sup>20</sup>, Cell C share of total subscribers in the mobile market declined from 9.9% to 7.4% between January and September 2023.<sup>21</sup>
- 6.10.8. Cell C also provides wholesale services to mobile virtual network operators ("**MVNOs**") and mobile virtual network enablers ("**MVNEs**"), which involves providing them with network access.

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<sup>20</sup> Cell C 2023 financial results presentation, slide 14. Available at: <https://worldofcellc.co.za/pdf/mediaresources/cell-c-market-update-november-2023-finalshare.pdf>.

<sup>21</sup> Refer to para 6 of Cell C's response dated 15 March 2024 to submissions from third parties.

## ***The Transferee***

6.10.9. The Transferee is TPC, a wholly owned subsidiary of BLT, a public company listed on the Johannesburg Stock Exchange. TPC is a wholesaler of a broad range of prepaid telecommunications products and services<sup>22</sup> which include the following: (i) bulk purchase and wholesaling of prepaid cellular airtime (including for voice, data and SMS), (ii) the purchase and distribution of SIM cards and entry-level devices, (iii) the resale of postpaid contracts to customers and (iv) the sale of handsets to Cell C postpaid customers.

6.10.10. A brief description of these products and services as set out in the Applications, is provided below.

6.10.11. Bulk purchase and wholesaling of prepaid cellular airtime –

6.10.11.1. TPC procures the prepaid airtime from the MNOs and facilitates the transfer of payment for these products back to the MNOs. The airtime is distributed through BLT's subsidiaries, namely, Blue Label Distribution Proprietary Limited ("BLD") as well as Glocell Retail Solutions Proprietary Limited ("**GRS**") and Glocell Distribution Proprietary Limited ("**GD**"), which owns, manages and maintains vending devices or APIs<sup>23</sup> which interface with vendor software, e.g. banks. These vending devices interface with vending software (e.g. banks, retailers, etc) and the MNOs. TPC's prepaid airtime makes up the vast majority of its revenue.

6.10.12. The purchase and distribution of SIM cards and entry-level devices –

6.10.12.1. These products are purchased and distributed by TPC on behalf of Vodacom and are distributed to wholesalers, the petroleum retail sector, and grocery and clothing retailers.

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<sup>22</sup> Apart from telecommunications products, TPC also offers other services including prepaid electricity and bulk print solutions.

<sup>23</sup> Application Programming Interface. An interface that allows two or more applications to interact.

- 6.10.12.2. In relation to SIM cards, TPC records the serial number of SIMs, provides the mechanism for RICA<sup>24</sup>, facilitates the registration of the SIMs on the respective network (i.e. Vodacom's), and ensures that the ongoing revenue related to the SIM distribution is correctly allocated and paid.
- 6.10.12.3. According to TPC, the purchase and distribution of SIM cards and entry-level devices forms a small part of its business and accounted for just 3% of its revenues in the 2022 financial year.
- 6.10.12.4. The above prepaid products are distributed through both formal (e.g. Spar, PnP, Clicks, banks and other aggregators) and informal (e.g. large and small cash and carry's, small independent wholesalers, superettes and local spaza shops) sales channels.

#### 6.10.13. Resale of postpaid contracts –

- 6.10.13.1. Through one of its subsidiaries, namely, Blue Label Connect Proprietary Limited ("**BLC**"), TPC resells postpaid contracts. These postpaid contracts are resold by TPC to customers who may otherwise not have been able to purchase a postpaid contract through one of the MNOs.
- 6.10.13.2. BLC purchases the contracts either from Vodacom, MTN or Cell C and remains liable to these MNOs for payment. Accordingly, instead of the MNOs taking the risk of customers defaulting on their payment obligations, BLC assumes that risk. The resale of postpaid contract accounts for a minuscule part of TPC's business (1% of TPC's total revenue in the 2022 financial year).

#### 6.10.14. Sale of handsets to Cell C postpaid customers –

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<sup>24</sup> Regulation of Interception of Communications and Provision of Communication-Related Information Act, 70 of 2002

6.10.14.1. TPC sells handsets to Cell C's postpaid customers through one of its subsidiaries, namely, Comm Equipment Company Proprietary Limited ("**CEC**"), a specialist finance house. Customers pay off the handsets in monthly instalments and CEC assumes the risk of repayment for the handsets should customers default on their monthly instalments. The sale of the handsets accounted for a small portion of TPC's revenue for the year ended May 2022<sup>25</sup>.

6.10.14.2. CEC also provides certain administrative, support and back-office services to Cell C. However, CEC does not compete in any market for services of this nature, nor does it provide the services to any third party (either to other MNOs or any other firms in the telecommunication sector or other sectors).

#### **6.11. Rationale for the Proposed Transaction**

6.11.1. In the Applications, Cell C and TPC advanced the following reasons for entering into the Proposed Transaction.

##### ***Cell C***

6.11.2. Cell C entered the mobile market in 2001. Although Cell C has continued to provide affordable and quality mobile products and services to its customers for several years, it has struggled to achieve an optimal financial position ever since it entered the market. This is due to a number of factors that have resulted in Cell C accumulating losses of R45 billion. The company has not turned a profit for more than twenty years.

6.11.3. On the other hand, two of the largest MNOs, i.e. Vodacom and MTN (who were both established in the early 1990s) have continued to reap the benefits of significant first mover advantages such as large subscriber

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<sup>25</sup> Exact percentages granted confidentiality in terms of section 4D of the ICASA Act.



bases and levels of profitability that far exceed the capabilities of smaller MNOs. As a direct result, MTN and Vodacom find themselves in insurmountable positions relative to the smaller operators in terms of network coverage and ensuring sufficient capacity to maintain high network quality levels. It is simply not possible for the smaller MNOs to fund capital expenditure at the same level as Vodacom and MTN partly because they need to do so through shareholder equity and/or debt funding.

6.11.4. This is one of the key factors that have contributed to Cell C's dire financial position since the only option available to Cell C to grow its subscriber base and improve its profitability has been to incur excessive debt, much of which has been denominated in foreign currency. This has proved unsustainable and ultimately caused the company to reach a point of technical insolvency.

6.11.5. Financial and liquidity constraints impacted on Cell C, constraining its business activity and investment, including (i) impacting Cell C's ability to maintain and acquire customers; (ii) limiting Cell C's ability to procure and maintain adequate product stock levels to support its business; (iii) curtailing Cell C's marketing and other commercial activities; and (iv) deterring new partners from doing business with Cell C.

6.11.6. Since 2017, Cell C has undergone two recapitalisations which have focused on improving operational efficiencies, implementing an innovative network strategy, improving liquidity and restructuring its balance sheet for growth and to be more market ready and competitive. Its debt was financially reorganised to stabilise the business and restructure Cell C's financial and operational liabilities. While Cell C is on the right path, it continues to face financial difficulties and remains technically insolvent.

#### **TPC**

6.11.7. TPC currently holds a non-controlling 49.53% of the issued ordinary shares in Cell C and has been Cell C's only funder for approximately ten

years. It has injected R5.5 billion into Cell C, settled creditors' claims, loaned Cell C R1.03 billion and currently holds Cell C prepaid airtime/data stock to the value of billions of Rands.

6.11.8. BLT's subsidiaries (TPC together with its subsidiary CEC) have made financial contributions in excess of R14.4 billion to Cell C. BLT has thus invested heavily in Cell C, incurring a significant amount of debt in the process in the form of secured loans to Cell C, along with providing further assistance to Cell C with its working capital requirements. Accordingly, TPC and BLT have a vested interest in improving Cell C's financial viability as well as significant exposure.

6.11.9. However, as a non-controlling shareholder, TPC (and in turn BLT) lacks the ability to control the strategic direction of Cell C and/or to influence decisions that are not only material to Cell C's commercial recovery but also necessary to protect TPC's investment. Cell C's dispersed shareholding structure has inhibited Cell C's ability to improve its financial position precisely because it has lacked the necessary direction that would come with having a single controlling shareholder.

6.11.10. BLT (through TPC) wishes to have some say on how Cell C is managed and run to ensure its investment and interests are protected. It is in this context that TPC seeks to acquire additional shares in Cell C, thereby increasing its shareholding from a non-controlling 49.53% to a controlling 53.57%.

6.11.11. Given that Cell C does not have funding from any other shareholder, investor or financial institution as they are (and have been) unwilling to inject further funding into Cell C, the Proposed Transaction is the only means available to Cell C for securing its continued operation and facilitating its financial recovery so that it can compete effectively in the mobile market in the future, provide its employees with job security and afford its shareholders some hope of return on their investment.

## 6.12. **Market Definition**

Cell C and TPC assessed the effects of the Proposed Transaction on the following product and geographic markets:

6.12.1. The market for retail mobile services;

6.12.2. The market for bulk purchase and distribution of prepaid airtime, starter packs<sup>26</sup>/SIM cards and mobile devices; and

6.12.3. The market for outsourced services.

6.12.4. The above markets are explained as follows by the parties.

6.12.5. **The Market for Retail Mobile Services**

### **Case Precedent**

6.12.6. The parties note that in respect of this market, the Competition Tribunal (“**Tribunal**”) has, in certain cases, previously defined a broad subscription and services market rather than separate markets for voice, SMS, and data.<sup>27</sup> The parties also note that the Tribunal did not (in the same cases) differentiate between prepaid and postpaid subscription and services. Further, the parties submit that the Authority also included the retailing of mobile voice, data and SMS services in a broad mobile retail services market (although it did not delineate separate markets for prepaid and postpaid retail mobile services).

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<sup>26</sup> Starter packs are SIM cards that may be pre-loaded with airtime. The terms are typically used interchangeably.

<sup>27</sup> Competition Tribunal of South Africa. (2014, October 13). Vodacom/Nashua in respect of its Vodacom subscriber base, Case No. 019034; Competition Tribunal of South Africa. (2016, March 30). Cell C Service Provider Company/Altech, Case No. LM117Aug15; Competition Tribunal of South Africa. (2016, April 18). MTN/Altech Autopage, Case No. LM182Nov15; Competition Tribunal of South Africa. (2016, April 18). Vodacom/Altech Autopage, Case No. LM185Nov15; Competition Tribunal of South Africa. (2018, June 27). Cell C Limited and Cell C Service Provider/Glocell Service Provider, Case No. LM314Mar18.

