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APPLICATIONS BY DARK FIBRE AFRICA (PTY) LTD ("DFA") FOR THE TRANSFER OF ITS INDIVIDUAL ELECTRONIC COMMUNICATIONS SERVICE ("I-ECS") AND INDIVIDUAL ELECTRONIC COMMUNICATIONS NETWORK SERVICE ("I-ECNS") LICENCES (COLLECTIVELY "THE SERVICE LICENCES") TO MAZIV (PTY) LTD ("NEWCO"); THE TRANSFER OF CONTROL OF THE SERVICE LICENCES TO VODACOM (PTY) LTD ("VODACOM"); THE SURRENDER OF A RADIO FREQUENCY SPECTRUM LICENCE AND THE APPLICATION BY SOUTH AFRICAN DIGITAL VILLAGES (PTY) LTD ("SADV") FOR THE SURRENDER OF ITS I-ECS AND I-ECNS LICENCES

REASONS FOR DECISION

NOVEMBER 2025

Table of Contents

GLOSSARY	3
1. INTRODUCTION.....	4
2. THE PROPOSED TRANSACTION	6
3. APPLICABLE LEGISLATIVE FRAMEWORK.....	8
4. CONSIDERATION OF THE APPLICATIONS.....	21
5. SUMMARY OF WRITTEN REPRESENTATIONS.....	23
6. ANALYSIS AND FINDINGS	45
Impact/ Benefits of the Transaction.....	48
Compliance and Status of Licences	51
7. OWNERSHIP BY HISTORICALLY DISADVANTAGED PERSONS AND BROAD-BASED BLACK ECONOMIC EMPOWERMENT (B-BBEE)	52
Analysis of the Parties with Respect to equity ownership by HDPs	55
8. COMPETITION	57
Promotion of consumer interests.....	59
Promote competition within the ICT sector	60
Investment.....	60
Relevant Markets	61
Competition Assessment.....	64
Horizontal Assessment.....	64
NEWCO Vertical Assessment.....	66
9. RADIO FREQUENCY SPECTRUM AND TECHNICAL ANALYSIS.....	72
Surrender of RFS Licence	72
10. SADV SURRENDER APPLICATION	73
11. REGULATORY REASONS FOR REFUSAL- TRANSFER APPLICATIONS.....	73
12. AUTHORITY'S DECISION	74

GLOSSARY

B-BBEE	Broad-based Black Economic Empowerment
CCC	Complaints and Compliance Committee
CIVH	Community Investments Ventures Holdings (Pty) Ltd
Competition Authorities	Collectively refers to the Competition Commission, Competition Tribunal and the Competition Appeal Court
DFA	Dark Fibre Africa (Pty) Ltd
ECA	Electronic Communications Act, 36 of 2005
FNO	Fibre Network Operator or Fixed Network Operator (as the context may indicate)
FTTB	Fibre to the Business
FTTH	Fibre to the Home
FWA	Fixed Wireless Access
HDP	Historically Disadvantaged Persons
I-ECS	Individual Electronic Communications Services
I-ECNS	Individual Electronic Communications Network Services
ICASA Act	Independent Communications Authority of South Africa, Act 13 of 2000
ICT	Information and Communication Technology
ISP	Internet Service Providers
ISPA	Internet Service Providers' Association
MNO	Mobile Network Operator
NEWCO	Business Venture Investments No. 2213 (Pty) Ltd (now Maziv Proprietary Limited)
OECD	The Organisation for Economic Co-operation and Development
RFS	Radio Frequency Spectrum
SADV	South African Digital Villages (Pty) Ltd
Vodacom	Vodacom (Pty) Ltd
Vumatel	Vumatel (Pty) Ltd

1. INTRODUCTION

- 1.1. Dark Fibre Africa (Pty) Ltd ("**DFA**") is a wholesale provider of open-access fibre infrastructure and connectivity across South Africa, between Internet service providers, operators, and their customers.
- 1.2. On 15 December 2021, DFA submitted the following applications:
 - 1.2.1. "a transfer application for the transfer of the Service Licences of DFA to Business Venture Investments No. 2213 (Pty) Ltd" (now Maziv Proprietary Limited) ("**NEWCO**¹");
 - 1.2.2. "a control application for the transfer of control of the Services Licences of DFA, to be held by NEWCO, to Vodacom (Pty) Ltd" ("**Vodacom**"); and
 - 1.2.3. "a control application for the transfer of control of the Radio Frequency Spectrum licence ("**RFS Licence**") of DFA to Vodacom".
- 1.3. Pursuant to engagements with the Authority, DFA submitted a consolidated application on 6 April 2022 ("**the Consolidated Transfer Application**"), which consolidated application comprised the following:
 - 1.3.1. an application in terms of section 13 of the Electronic Communications Act, 36 of 2005, as amended ("**ECA**") read with Regulation 11 of the Licensing Processes and Procedures Regulations for Individual Licences, 2010, as amended² ("**Licensing Regulations**") for the transfer of ownership of the Service Licences held by DFA to NEWCO ("**Licence Ownership Transfer**"); and

¹ NEWCO's name has, since the applications were filed with and approved by the Authority, been changed to "Maziv Proprietary Limited ("Maziv").