- 6.12.7. In addition, the parties submit that the Competition Commission's ("Commission") Data Services Market Inquiry ("DSMI") did not disagree with the Authority's findings on market definition.<sup>28</sup>
- 6.12.8. The parties concluded that they do not delineate markets into various products (such as voice, SMS and data) in line with previous Tribunal's decisions as well as the Authority's<sup>29</sup> and the DSMI's findings. In relation to prepaid and postpaid customers, the parties considered the Proposed Transaction on both a narrow and broad definition.
- 6.12.9. In relation to the geographic market, the parties stated that they consider a broad national geographic market since the Proposed Transaction does not result in a substantial prevention or lessening of competition regardless of whether there are narrow geographic markets for retail mobile services, or broader markets.

### **Market Context**

- 6.12.10. The parties' submission in respect of the market for retail mobile services in the country is set out below.
- 6.12.11. The market is characterised by –
- 6.12.11.1. Two large incumbent MNOs, i.e. MTN and Vodacom, both of which entered the market in the mid-1990s;
  - 6.12.11.2. Two challenger networks, Cell C and Telkom and a recent new entrant, Rain; and
  - 6.12.11.3. A number of smaller MVNOs that have entered the market largely using Cell C's network.

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<sup>28</sup> Competition Commission. (2019, April 24). DSMI Provisional Report. Provisional Findings and Recommendations. Available here. Para. 565; Competition Commission. (2019, December 2). DSMI Final Report para 69.

<sup>29</sup> Findings Document on Priority Markets Inquiry in the Electronic Communications Sector, 2018.

6.12.12. Cell C is the smallest of the 4 main MNOs, and its market share has been largely declining over time, having been overtaken by Telkom in 2020. Cell C's market share decline was accompanied by financial difficulties, including changes in shareholding and debt restructuring.

6.12.13. Cell C has historically been the only network to host MVNOs, however, this situation changed at the end of 2020, when MTN announced that it too was starting to offer MVNO services. MTN already had 30 MVNO partners in September 2023, just short of 3 years after having launched its MVNO platform.

6.12.14. Cell C accounted for between 60% to 80%<sup>30</sup> % of MVNO active subscribers in 2021 (although the percentage may have since changed). The largest MVNO in the country, FNB Connect, which had 878,000 active SIM cards in 2022, now uses both the Cell C and MTN networks. Previously, FNB Connect only used the Cell C network. Both Vodacom and Telkom have recently announced they would open their networks to MVNOs in 2023.<sup>31</sup>

6.12.15. In relation to SIM cards, the parties explained that there is no public information about the number of SIM cards sold each year by each of the MNOs. However, the parties estimated that there may be between 120 million (BLT's estimation) and 150 million (Cell C's estimation) SIM cards distributed per annum.<sup>32</sup> Cell C sold approximately less than 30 million SIM cards in 2022<sup>33</sup>, and so potentially accounted for a minor portion of all SIM cards (including starter packs) distributed in 2022.<sup>34</sup>

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<sup>30</sup> Confidential information in terms of section 4D of the ICASA Act

<sup>31</sup> Prior, B. [2022, November 20]. Vodacom network open to MVNOs. MyBroadband; Staff Writer. [2023, January 18]. Telkom announces MVNO platform plans. MyBroadband.

<sup>32</sup> The parties, however, submit that only 70-85% of these SIM cards are activated and that this percentage is even lower in the informal sector.

<sup>33</sup> Exact amount granted confidential status in terms of section 4D of the ICASA Act.

<sup>34</sup> The parties note that the number of SIM cards sold per annum does not correspond to the number of new subscribers at the end of each financial year. Consumers will often only use SIM cards temporarily or they may use multiple SIM cards concurrently.

6.12.16. **The market for bulk purchase and distribution of prepaid airtime services, starter packs<sup>35</sup>/SIM cards and mobile devices**

**Case Precedent**

6.12.17. The parties noted that previous Tribunal cases have always delineated prepaid airtime from postpaid airtime and there was no delineation between formal and informal markets.<sup>36</sup>

6.12.18. In relation to the distribution of airtime and starter packs/ SIM cards, the parties noted that the Commission, the Tribunal and the Competition Appeal Court (collectively, the "**Competition Authorities**") have taken slightly different approaches to whether or not the distribution of airtime is in a separate market from the distribution of starter packs/ SIM cards depending on the particular merger considered at the time.<sup>37</sup>

6.12.19. The parties then, in line with previous decisions, defined a prepaid distribution market without separating formal and informal distribution markets. The parties also stated that they have considered narrow product markets for (i) the bulk purchase and distribution of prepaid airtime (including SMS, data and voice) and (ii) the purchase and distribution of starter packs/SIM cards because the market dynamics are slightly different across these two mobile products.

6.12.20. In relation to the geographic market, the parties considered that the distribution occurs throughout the country, and that the relevant market is therefore national, as per previous decisions of the Tribunal.

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<sup>35</sup> Starter packs are SIM cards that may be pre-loaded with airtime. The terms are typically used interchangeably.

<sup>36</sup> Competition Tribunal of South Africa. (2022, April 7). Net1 Applied Technologies South Africa/Ovobix (RF) and Luxiano227. Case Number LM121Nov2; Competition Tribunal of South Africa. (2018, July 31). Net 1 Applied Technologies South Africa/DNI-4PL Contracts. Case Number LM018Apr18; Competition Tribunal of South Africa. (2014, July 31). Paycorp Group/Saicom Group. Case Number 018705; Competition Tribunal of South Africa. (2021, April 21). The Prepaid Company/GloCell Distribution. Case Number LM210Mar21; Competition Tribunal of South Africa. (2014, April 10). The Prepaid Company/Retail Mobile Credit Specialists. Case Number 018416.

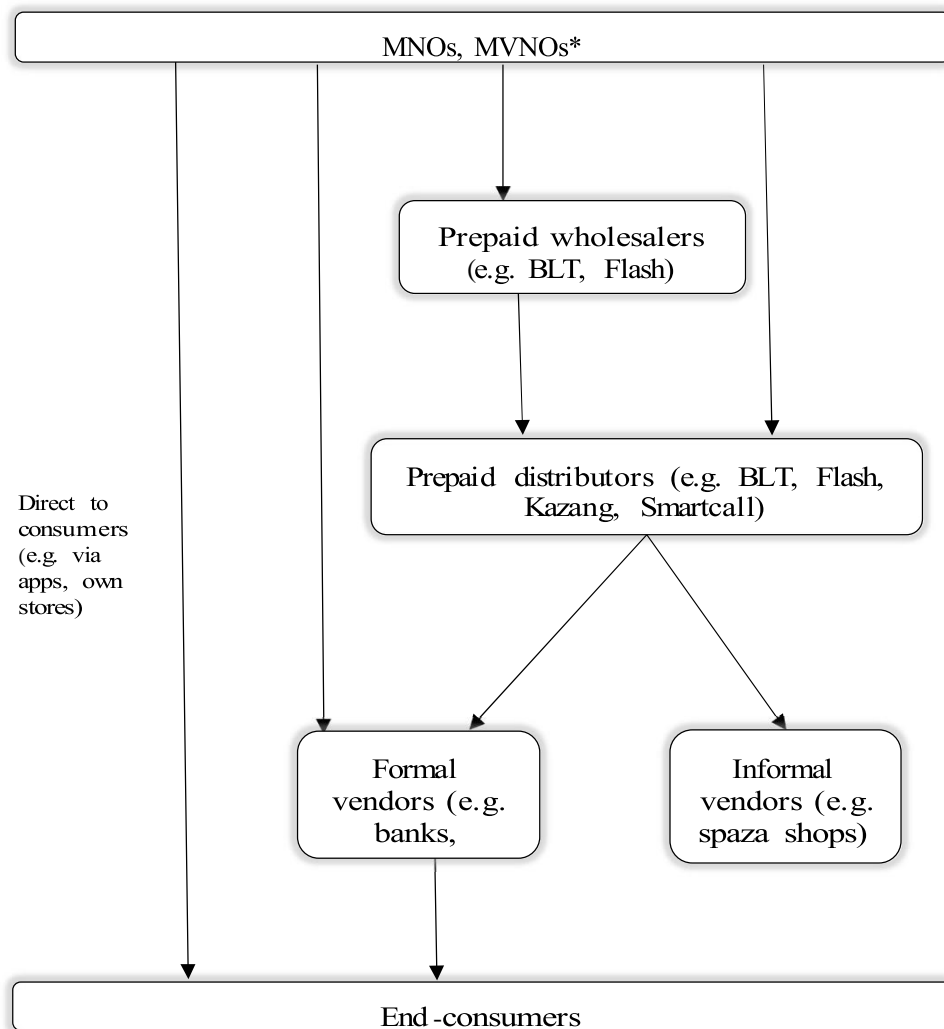
<sup>37</sup> Paragraph 36 and 37 of the competition report.

### **Market Context**

6.12.21. According to the parties, network operators distribute their respective products and services through their own operator-owned service providers ("**OSPs**"), as well as intermediaries/distributors, of which TPC is one. In relation to the distribution of prepaid airtime, TPC not only distributes airtime to retailers but also sells airtime to distributors, who then on-sell to retailers.

6.12.22. Below is a description of the prepaid airtime value chain as provided by the parties.

**Figure 1: Pre-paid airtime value chain<sup>38</sup>**



\* MVNOs supply direct to consumers only

6.12.24. According to the parties' market share estimates, TPC has approximately between 45% to 60% share of the distribution of prepaid airtime market if sales TPC makes to other distributors are included in the calculation and approximately less than 50% if sales TPC makes to other distributors are excluded from the calculation.

6.12.25. The parties estimated that Cell C sells and distributes approximately 1% to 2% of all its prepaid airtime<sup>39</sup>. This, according to the parties, is based on Cell C's data about the percentage of airtime that Cell C distributes

<sup>38</sup> Para 35 of the response from Cell C in respect of the third-party submissions.

<sup>39</sup> Disclosed in Cell C's non-confidential response to the submissions by stakeholders at para 49.7



via competing wholesaler distributors and how much it sells to retailers/banks and end-consumers directly (by-passing distributors).

6.12.26. In relation to other competing firms, TPC has indicated that the following firms are among its competitors in this market – Pepkor/Flash Mobile Vending Proprietary Limited, The Starter Pack Company, Virtual Payment Solutions Proprietary Limited, Smartcall, Shop2Shop, DNI, Awesim, PAV Cellular, Qmart, Blue Cellular and Crown Cellular Starter Pack Company. The parties also indicated that further distributors were identified based on Cell C's data. A summary of these distributors and what each distributes is presented in the table below.

**Table 1: Summary of TPC's competitors**

<b>Competitor</b>	<b>Airtime Distribution</b>	<b>SIM/ Starter Pack Distribution</b>	<b>Geographic coverage</b>	<b>Formal/ Informal</b>
<b>Pepkor/Flash Mobile Vending</b>	X	X	Nationwide	Both
<b>Virtual Payment Solutions</b>	X	X	Nationwide	Both
<b>SmartCall</b>	X	X	Nationwide	Both
<b>Shop2Shop</b>	X		Nationwide	Informal
<b>DNI</b>	X	X		
- <b>DNI Retail</b>		X	Nationwide	Formal
- <b>Starter Pack Co.</b>	X	X	4 provinces <sup>29</sup>	Informal
- <b>Switch Mobile</b>	X	X	Nationwide	Informal
- <b>3G Mobile</b>			Nationwide	Formal
- <b>Airvantage</b>	X			Formal
<b>Awesim Telecoms</b>		X	Nationwide	Informal
<b>PAV Cellular</b>		X	Nationwide	Informal

<b>Competitor</b>	<b>Airtime Distribution</b>	<b>SIM/ Starter Pack Distribution</b>	<b>Geographic coverage</b>	<b>Formal/ Informal</b>
<b>Qmart</b>	<b>X</b>	<b>X</b>	Nationwide	Both
<b>Blue Cellular</b>	X	<b>X</b>	Nationwide	Informal
<b>Crown Cellular</b>		<b>X</b>	Nationwide	Informal
<b>Kazang</b>	<b>X</b>		Nationwide	Informal
<b>EasiCall</b>	<b>X</b>	<b>X</b>	Nationwide	Not known
<b>Pattern Matched</b>	<b>X</b>		Nationwide	Formal
<b>Net1 (now Lesaka)</b>	<b>X</b>		Nationwide	Both
<b>ERZ Telecom</b>	<b>X</b>	<b>X</b>	Nationwide	Informal
<b>BASA Ventures</b>		<b>X</b>	Not known	Informal
<b>Worldstream</b>		<b>X</b>	Not known	Not known
<b>Vestlane t/a Pactel Telecom</b>		<b>X</b>	Not known	Not known
<b>Safeme</b>	<b>X</b>	<b>X</b>	Nationwide	Both
<b>ICOP Telecoms</b>		<b>X</b>	Not known	Not known
<b>Jabba Mobile</b>		<b>X</b>	Durban, Tshwane, Cape Town	Informal

**Sources: BLT, Cell C and company websites**

6.12.27. The parties submitted that they did not have information about the total market shares of competing distributors of airtime. Therefore, the parties presented the remaining share estimates relatively broadly<sup>40</sup>.

6.12.28. In relation to the distribution of Sim Cards/starter packs, the submission from the parties is that –

<sup>40</sup> Exact percentages granted confidential status by the Authority in terms of section 4D of the ICASA Act.

6.12.28.1. Based on BLT's data, BLT distributed (through TPC and GD) 10 to 15 million<sup>41</sup> SIM cards in the 12 months ended February 2023, which accounts for a small portion of all SIM cards distributed if 120 to 150 million SIM cards are distributed per annum.

6.12.28.2. Cell C predominantly uses distributors (super dealers) to distribute its SIM cards. However, Cell C distributed less than 20% of its own SIM cards through its store network and postpaid sales, accounting for a small portion<sup>42</sup> of all SIM cards distributed in 2022.

#### 6.12.29. **The Market for Outsourced Services**

6.12.30. According to the parties, during the course of the funding of Cell C, Cell C and TPC (through CEC) identified a range of services that Cell C could outsource in order to better manage or reduce costs.

6.12.31. However, Cell C and TPC contend that these services are not competitive services offered to a market since CEC only provides the relevant services to Cell C.

### 6.13. **Competition Assessment**

6.13.1. The parties submitted that the proposed transfer of control of Cell C's licences to TPC results in both horizontal and vertical overlaps between their respective activities. These overlaps are discussed below.

### 6.14. **Horizontal Overlaps**

#### 6.14.1. **Bulk Purchase and Distribution of Prepaid Airtime**

6.14.1.1. In this market, the parties will have a combined post-merger share of less than 50% when distributors who purchase airtime

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<sup>41</sup> Exact amounts granted confidential status by the Authority in terms of section 4D of the ICASA Act.

<sup>42</sup> Exact amounts granted confidential status by the Authority in terms of section 4D of the ICASA Act

from TPC are excluded from BLT' share and a combined post-merger share of between 45% to 60% when those distributors are included<sup>43</sup>.

6.14.1.2. According to the parties, the overlap in the distribution of prepaid airtime will not have a substantial negative impact on competition in this market due to the following reasons –

6.14.1.2.1. The pre-merger prepaid airtime distribution market is already concentrated and the accretion in market share is insubstantial;

6.14.1.2.2. The airtime distribution services provided by TPC and Cell C are highly differentiated, so the parties are unlikely to be regarded as close competitors. Whereas TPC sells the airtime of all the largest MNOs, Cell C distributes only its own airtime. Cell C distributes airtime directly to consumers and to large third parties in the formal sector such as banks and retailers, while BLT distributes airtime to a range of retailers in both the formal and informal sectors. In addition, while Cell C relies on the IT systems of the large banks and retailers to which it distributes, BLT provides an integrated information technology platform;

6.14.1.2.3. TPC is likely constrained at least to some extent by banks, large retailers and fuel outlets as these entities are able to source airtime directly from MNOs and provide services in-house; and

6.14.2. **The purchase and distribution of starter packs/SIM cards**

6.14.3. The parties submitted that, in this market, they will have a combined minimal post-merger share as well as an insubstantial market share

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<sup>43</sup> Exact percentages subject to confidentiality in terms of section 4D of the ICASA Act

accretion. According to the parties, the overlap in this market will not have a substantial negative impact on competition as the parties' combined share is not high, coupled with an insignificant market share accretion.

6.14.4. Further, according to the parties, there are a number of competing distributors as indicated in table 1 above.

6.14.5. **The sale of mobile postpaid subscriptions to customers**

6.14.6. The parties submitted that the overlap in this market is unlikely to impact negatively on competition as the parties' combined post-merger market share is minor.

6.14.7. The parties further indicated that the postpaid contracts offered by BLT (through BLC) are highly differentiated from Cell C's postpaid contracts. In this regard, BLC serves a niche customer segment that would typically not have otherwise purchased a postpaid contract, for instance because they have not met the credit criteria of the MNOs.

6.14.8. Therefore, according to the parties' submission, many of BLC's customers cannot easily switch to any of the other mobile operators' postpaid offerings, including Cell C and the postpaid customers of Cell C are also unlikely to switch to BLC because they would essentially be receiving the same product at a higher price.

6.14.9. **The Sale of Handsets to Customers**

6.14.10. In relation to this market, the parties have not provided a conclusive view on whether the sale of handsets to pre-paid and postpaid customers are in the same market. In this regard, the parties argued that if the sale of handsets to postpaid customers and the sale of handsets to prepaid

customers are in separate relevant markets, then there would be no overlap.

6.14.11. However, if the two are considered together, then the market would be highly differentiated (since CEC sells handsets for postpaid customers and Cell C sells entry-level handsets to prepaid customers) with a small post-merger market share of 3% at most. Furthermore, the merged entity will face many other competitors' post-merger.

#### 6.15. **Vertical Overlaps**

6.15.1. According to the parties, the Proposed Transaction results in the following vertical relationships between the activities of the parties:

6.15.2. TPC distributes prepaid airtime for Cell C;

6.15.3. TPC distributes Cell C's SIM cards/starter packs<sup>44</sup>;

6.15.4. BLC purchases postpaid contracts from the MNOs and resells these postpaid contracts to a niche segment of consumers, some of which are on Cell C's network; and

6.15.5. CEC sources, supplies, and finances handsets for the postpaid customers of Cell C.

6.15.6. The parties have conducted an assessment of the above relationships to determine their impact in the relevant markets post transaction. This assessment and the parties' findings are discussed below.

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<sup>44</sup> The parties, however, indicate that TPC is currently not a direct customer of Cell C with respect to SIM card sales – para 65 of the competition report.

#### 6.15.7. **Distribution of Prepaid Airtime**

##### (i) Input foreclosure

6.15.8. Cell C provides airtime to TPC and to TPC's competitors. However, it is highly improbable that the parties have the ability or the incentive to use the Proposed Transaction to foreclose competitors to TPC in the supply of prepaid airtime as they do not have the ability nor incentive to do so.

6.15.9. In respect of the ability to effect foreclosure, the parties submitted as follows –

6.15.9.1. Cell C highlighted its 10% market share of prepaid subscribers, and its percentage of prepaid revenue based on 2022 estimates, which it argued are too small to enable it to foreclose competitors. It is the least voluminous and least in-demand national MNO for prepaid mobile network services. Accordingly, even if TPC's rivals were completely denied access to Cell C prepaid airtime (or were only offered it at unsustainable prices), this could not cause foreclosure in the downstream market (distribution of airtime to other distributors and retail customers);

6.15.9.2. Vodacom and MTN are individually and collectively (insofar as they both are airtime suppliers to TPC) much larger than Cell C in relation to their prepaid revenue shares as measured in 2022. Telkom also exceeds Cell C's share of prepaid subscribers; and

6.15.9.3. These three MNOs' products (Vodacom, MTN and Telkom) are therefore more important retail prepaid products for distributors to stock than Cell C's. TPC's sales of airtime, for example, are mostly comprised of sales of Vodacom's and MTN's products. Vodacom's and MTN's respective TPC's airtime face value sales each comprise approximately three times more than Cell C's share. Telkom's share of TPC's face value sales also exceeds Cell C's share.