² GNR. 522 of 14 June 2010: Licensing Processes and Procedures Regulations, 2010 (*Government Gazette* No. 33293)

- 1.3.2. an application in terms of section 13 of the ECA read with Regulation 11 of the Licensing Regulations for the transfer of control of the Service Licences of DFA to Vodacom pursuant to the acquisition of an indirect controlling interest in NEWCO by Vodacom ("**Licence Control Transfer**");
- 1.4. Simultaneously with the Consolidated Transfer Application, DFA re-submitted its application for the transfer of control of its Radio Frequency Spectrum Licence to Vodacom in terms of section 31(2A) of the ECA ("**RFS Control Application**"). The RFS Control Application was subsequently withdrawn by DFA on 27 June 2022.
- 1.5. On 28 March 2022, DFA submitted to the Authority an application in terms of Regulation 13 of the Radio Frequency Spectrum Regulations³, 2015 as amended for the surrender of the Radio Frequency Spectrum ("**RFS**") licence held by DFA ("**RFS Surrender Application**").
- 1.6. In addition to the above, on 27 July 2022 SADV submitted a notice of surrender in terms of section 12 of the ECA read with regulation 13 of the Licensing Regulations in terms of which it notified the Authority of its intention to surrender its Service Licences ("**the SADV Surrender Application**").
- 1.7. Following a public hearing held on 12 July 2022, consideration of written representations submitted by the Internet Service Providers' Association ("**ISPA**") as well as the Authority's assessment of the applications, the Authority took a decision to approve the Licence Ownership Transfer application, and the Licence Control Transfer application subject to conditions relating to, *inter alia*, open access and board control of NEWCO on 21 October 2022.
- 1.8. The Authority's decision to approve the Proposed Transaction was implemented as follows:-

- 1.8.1. at the request of NEWCO and DFA, the Authority issued new / amended I-ECS and I-ECNS licences to NEWCO on the basis of the approval of the Licence Ownership Transfer on 11 April 2024 ("**the First Licences Issue Date**"); and
- 1.8.2. following completion of the negotiations of the I-ECNS licence conditions referred to in paragraph 1.7, the Authority issued new / amended I-ECS and I-ECNS licences to NEWCO on the basis of the approval of the Licence Control Transfer on 20 November 2025 ("**the Second Licences Issue Date**").
- 1.9. This reasons document sets out the Authority's reasons for its decision to approve the aforementioned applications.

2. THE PROPOSED TRANSACTION

- 2.1. The proposed transaction which gave rise to the various applications lodged with the Authority on 6 April 2022, 28 March 2022 and 27 July 2022 comprised two separate but interrelated transactions, namely, the transaction underlying the Licence Ownership Transfer and the transaction pertaining to the Licence Control Transfer (collectively "**Proposed Transaction**").
- 2.2. The Licence Ownership Transfer transaction involved an internal restructuring of the group of companies of Community Investments Ventures Holdings (Pty) Ltd ("**CIVH**") involving, *inter alia*:
 - 2.2.1. the incorporation of a new entity, namely, NEWCO, wholly owned by CIVH;
 - 2.2.2. the transfer by CIVH to NEWCO of all CIVH's shares in two of its wholly owned subsidiaries, namely:

2.2.2.1. DFA, which transfer results in an indirect transfer of shares that DFA holds in its wholly owned subsidiary, SADV; and

2.2.2.2. Vumatel (Pty) Ltd ("**Vumatel**").

2.3. The Licence Control Transfer transaction involves the acquisition by Vodacom of 30% (thirty percent) shareholding in NEWCO by way of a subscription for shares in NEWCO, which has the effect of diluting CIVH's shareholding. In terms of the information contained in the Consolidated Transfer Application, Vodacom has an option to increase its shareholding in NEWCO to a maximum of 40% (forty percent).