6.15.10. In respect of the incentive for foreclosure, the parties submitted that –

- 6.15.10.1. TPC is currently already sitting with excess stock of Cell C's airtime to the value of billions of Rands<sup>45</sup> as a result of the volume-based commitments arising from its funding arrangements with Cell C;
- 6.15.10.2. BLT has always competed with other distributors yet still sold airtime to them. This is because it is in TPC's interest to purchase large volumes of airtime from MNOs in order to qualify for early settlement and bulk buying. Further, BLT (through BLD and GRS) cannot distribute to each and every retailer in the country especially those in the informal sector. It is far too expensive for BLT to reach every informal retailer in the country (e.g. spaza shops) and doing this via other airtime distributors is more economical;
- 6.15.10.3. It is unlikely that TPC would be able to immediately replace all the Cell C airtime sales going through other distributors, who together accounted for a substantial portion of Cell C's prepaid airtime distribution in 2022; and
- 6.15.10.4. In addition, Cell C is already in a poor financial position and has struggled to compete with the larger MNOs. In 2022, its EBITDA<sup>46</sup> margin dramatically declined from 20% in the first half of 2021 and 21% in 2020.

(ii) Customer Foreclosure

6.15.11. BLT is an important customer for Cell C for the purchase and distribution of prepaid airtime. However, the parties considered it highly unlikely that

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<sup>45</sup> Confidential information.

<sup>46</sup> Earnings before interest, taxes, depreciation and amortisation.



the merged entity will prevent BLT from being a customer of rival MNOs due to the reasons set out below.

6.15.12. In respect of the *ability* to foreclose, the parties submitted that –

- 6.15.12.1. Cell C is the second smallest MNO after Rain. The other MNOs (other than Telkom) are substantially larger than Cell C in terms of prepaid subscribers and service revenue. Therefore, the likelihood of TPC using customer foreclosure to develop any market power is highly implausible;
- 6.15.12.2. There are 13 other distributors of airtime that MNOs can use for distributing airtime. More importantly, MNOs can and do distribute their own prepaid airtime (directly to retailers/banks as well as directly to the end consumer (e.g. via the app and their company stores));
- 6.15.12.3. In addition, the sale of airtime is driven by the popularity of MNOs, which depends on, among other things, network coverage and speed (or perceptions of coverage and speed). Accordingly, although distributors can seek to promote the sale of airtime of particular MNOs, their ability to materially change or affect demand is limited. In short, Cell C will not be able to foreclose Cell C's rivals via BLT; and
- 6.15.12.4. BLT does not engage in any direct marketing activities. Instead, marketing support is usually provided by the MNOs for the promotion of particular products. There is no reason to believe that this will change post-merger.
- 6.15.12.5. In respect of the incentive for foreclosure, the parties submitted that –
  - BLT already has a substantial financial interest in Cell C but

has not foreclosed competitor's pre-merger. The marginal increase in shareholding of just 4.04% will not change BLT's incentives;

- For a distributor of prepaid airtime, Vodacom's and MTN's airtimes are critical products to have available stock for supply to customers, given both MNOs' market shares in the mobile market (without which BLT's airtime offering to retailers will be irrelevant);
- It would unlikely be profitable for TPC to foreclose other MNOs (competitors of Cell C) as TPC's Cell C airtime sales appear to amount to a small portion of total airtime face value sales. Instead, TPC relies more on Vodacom, MTN, and even Telkom (which appears to exceed Cell C volumes);
- TPC has developed the Ringas airtime voucher which is network agnostic. For this voucher to be attractive, it needs to contract also with all the main four MNOs; and
- TPC has developed "back end or supporting" technology to integrate with the MNOs and interface with vendors. TPC's back-end technology has taken years to develop (including changing and adapting the system) and costs the BLT group approximately hundreds of millions of Rands per year.

#### 6.15.13. **Distribution of SIM Cards / Starter packs**

##### (i) Input Foreclosure

6.15.14. In respect of the ability to foreclose, the parties submitted that –

- 6.15.14.1. Cell C's share of the mobile market is relatively small. Its share of the SIM card market as measured in 2022 (assuming that the

estimates of total SIM cards distribution in the country are correct) was substantially less than its competitors. Therefore, even if TPC's rivals were completely denied access to Cell C's SIM cards, they would still have access to SIM cards from other competitors. Accordingly, foreclosure in the downstream market is unlikely.

6.15.15. In respect of the incentive to foreclose, the parties submitted that –

6.15.15.1. Cell C's poor financial position will potentially be impacted by a disruption to its SIM cards distribution channels. It is also unlikely that BLT would be able to immediately replace Cell C's sales of SIM cards that are distributed through competing distributors – BLT currently distributes only a minuscule portion of Cell C's SIM cards.

(ii) Customer Foreclosure

6.15.16. According to the parties, while TPC does distribute some of Cell C's SIM cards/starter packs, it is currently not a direct customer of Cell C with respect to SIM card sales. Nonetheless, the parties assessed whether there will be any customer foreclosure impact arising from the Proposed Transaction.

6.15.17. In respect of the ability to foreclose, the parties submitted that –

6.15.17.1. BLT distributed SIM cards largely on behalf of only one mobile operator, Vodacom, in 2022. BLT accounts for a small portion of all SIM cards distributed in 2022 and there are at least 17 other distributors who can distribute SIM cards for the other MNOs should BLT no longer do so. Therefore, it is unlikely that the merged entity would be able to foreclose other MNOs by denying them access to SIM cards distribution.

6.15.18. In respect of the incentive to foreclose, the parties submitted that –

6.15.18.1. SIM cards distributors/resellers earn connection bonuses (for each SIM card connected to the network) and on-going revenue from airtime recharges. Revenues earned from the on-sale of SIM cards from other MNOs are likely to be much higher in value than Cell C's SIM cards based simply on the difference in overall shares of subscribers and service revenue. Cell C's SIM cards sales make up less than 5% of BLT's total SIM cards sales as opposed to Vodacom SIM cards sales which account for the lion's share of BLT's SIM cards distributed in the 6 months ended in June 2023; and

6.15.18.2. they accordingly do not have an incentive to foreclose.

6.15.19. **Other minor Vertical Overlaps**

6.15.20. For the sake of completeness, the parties have also considered the potential foreclosure for other minor vertical overlaps, namely, whether the merged entity is likely to foreclose MNO rivals from (i) handset provision and (ii) credit services and (ii) the purchase of postpaid contracts.

6.15.21. In relation to handsets and credit services, the parties indicated that this overlap is hypothetical because BLT does not at present offer handset provision and credit services to any other MNO apart from Cell C. Other MNOs cannot be foreclosed by a future strategy by the merged entity not to deal with them because other MNOs do not rely on BLT for postpaid handset at present and they simply do not require this service from BLT to operate their respective businesses.

6.15.22. In relation to the purchase of postpaid contracts, the parties submitted foreclosure is unlikely as BLT (through BLC) provides the service to a small number of all postpaid subscribers.

6.16. **Other Relevant Factors Considered by the Parties**

6.16.1. In addition to the assessment of the horizontal and vertical overlaps as discussed above, the parties to the Applications also considered other factors relevant for assessing competition. These factors are the following: (i) barriers to entry, (ii) coordinated effects, (iii) efficiencies and (iv) third party concerns.

6.16.2. The following are the parties' submissions in respect of each of the factors above.

6.16.3. **Barriers to Entry**

*Retail Mobile Services*

- There are well-known significant barriers to entry and expansion facing MNOs, which limit the number of MNOs in mobile markets. The nature of spectrum assignments, the large expense of rolling out new sites and limited site sharing, high roaming prices, regulatory barriers, and economies of scale coupled with first mover advantages together raise barriers to entry and expansion. New entry is unlikely to occur and so the ability of the existing challengers of the MNOs to continue operating, and in fact, grow, is vital for the competitive health of the mobile market in the country.
- Barriers facing MVNOs have improved since MTN started offering wholesale services to MVNOs near the end of 2020. Access will improve further in 2023 when both Telkom and Vodacom will open up their networks to MVNOs. Additional requirements for both MNOs and MVNOs are investments in marketing and the cost of investing in distribution channels.

### *Bulk Purchase and Distribution of Prepaid Airtime, Starter Packs, Mobile Phones*

- There are numerous entry and expansion barriers facing new and potential distributors, although they are clearly not insurmountable given that there are at least 13 other distributors of airtime in the country.
- Barriers include, *inter alia*, the time taken to build up relationships with all the MNOs as well as the retailers in the formal and informal sector (where there are many small vendors), the people to serve the distribution network such as support teams and distribution teams, the development of systems to integrate with the information systems of MNOs, economies of scale from early settlement discounts from MNOs, and high working capital requirements to buy inventory in advance. Many of these barriers (e.g. building relationships and IT integrations with MNOs as well as early settlement discounts) are typically overcome by purchasing from large wholesalers of airtime.

### *Outsourced Services*

- There are numerous and diverse sellers of handsets in the country, despite some obvious barriers to entry (such as high capital requirements involved with purchasing handsets for on-sale, economies of scale from volume-based discounts on handsets, and a need to develop relationships with the authorized distributors of branded handsets in the country).

#### 6.16.4. Coordinated Effects

### *Coordination Between Wholesalers/Distributors*

- The parties submitted that coordination at this level of the market is improbable since Cell C accounted for only a small portion of TPC's airtime purchases from MNOs. This percentage would have been even lower had TPC not agreed to pre-purchase airtime from Cell C. On that basis, Cell C is likely to make up an even smaller percentage of other distributors' airtime sales.
- Therefore, TPC would not be in a position to obtain sufficient information about other distributors' airtime purchases based on Cell C's data to affect competition in its airtime distribution activities.
- Cell C is likely to also account for a small share of distributors' SIM card distribution, given that its share of the SIM card market is substantially less than that of its competitors.
- There are at least 13 other distributors of airtime and at least 17 other distributors of SIM cards, which would make coordination among distributors difficult.
- In any case, it would not be in the interest of the merged entity's MNO business if distributors conspired to raise the discounts they demand on airtime from MNOs.

#### *Coordination between MNOs*

- Given the nature of the vertical relationships between the merging parties, airtime sales information on rival MNOs may become available to Cell C via TPC. However, this information is unlikely to give rise to coordinated effects since this information is partial. TPC accounts for less than 50% and between 45% to 60% (if sales to distributors are excluded and included, respectively). BLT also accounted for a small portion **of** all SIM cards distributed. This would only allow a partial view of the sales of airtime and SIM cards of other MNOs.

- Market shares at the retail level are highly skewed – Vodacom's and MTN's market shares are at least double the market shares of Telkom and Cell C, providing powerful incentives for smaller rivals such as Cell C to grow their market shares, reducing the likelihood of reaching and maintaining a coordinated agreement.

#### 6.16.5. Efficiencies

- Cell C's market share has been declining in recent years. The Proposed Transaction will provide TPC with a controlling shareholding in Cell C, which will put it in a better position to focus its efforts on Cell C's financial stability, which is likely to stem this decline.
- This will have pro-competitive effects on the mobile market as it will enable Cell C to become a more effective constraint on Vodacom and MTN, towards which the market has historically been skewed. There are high barriers to entry in the retail mobile market, which make relying on future entry an unlikely prospect. Enabling Cell C to improve its market position will be a much more certain, timeous and cost-effective endeavour than waiting for future entry.
- Cell C's continued survival is especially important given the recent news about Telkom's cash flow problems, which suggests the entity is in serious financial trouble. A mobile market in which the two main challengers (Cell C and Telkom) are severely weakened or forced to exit would put Vodacom and MTN into an even stronger position in future, further weakening competition in the South African mobile industry to the detriment of the South African consumers.



6.17. **Third Party Concerns Relating to the Impact of the Proposed Transaction on Competition**

6.17.1. As mentioned in paragraphs 4.10 and 5.1 above, subsequent to the publication of the Notice, the Authority received six written representations. Three of these representations were from the three MNOs, (i.e. Vodacom, MTN and Telkom) which compete with Cell C and TPC in the markets affected by the Proposed Transaction. In their respective representations, Vodacom and MTN raised concerns relating to the possible negative impact of the Proposed Transaction on competition, in particular vertical foreclosure concerns. These concerns are summarized below.

6.17.2. Vodacom and MTN argued that the Proposed Transaction will likely result in them being foreclosed from the retail mobile market for the provision of pre-paid products (customer foreclosure concerns). In this regard, Vodacom and MTN submitted that –

- TPC's acquisition of control of Cell C may create the ability and incentive for TPC to stop purchasing all, if not much of, the prepaid airtime that it is currently purchasing from the other MNOs and instead turn to Cell C to satisfy its pre-paid airtime requirements; and
- TPC may offer Cell C more favourable terms than the other MNOs in the downstream distribution of airtime to the detriment of competition in the upstream retail market.

6.17.3. Further to the above, Vodacom raised the following concerns –

- that Cell C could, through TPC, persuade its customers to port to Cell C; and

- TPC may share Vodacom's competitively sensitive information with Cell C regarding, for example, the sale of Vodacom's products and services, commercial construct and the terms of Vodacom's products.

6.17.4. Cell C has submitted comprehensive responses to the concerns raised by Vodacom and MTN. Below is a summary of Cell C's responses.

6.17.5. Customer foreclosure concerns raised by Vodacom and MTN.

(i) Merger specificity

- Pre-merger, TPC is already the biggest shareholder of Cell C with a 49.53% shareholding (i.e. it holds more shares – TPC holds more shares than any other shareholder by approximately 39%).
- The merger involves an acquisition of a mere 4.04% of the shares in Cell C. Following approval, TPC will own 53.57% of Cell C's total issued share capital. Despite having crossed the 50% threshold for control, it cannot seriously be said that an additional 4.04% of Cell C shares would materially change TPC's incentives in any way.
- Accordingly, TPC already has a significant vested interest in ensuring that Cell C succeeds and already has significant exposure due to the billions of rands worth of funding which it has provided to Cell C since 2017. TPC also has volume-based commitments to Cell C, which are part of TPC's funding arrangements, in particular to provide Cell C with cash flow.
- In this way, the interests and incentives of TPC and Cell C are already intertwined pre-merger. The acquisition of a few more Cell C shares by TPC will not materially alter that position.

- Further, TPC simply does not have the ability to drive demand towards Cell C in the way that the MNOs contend, and the merger does not increase its ability to do so. Had this been possible pre-merger, TPC would have already done so, given the substantial excess stock that TPC has purchased from Cell C.
- The fact remains that TPC has not pursued, and is not pursuing, any foreclosure strategies vis-à-vis the MNOs. In addition, TPC has not provided Cell C with favourable distribution terms, ceased to purchase the airtime products of the other MNOs or reduced the number of purchases from those other MNOs, nor would it make any sense to do so given that the other MNOs account for 90% of the market for pre-paid airtime.
- To the extent that there might be any ability and/or incentive to foreclose MNOs post-merger, that ability and/or incentive exists today and is not enhanced by the merger. Put differently, it is not merger specific.

(ii) Ability to foreclose

- The largest MNOs account for approximately 87% of the market for pre-paid airtime, while TPC's commercial viability and ability to compete in the market for the distribution of prepaid products depends on its ability to satisfy retail demand for the MNOs' products. If TPC is unable to meet the demand of Vodacom, MTN and Telkom, it runs the risk of losing sales of airtime to end consumers.
- This is underscored by the fact that the MNOs have large customer bases in the market for prepaid airtime which anchor the demand for their products. In 2022, Vodacom's and MTN's customer bases for pre-paid airtime amounted to 40.8% of the market and 32% of the market respectively, whilst Telkom's customer base for pre-paid subscribers was 15 million subscribers (16% of the market).

- Given that Cell C only has 10% share in the market for pre-paid airtime, it is highly unlikely that the combination of TPC and Cell C will place the merged entity in a position that Cell C could increase its prepaid airtime sales to such a degree that it would (i) foreclose the other MNOs that collectively account for 90% of the market for pre-paid airtime and, at the same time, (ii) sufficiently compensate TPC for the lost volumes and revenues it would have incurred if it were to cease to purchase the products of the other MNOs altogether or reduce the level of purchases it currently sources from them.
- Critically, Vodacom and MTN rely on alternative distribution channels to TPC for 46% and 53% of their respective sales of airtime products. Similarly, Telkom relies on distribution channels other than TPC for 58% of its total airtime sales.
- The introduction of MNO branded and owned distribution channels has been an important development in the mobile market. Both Vodacom and MTN have been heavily promoting their apps (such as Vodacom's VodaPay) and mobile money services (such as MTN's MoMo) to their subscribers as a preferred means of purchasing their airtime products.
- From the perspective of MNOs, driving their own distribution channels not only gives them greater control over those channels but also generates efficiencies. It enables the MNOs to make bigger margins because they can sell their airtime directly to subscribers without the need to offer discounts to intermediaries and formal retailers as a means of incentivising them to purchase and sell their products.
- In these circumstances, it is self-evident that even if TPC were to engage in a foreclosure strategy, it would not force the MNOs which compete with Cell C out of the market, nor would it hamper

their ability to compete with Cell C since they clearly have alternative routes to market.

(iii) Incentive to foreclose

- TPC's business model is built on aggregation and volume which is clearly at odds with a customer foreclosure strategy.
- In terms of aggregation, TPC distributes pre-paid airtime of all the MNOs and other pre-paid products. An aggregator business model requires ubiquity in the availability of the products in question. That business model would lose its main value proposition if the products of some, but not all, MNOs were available or if the products of some MNOs are available on worse terms or higher prices through TPC than through the MNOs' other distributors and their own distribution channels.
- In terms of volume, the purchase and sale of pre-paid airtime is a low margin business. At the same time, TPC's business model requires significant investment, not least because it has invested in IT and other technology systems. Accordingly, in order to remain efficient and profitable, TPC requires significant volumes.
- As already indicated, Cell C's competitors account for at least 90% of TPC's pre-paid volumes and revenues. Accordingly, TPC could not possibly have an incentive to foreclose suppliers that account for such a significant share of its revenues. Even a partial foreclosure strategy aimed at providing Cell C with favourable terms relative to the other MNOs would not make sense. TPC is highly dependent on the other MNOs for the sustainability of its business and cannot afford to harm the commercial relationships that it currently has with the other MNOs.

- It is also important to note that a foreclosure strategy will not be profitable.<sup>47</sup> TPC as a profit maximising firm, would reasonably need to believe that the loss of sales of the other MNOs' products would be outweighed by the increased profits that Cell C would make through increasing its competitive performance relative to the decreased competitive performance of the other MNOs.
- That would be a momentous gamble for TPC to take in circumstances where a substantial amount of its pre-paid airline sales volumes comprises products of the other MNOs (i.e., other than Cell C) and only a small portion of its pre-paid airline sales is made up of Cell C's pre-paid airline.

6.17.6. In addition to raising the foreclosure concerns, the parties indicated that Vodacom has also proposed remedies<sup>48</sup> to address its concerns. However, the parties are of the view that given the absence of any substantiated foreclosure concerns, no remedies would be appropriate.

6.17.7. As already indicated above, Vodacom also raised a concern around the Proposed Transaction leading to the sharing of competitively sensitive information between the Cell C and the TPC group as well as the porting of Vodacom customers to Cell C. Cell C's response to these concerns is summarized below.

(iv) Information exchange concerns –

- Vodacom has not explained the purported competitive harm that underscores this concern. It is, in any event, unfounded for at least the following reasons:

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<sup>47</sup>Foreclosure (even partial foreclosure) first involves costs for the firm engaging in the foreclosure due to the initial loss in sales volumes and revenues that arise from ceasing to supply some or all of the products of other firms. It is only at some point thereafter that the firm may realise any potential benefits from that foreclosure, namely if the firm were able to recoup the lost volumes by increasing sales of its new upstream division's products.

<sup>48</sup> See para 14 of Annexure A to Vodacom's submissions.

- The MNOs determine their own advertising and promotional campaigns regarding their product offerings, new products and pricing. Those are in the public domain;
- TPC does not obtain advance notice of confidential strategic and competitive plans of the MNOs. However, these are also in the public domain as they are well-advertised;
- In relation to sales volumes, many aspects of the MNOs' retail offerings, their subscriber numbers and sales volumes and performance are also in the public domain;
- The limited information which TPC has is that its sales volumes of MNOs' pre-paid airtime products constitute less than the majority share of each of the other MNOs' own pre-paid airtime;
- Accordingly, TPC does not have access to the volumes and sales performance of the majority of Vodacom's, MTN's and Telkom's pre-paid airtime sales; and
- In any event, this information would have no impact whatsoever on Cell C's ability to compete. All the MNOs can already take note of marketing and promotional campaigns of the other MNOs and introduce their own promotional and competitive responses.

(v) Porting customers

- Cell C contended that this concern is unsubstantiated and absurd. Competition in mobile markets occurs primarily on the basis of quality of service, coverage, and price. Vodacom has an extensive mobile network infrastructure in which it continually invests in.

- Vodacom has also marketed its network infrastructure as being, amongst others, the "most reliable network" in the country. In these circumstances, it is simply inconceivable that a distributor of airtime products could persuade Vodacom's customers to move across to Cell C's network especially when considering that the MNOs are the ones who are responsible for developing and marketing their own products and services. TPC is merely a purchaser and seller of prepaid airtime.
- Vodacom and MTN have dominated the mobile market for decades partly because of significant first-mover advantages and other market features that have persistently entrenched their market position. Both Vodacom and MTN have subscriber bases and levels of profitability that far exceed the capabilities of smaller MNOs.
- These are the main reasons why Cell C has not been able to exert a strong competitive constraint on them in the past. If, for whatever reason, the Proposed Transaction does enable Cell C to strengthen and win customers from Vodacom and MTN, it could hardly be a cause for concern. Indeed, this is the very nature of competition.

6.17.8. In conclusion, Cell C's submission was that for the reasons that have already been provided, it is inconceivable that a foreclosure strategy by TPC would have any effect whatsoever on the businesses of the other MNOs, particularly Vodacom and MTN. On the contrary, it would harm TPC's business given that MNOs other than Cell C account for 90% of the total airtime products purchased and distributed by TPC.

6.17.9. In addition, Cell C submitted that the Proposed Transaction is in fact pro-competitive due to the reasons set out below–

6.17.9.1. The Proposed Transaction will secure Cell C's continued operation and facilitate its financial recovery so that it can strengthen its market position and ultimately pose some form of competitive



constraint on Vodacom and MTN which have dominated the mobile market for decades;

6.17.9.2. Given the significant barriers to entry and expansion for existing MNOs (apart from Vodacom and MTN) and potential MNOs, future entry in the market is unlikely. It is therefore imperative that existing challenger MNOs continue to operate; and

6.17.9.3. Cell C's continued survival is especially important given Telkom's reported cash flow problems, which suggests that the entity is in serious financial trouble.<sup>49</sup> A mobile market in which the two main challengers (Cell C and Telkom) are severely weakened or forced to exit would further enhance the significant market power of Vodacom and MTN, further weakening competition in the South African mobile industry to the detriment of South African consumers.

## 6.18. **THE AUTHORITY'S VIEWS ON THE PARTIES' HORIZONTAL AND VERTICAL ANALYSIS**

6.18.1. The Authority's assessment is set out below.

### Market definition

6.18.2. In relation to market definition (product and geographic markets), the definition provided by the parties in respect of the relevant markets is broadly in line with that provided in case precedent assessed by the Authority.

6.18.3. Further, none of the written representations received by the Authority from the MNOs (who are competitors to Cell C and TPC) raised any issues on this point.

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<sup>49</sup> Daily Investor on MyBroadband. (16 June 2023). "Telkom is in deep trouble". Available at <https://mybroadband.co.za/news/telecoms/496655-telkom-is-in-deep-trouble.html>.

6.18.4. Accordingly, the Authority was persuaded by the parties' definition of the relevant product and geographic markets.

*Impact of the Proposed Transaction on competition (horizontal and vertical)*

6.18.5. The Authority's view in relation to the competition assessment undertaken by Acacia Economics is that the Proposed Transaction is unlikely to lead to a substantial prevention or lessening of competition in the identified relevant markets (horizontally or vertically) namely:

6.18.5.1. (i) the bulk purchase and distribution of prepaid airtime;

6.18.5.2. (ii) the purchase and distribution of starter packs/SIM cards;

6.18.5.3. (iii) the sale of mobile postpaid subscriptions to customers; and

6.18.5.4. (iv) the sale of handsets to customers.

6.18.6. The Authority's reasons for this view are set out below.

*Horizontal assessment*

6.18.7. Out of the above markets, the only market in which the merged entity will have a high combined market share is the market for the bulk purchase and distribution of prepaid airtime. However, even with the high market share in this market, the Proposed Transaction is unlikely to result in any substantial negative effect on competition in this market as the overlap is minor and results in a single digit percentage market share accretion<sup>50</sup>. Further, Cell C and TPC are not each other's closest competitors (Cell C sells only its own airtime whereas TPC sells airtime of all the MNOs, including Cell C).

6.18.8. Furthermore, the Proposed Transaction does not result in the removal of an overall effective competitor, i.e. Cell C. In this regard, Cell C's competitiveness has been declining over a period of years now – its

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<sup>50</sup>The exact percentage has been granted confidential status by the Authority in terms of section 4D of the ICASA Act.

market position was even overtaken by Telkom (which is now the third largest MNO). It also appears that this decline is continuing as Cell C's latest share of total subscribers in the mobile market shows a decline from 9.9% to 7.4% between January and September 2023.<sup>51</sup> The remaining MNOs, two of which have been (since their respective entry in the industry in the 1990s) and currently are the first and second largest (i.e. Vodacom and MTN), will continue to constrain the merged entity post transaction.

6.18.9. The other horizontal overlaps in the remaining markets (i.e. the purchase and distribution of starter packs/SIM cards, (iii) the sale of mobile postpaid subscriptions to customers and (iv) the sale of handsets to customers) do not result in the merged entity having high market shares. Further, the parties will continue to compete in all three markets with the other MNOs and other firms present in those markets.

#### Vertical Assessment

6.18.10. In relation to the vertical overlaps, the Proposed Transaction is unlikely to result in input foreclosure – i.e. Cell C is unlikely to foreclose other competitors of TPC in the airtime distribution market from accessing its airtime). This is because for input foreclosure to have a chance of success, the vertically integrated entity must have market power in the upstream market, i.e. retail mobile services (in respect of the supply of airtime to wholesale distributors/other distributors and retailers).

6.18.11. As already indicated above, Cell C is not an effective or significant MNO compared to the other three MNOs, it is currently in dire financial difficulties and its subscriber base is continuing to decline – its current figures show that its share of total subscribers in the market declined from 9.9% to 7.4% between January and September 2023. On the other hand, Vodacom and MTN have much higher subscriber numbers, (40.8%

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<sup>51</sup> Para 6 of the latest submission from Cell C dated 15 March 2024.

of the market) and (32.9% of the market) respectively – these two MNOs hold close to 74% of the mobile market share by subscribers<sup>52</sup>.

6.18.12. Cell C therefore lacks any ability to foreclose the competitors of TPC. Further, there appears to be no incentive for the merged entity to employ an input foreclosure strategy – one of the main reasons for the Proposed Transaction is for Cell C to improve its financial position and grow its subscriber/revenue base in order to effectively compete. For TPC, the Authority is of the view that it would simply not make any financial sense for it to even attempt any foreclosure strategy after having contributed billions of rands to Cell C - TPC clearly has a vested interest in the improvement (financially and as a competitor) of Cell C.

6.18.13. In respect of customer foreclosure, the Authority is similarly of the view that the Proposed Transaction will not lead to any customer(s) foreclosure. Although TPC is an important customer to Cell C in the purchase of prepaid airtime, as a wholesale distributor, TPC not only requires large volumes of airtime but also requires the airtime from all the MNOs in order to satisfy the requirements of its customers (i.e., other distributors and retailers (formal and informal)).

6.18.14. Given that TPC's largest suppliers are Vodacom and MTN, the Authority determined that the pursuit or implementation of a foreclosure strategy by TPC, whether independently or in conjunction with Cell C, would be counterproductive and likely detrimental to their respective interests. Even if the merged entity were to attempt a foreclosure strategy, other MNOs, particularly Vodacom and MTN, would likely aggressively resist any such attempt by the merged entity as both Vodacom and MTN have the resources to do so due to their respective financial standing and market position.

6.18.15. Furthermore, there is no evidence to suggest that TPC, prior to the Proposed Transaction, refused to sell airtime or sold airtime on unfair

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<sup>52</sup> Para 6.4 of Cell C's response to representations dated 15 March 2024.

terms to either its customers and/or other competing distributors despite having been Cell C's largest shareholder. Another consideration for the Authority was that other MNOs have access to alternative distribution channels for their respective products.

6.18.16. In addition to the above, none of the parties' retail customers raised any concerns regarding the Proposed Transaction.

#### Case Precedent from the Competition Authorities

6.18.17. The Authority notes that the Competition Authorities<sup>53</sup> have, over the years, dealt with merger cases that addressed the main competition concerns arising from the Applications, i.e. vertical foreclosure concerns. The Competition Authorities have in those cases<sup>54</sup> assessed foreclosure issues by addressing three primary questions, namely, ability to foreclose, incentive to foreclose and whether the foreclosure will have a detrimental effect on competition. This approach is in line with how the parties to the Proposed Transaction have conducted the vertical assessment.

#### Other Third Party Concerns

6.18.18. In addition to the foreclosure concerns raised by Vodacom and MTN, two further concerns were raised by Vodacom, which were (i) the porting of customers by the merged entity (through TPC) to the Cell C network and (ii) the possibility of Vodacom's competitively sensitive information being shared by TPC post-transaction.

6.18.19. The issues highlighted above are analysed below.

#### *(i) Customer Porting*

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<sup>53</sup> The Competition Commission, the Tribunal and the Competition Appeal Court ("CAC").

<sup>54</sup> Astral Foods/National Chick (69/AM/Dec01), Bayne Investment/Clidet (90/LM/Aug07), the South African Breweries/Diageo South Africa (LM187/Oct18), Foodcorp/Sunshine Bakery (LM/089/Aug22), Mondy/Kohler (06/LM/Jan02, 20/CAC/Jun02) and Sasol/Engen (101/LM/Dec04).

6.18.20. In relation to the customer porting concern, the Authority is of the view that it is not difficult to believe that the merged entity could indeed come up with measures to persuade customers of Vodacom (and other MNOs) to port to Cell C. Whether this actually works and to what extent is another matter.

6.18.21. However, the Authority is of the view that persuading customers to switch from one MNO to another would not necessarily be a concern that could be viewed as being anti-competitive.<sup>55</sup>

(ii) *Information Sharing*

6.18.22. As already mentioned, Vodacom raised concerns about the possibility of its competitively sensitive information being shared between Cell C and TPC post transaction. Cell C's response to this concern is provided in paragraph 6.17.7 above.

6.18.23. The issue on information exchange has been dealt with by the Competition Authorities on a number of occasions. The Commission has also published Information Exchange Guidelines<sup>56</sup> which set out its approach in determining whether information exchanges between competing firms is likely to contravene section 4 of the Competition Act.

6.18.24. The abovementioned Guidelines define<sup>57</sup> competitively sensitive information as –

*"Information that is important to rivalry between competing firms and likely to have an appreciable impact on one or more of the parameters of competition (for example price, output, product quality, product variety or innovation). Competitively sensitive information could include prices, customer lists, production costs, quantities, turnovers, sales, capacities,*

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<sup>55</sup> Unless this persuasion involves an element of inducement – this would then be problematic as per section 8(1)(d)(i) of the Competition Act No. 89 of 1998, as amended.

<sup>56</sup> These are titled "Guidelines on the Exchange of Competitively Sensitive Information" – published on 23 February 2023.

<sup>57</sup> Paragraph 2.5 of the Guidelines.

*qualities, marketing, plans, risks, investments, technologies, research and development programmes and their results”.*

6.18.25. In order for competition to work effectively, competitors must act strictly independently of each other in any given market and must therefore not share and/or discuss the types of information mentioned above. Sharing and/or discussing information that falls under the category of competitively sensitive information is prohibited in terms of section 4 of the Competition Act.

6.18.26. The exchange<sup>58</sup> of competitively sensitive information between competitors can raise several competition concerns which include the following –

6.18.26.1. Facilitation of collusion and/or coordination:

6.18.26.1.1. Competitors replacing their independent actions and instead coordinating by fixing prices for goods/services (i.e. setting prices at a level above what would otherwise be sustainable in a competitive market and thus resulting in higher prices and reduced choice for customers/consumers).

6.18.26.1.2. Competitors fixing any other trading condition such as output levels (for example agreeing on how much a particular product is to be produced).

6.18.26.1.3. Competitors dividing markets (by allocating customers, suppliers, territories, or specific types of goods or services).

6.18.26.1.4. Competitors allocating tenders.

6.18.26.2. Foreclosure of new entrants:

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<sup>58</sup> Certain types of information can be shared/exchanged such as historical and aggregated information. Such aggregated information should be such that it should not be possible to deduce the activities of an individual competitor. Refer to the guidelines for further insights.

6.18.26.2.1. New entrants in the market are likely to be deprived of accessing the exchanged information or incumbent firms may take steps to prevent or limit the entry of new firms into the market.

6.18.27. In addition to the Guidelines, case precedent also shows that the Competition Authorities tend to adopt a cautious approach when dealing with transactions wherein competitively sensitive information could likely be shared. As a result, when dealing with such transactions, the Competition Authorities tend to impose conditions aimed at limiting the flow of competitively sensitive information.<sup>59</sup>

6.18.28. Cell C and TPC have provided their responses regarding Vodacom's concern of its competitively sensitive information likely being shared by the parties post the Proposed Transaction. However, the Authority is not entirely convinced about the response provided by the parties.

6.18.29. For instance, on the one hand the parties argue that "...TPC does not obtain advance notice of confidential strategic and competitive plans of the MNOs. However, these are also in the public domain as they are well-advertised"<sup>60</sup>. On the other hand, the parties argue that "... the limited information which TPC has is that its sales volumes of MNO pre-paid airtime products constitute less than [CONFIDENTIAL] of each of the other MNOs' own pre-paid airtime... In any event, this information would have no impact whatsoever on Cell C's ability to compete".<sup>61</sup>

6.18.30. The Authority is of the view that it is highly unlikely that the information that the parties argue is already in the public domain is indeed publicly available. Further, information such as sales volumes and strategy documents/plans fall under the category of information that must not be shared with one's competitors. The Authority posed these questions to

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<sup>59</sup> See for instance, the following cases – Community Investment Ventures Holdings/Vumatel (LM09Jul18), Cumulative Properties/Moolgem (LM142Jul18), Gatsby Security/Cell C (LM104Oct23), DH Brothers/Russellstone (LM061Jun20) and Momentum Metropolitan/Investment Managers (LM104Oct23).

<sup>60</sup> Paragraph 91.2 of Cell C's response to written representations dated 15 March 2024.

<sup>61</sup> Paragraphs 91.4 and 91.5 of Cell C's response to written representations dated 15 March 2024.



the Applicant during the public hearings and requested additional information to be provided in this regard.

6.18.31. Furthermore, the Authority inquired from the parties during the public hearings as to whether TPC (in whose possession any potentially sensitive information would be) would be amenable to provide the Authority with formal undertakings which would be incorporated into Cell C's licence/s as information exchange conditions to alleviate the concern raised.

6.18.32. In their subsequent written response on this issue, the parties indicated *inter alia* that the Authority does not have powers to impose undertakings on non-licensees such as TPC and that in any event, such undertakings are not necessary as TPC has a vested interest to preserve Cell C as a going concern. The parties also submitted that they are both committed to complying with laws of general application which address any concerns regarding the flow of information. The parties accordingly indicated that TPC is not amenable to provide any information exchange undertakings.

6.18.33. Having considered the information provided by the parties as well as the response to the questions that the Authority posed, the Authority remained unconvinced that the information that the parties argued was already in the public domain was indeed publicly available. The Authority further maintained that information such as sales volumes and strategy documents/plans fall under the category of information that must not be shared with one's competitors.

6.18.34. However, the Authority is of the view that, although there exists a risk that competitively sensitive information belonging to the other MNOs could, post transaction, flow from TPC to Cell C, the Authority is unable to impose licence conditions on TPC as a non-licensee.

6.18.35. Based on the reasons outlined above, the Authority is of the view that the Proposed Transaction is unlikely to substantially prevent or lessen competition in the identified relevant markets.

6.18.36. In relation to third-party foreclosure and customer porting concerns, the Authority is of the view that, taken together with its analysis, such concerns have been responded to by Cell C and TPC, and the Authority is satisfied with the responses provided.

#### 6.19. **Consumer Interest Report**

6.19.1. As per the requirement of Clause 9.3 of Form G of the Licensing Regulations, an independent consumer report outlining the possible impact of the Proposed Transaction on customers and/or consumers was submitted by the parties. The consumer interest report was prepared by Acacia Economics on behalf of the parties.

6.19.2. In the consumer interest report, Acacia Economics noted that the Applications apply to the licensable activities of Cell C and, accordingly, the analysis required is in relation to customers of Cell C for Cell C's licensable activities. BLT does not directly hold any licences (nor is there a transfer of control over BLT) and, accordingly, customers of BLT are not relevant to or required for the analysis. The Authority agrees with this view.

6.19.3. The submissions in relation to the assessment of the impact of the Proposed Transaction on customers and consumers are outlined as follows.

6.19.3.1. Cell C has a range of different customers, including (i) end consumers; (ii) bulk wholesaler-distributors; (iii) retailers (such as banks, grocery retailers and fuel retailers, to which Cell C directly distributes its airtime and SIMs); and (iv) MVNOs and MVNEs who purchase wholesale services from Cell C for purposes of providing mobile retail services to customers; and

6.19.3.2. There are two ways in which customers may be affected by the transfer of control of Cell C's licences, i.e. (i) there may be a

change in business operations and (ii) customers may be affected by a change in competitive dynamics.

- 6.19.4. In respect to a change in business operations, BLT does not anticipate making major changes to Cell C's underlying business. Cell C will continue to hold its i-ECS, i-ECNS and RFS Licences after TPC has acquired control and will continue to operate in much the same way as it does currently, except with the strategic direction and guidance of a controlling shareholder with a vested interest in Cell C's success.
- 6.19.5. In respect to the competitive dynamics, there is unlikely to be a substantial prevention or lessening of competition in the relevant markets as outlined in the competition report. The "present transaction" is likely to produce pro-competitive benefits as it will better enable Cell C to compete effectively.
- 6.19.6. Cell C's market share has been declining in recent years and Cell C is in serious financial trouble. A mobile market in which Cell C is severely weakened or forced to exit would weaken the competitive constraints in the mobile market. This would be to the detriment of consumers.
- 6.19.7. Acacia Economics also indicated that it interviewed three of Cell C's customers (i.e., two distributors of airtime, SIM cards and/or handsets and one MVNO and a direct purchaser of airtime from Cell C) in order to get their views about the Proposed Transaction.
- 6.19.8. According to Acacia Economics, although one distribution customer was worried about the Proposed Transaction since they compete more broadly with BLT, all three customers independently said that TPC's acquisition of control of Cell C as envisaged by the Proposed Transaction would enable Cell C to "get back on track" and become a more effective competitor in the mobile market.

- 6.20. A concern was raised by MTN around the possible adverse impact of the Proposed Transaction on consumers. In this regard, MTN indicated that the Applications do not elaborate on how the merged entity will achieve their stated objective, namely, that Cell C will become a more competitive MNO. In response, Cell C submitted that MTN's concern was speculative and did not provide evidence that the Proposed Transaction might harm consumers. Cell C was also of the view that it is not required to provide every single detail pertaining to its future recovery and growth plans in order to bolster its submission that the Proposed Transaction is in the interests of consumers.
- 6.21. In conclusion, the consumer report stated that the Proposed Transaction has the potential to strengthen Cell C's weak position relative to other MNOs and ensure the continued presence of Cell C as a competitor in the country. Further, the ability of the merged entity's ability to better constrain large competitors should yield price, quality and innovation benefits for customers and consumers more broadly.
- 6.22. **The Authority's views on the parties' analysis of the effects of the Proposed Transaction on customers/consumers**
- 6.22.1. The Authority is persuaded by the submissions in the consumer report to the effect that "*a mobile market in which Cell C is severely weakened or forced to exit would weaken the competitive constraints in the mobile market. This would be to the detriment of consumers*".<sup>62</sup>
- 6.22.2. Therefore, on the evidence before it, the Authority is of the view that the Proposed Transaction is likely to have a positive impact on customers and end consumers.
- 6.22.3. In relation to the interviews with Cell C's customers, the Authority had initially requested the records of such interviews from Acacia Economics. The Authority was, however, subsequently informed by the parties<sup>63</sup> that there are no recordings or transcripts of the interviews. The Authority did

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<sup>62</sup> Paragraph 11, page 4 of the Consumer Interest Report.

<sup>63</sup> Letter from the parties dated 27 May 2024.

not pursue this issue any further as the absence of recordings/transcripts did not have any material effect on the conclusion by the Authority with respect to the impact of the Proposed Transaction on consumers.

6.22.4. In relation to the concern by MTN, the Authority is of the view that Cell C is correct that there is no need for it to go into a detailed explanation on how it plans to become a more competitive MNO as these relate to its specific business plans and commercial strategies. The parties provided an explanation of their strategy in the section dealing with efficiencies<sup>64</sup> and this, in the Authority's view, suffices.

6.22.5. In addition, the Authority notes that apart from MTN's concern, there were no further concerns raised by stakeholders/consumers in relation to the impact of the Proposed Transaction on consumer welfare.

6.22.6. In conclusion, the Authority is of the view that the Proposed Transaction is unlikely to result in any negative impact on consumers.

### **6.23. RFS Licences issued to the Applicant**

6.23.1. Vodacom initially expressed concerns over the control of Cell C's RFS Licences and potential market foreclosure as a result of the Proposed Transaction.

6.23.2. However, at the public hearings and in correspondence delivered after the public hearings, Vodacom advised that it would not be persisting with its competition concerns raised before the Authority as those competition-related concerns would be addressed by the Competition Tribunal but highlighted the importance of the Authority's role in ensuring compliance with the Radio Frequency Spectrum Regulations.

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<sup>64</sup> In the merger between Trident Steel/Dorbyl (89/LM/Oct00) the Tribunal held that an assessment of efficiencies will only be relevant once it is established that the merger prevents or lessens competition.

### 6.23.3. **Key points from Vodacom's submission**

- 6.23.3.1.      Spectrum Control: Vodacom questioned whether Cell C and TPC would be in a position to comply with the terms and conditions of the RFS Licences post-transaction. It argued that the Authority must investigate who would control the spectrum after the Proposed Transaction and whether the transfer met the requirements of the ECA.
- 6.23.3.2.      Regulatory Compliance: Vodacom urged the Authority to ensure that Cell C's licences continued to comply with regulatory standards, particularly regarding spectrum use, and raised concerns about the transparency of the application process.
- 6.23.3.3.      Competition: Notwithstanding Vodacom's views in this regard, the Authority is obliged in terms of its empowering legislation to conduct its own independent competition analysis. Having analysed the Proposed Transaction from a competition perspective, the Authority is of the view that it does not raise competition concerns.

6.23.4. **MTN's Submission:** MTN's presentation focused on two main issues: the potential impact on competition and MTN's responses to arguments from Vodacom and others that spectrum-sharing arrangements between Cell C and other MNOs have relevance to the RFS Licences Transfer Application.

### 6.23.5. **Key points raised by MTN:**

- 6.23.5.1.      Competition Concerns: MTN emphasised that it did not oppose the Proposed Transaction outright but was concerned about potential market foreclosure. MTN further indicated that the Competition Tribunal was best suited to address these issues.
- 6.23.5.2.      Spectrum Sharing: MTN defended the legality of the spectrum-sharing arrangement with Cell C, stating that it had been

approved by the Authority. However, it argued that this issue should not be revisited in the Applications proceedings, as it was already the subject of separate legal proceedings.

6.23.6. The Authority considered Vodacom's submissions regarding Cell C's alleged relinquishment of control over the spectrum in question. The Authority is not persuaded by Vodacom's submissions in this regard.

6.23.7. The spectrum sharing arrangement was approved by the Authority pursuant to the exercise of its powers in terms of its empowering legislation against the backdrop of the information submitted to it. What is more, the dispute regarding spectrum sharing is the subject of litigation between the Authority and Vodacom.

## **7. REGULATORY GROUNDS TO REFUSE THE TRANSFER APPLICATION**

7.1. In terms of Regulation 12 of the Licensing Regulations, the Authority may refuse to transfer a Service Licence if the licensee has not complied with one or more of the following:

- (a) *Where the Licensee has been found guilty of a contravention by the CCC of the Authority and has not complied with the order by the Authority in terms of section 17 of ICASA Act; or*
- (b) *Where a Licensee is in arrears with respect to any fees; or*
- (c) *where the ownership and control of the Transferee (in a transfer application) or an Applicant in (in a renewal application) does not comply with the HDG Equity requirement as prescribed in the Regulations in respect of the Limitations of Control and Equity Ownership by Historically Disadvantaged Groups (HDGs) and the application of the ICT sector code, 2021."*

7.2. Upon consideration of its records and enquiries with the CCC, the Authority confirmed that Cell C has not been found guilty of a contravention by the CCC nor

has it failed to comply with an order issued by the Authority in terms of section 17 of the ICASA Act.

- 7.3. The Authority also noted that Cell C is compliant with regard to its payments of the annual licence fees and Universal Service and Access Fund (USAF) contributions.
- 7.4. In relation to HDGs ownership, whilst there is a slight decrease in black ownership pursuant to the Proposed Transaction, Cell C remains compliant with the statutory minimum threshold of 30% HDGs ownership.
- 7.5. Having dealt with the applicable provisions of the Licensing Regulations, the Authority turns now to addressing the pertinent provisions of the Radio Frequency Spectrum Regulations.
- 7.6. In this regard, Regulation 15(8) of the Radio Frequency Spectrum Regulations states that the Authority will not approve the assignment, ceding or transfer of control of an RFS Licence in circumstances where:
  - 7.6.1. a licensee has been found, by the CCC, to have contravened the provisions of the ECA, the ICASA Act, the Radio Frequency Spectrum Regulations, the terms and conditions of a radio frequency spectrum licence or a licence granted in terms of Chapter 3 of the ECA, and has failed to comply with an order by the Authority in terms of section 17E (4) of the ICASA Act;
  - 7.6.2. If such transaction will not promote competition; or
  - 7.6.3. If such transfer will result in the reduction of equity ownership held by HDP [sic] to be less than 30%.
- 7.7. As with the Service Licences, Cell C has not been found guilty of a contravention by the CCC and failed to comply with an order issued by the Authority in terms of section 17 of the ICASA Act.



- 7.8. Furthermore, the Authority is of the view, having analysed the competition report and analysed the relevant information provided to the Authority by the Applicant, that the Proposed Transaction will not substantially reduce or prevent competition nor will the transfer result in HDG ownership in Cell C being reduced to below 30%.

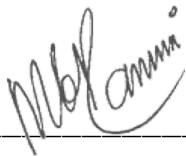
## **8. THE AUTHORITY'S DECISION**

- 8.1. In the circumstances, having considered the information contained in the Applications, representations by stakeholders and Cell C's responses thereto, supplementary information provided by Cell C and TPC and stakeholders, the public hearing, and the Authority's own analysis, the Authority took a decision to approve the Applications (i.e. the transfer of control to TPC of the Service Licences (i.e. I-ECS and I-ECNS) and the RFS Licences) without conditions on 29 November 2024. This decision was communicated to Cell C on 4 December 2024.

- 8.2. The Authority's decision was based on, *inter alia*, the following reasons:

- 8.2.1. The Applicant has met all relevant requirements and is compliant with Regulation 12 of the Licensing Regulations in relation to the Service Licences;
- 8.2.2. The Applicant has met all relevant requirements and is compliant with Regulation 15 of the Radio Frequency Spectrum Regulations in relation to the RFS Licences;
- 8.2.3. The Applicant has complied with all orders issued by the Authority in terms of section 17 of the ICASA Act;
- 8.2.4. The Applicant has paid the licence fees due and payable at the date of the Applications;

- 8.2.5. Post the Proposed Transaction the equity ownership held by persons from HDGs in Cell C will be 34.41% which exceeds the 30% minimum threshold.
- 8.2.6. The Authority is of the view that the Proposed Transaction is unlikely to have a negative impact on competition in the relevant markets.
- 8.2.7. The approval of the Proposed Transaction would be in the best interests of consumers and promote competition in the ICT sector.



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**Mothibi G. Ramusi**  
**ICASA Chairperson**  
**Date: 17/04/2025**