2.4. Following the implementation of the Licence Control Transfer, the issued share capital of NEWCO will be held as follows:-

2.4.1. CIVH: 70%; and

2.4.2. Vodacom: 30%.

2.5. As fully set out in paragraph 3.21 below, the Proposed Transaction entailed the transfer of ownership and/or control of various individual licences held by certain subsidiaries of CIVH in respect of which the approval of the Authority is required, as follows:

2.5.1. the transfer of ownership of the Service Licences held by DFA to NEWCO, (the aforesaid Licence Ownership Transfer);

2.5.2. the transfer of control of the Service Licences held by DFA to Vodacom pursuant to the acquisition by Vodacom of an indirect controlling interest in NEWCO (the aforesaid Licence Control Transfer);

2.5.3. subject to what is set out in paragraph 2.6 below, the transfer of control of the RFS Licence held by DFA to Vodacom

pursuant to the acquisition by Vodacom of an indirect control interest in NEWCO; and

2.5.4. subject to what is set out in paragraph 2.7, the transfer of control of the Service Licences of SADV to Vodacom pursuant to the acquisition by Vodacom of an indirect controlling interest in NEWCO.

2.6. In relation to the transfer of control of the DFA's RFS Licence, DFA submitted an application for the surrender of its RFS Licence on 28 March 2022 ("**RFS Surrender Application**"). This application was followed by the submission of a withdrawal of the RFS Control Application on 27 June 2022 ("**Withdrawal Notice**"). On this basis, the Authority did not consider the RFS Control Application (as it had been withdrawn and, by virtue of the aforesaid withdrawal, there was no longer an application before the Authority) and instead confined its assessment to the RFS Surrender Application submitted by DFA.

2.7. In relation to the transfer of control of SADV's Service Licences to Vodacom, on 27 July 2022, SADV submitted the SADV Surrender Application in respect of its Service Licences. In light of the fact that the Authority decided to approve the SADV Surrender Application, the Authority was no longer required to consider and approve the said transfer of control of the SADV Service Licences as the surrender thereof would have already become effective by the time the Proposed Transaction becomes effective.

3. APPLICABLE LEGISLATIVE FRAMEWORK

3.1. The Authority is a juristic person established in terms of section 3(1) of the ICASA Act.

3.2. The Authority's primary objects and functions are set out in terms of section 2 read with section 4 of the ICASA Act and include *inter alia* to:

- 3.2.1. regulate electronic communications in the public interest⁴;
 - 3.2.2. monitor the broadcasting, postal and electronic communications sectors to ensure compliance with the ICASA Act and underlying statutes⁵;
 - 3.2.3. control, plan, administer and manage the use and licensing of the radio frequency spectrum in accordance with bilateral agreements or international treaties entered into by the Republic⁶;
 - 3.2.4. grant, renew, amend, transfer and revoke licences in accordance with the provisions of the ICASA Act and the underlying statutes⁷; and
 - 3.2.5. achieve the objects contemplated in the underlying statutes as defined in section 1 of the ICASA Act⁸.
- 3.3. The “*underlying statutes*”, as defined, includes 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.
- 3.4. As an organ of state, the Authority is constrained by the principle of legality which enjoins organs of state to act within the confines imposed by their empowering statutes and other applicable legislation.
- 3.5. The principle of legality states that a public body or authority may not exercise a power not vested upon it by statute or other law. This means that a public authority or body may exercise only those powers properly

⁴ Section 4 of the ICASA Act read with 2(a) of the ECA.

⁵ Section 4(3)(b) of the ICASA Act.

⁶ Section 4(3)(c) of the ICASA Act.

⁷ Section 4(3)(e) of the ICASA Act

⁸ Section 2(c) of the ICASA Act.

conferred on it by the express or necessary implied provisions of an enabling statute⁹.

- 3.6. The principle of legality is a fundamental principle of the rule of law¹⁰ and is 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 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.
- 3.7. It should be noted that the lodgement by DFA of the Withdrawal Notice on 27 June 2022 in effect meant that there was no longer an RFS Control Application to be considered by the Authority. The withdrawal of the RFS Control Application is a unilateral legal act and nothing in the Authority's empowering legislation stipulates or provides that such withdrawal requires the approval of the Authority nor does the empowering legislation enjoin the Authority to consider the RFS Control Application despite the withdrawal thereof by DFA.
- 3.8. The Authority considered the Consolidated Transfer Application, RFS Surrender Application and SADV Surrender Application (collectively "**the Applications**") in terms of the relevant provisions of the ICASA Act and ECA, including those set out below.
- 3.9. Section 13 of the ECA governs the transfer of individual licences or change of ownership and states, among others, as follows:

"(1) *An individual licence may not be let, sublet, assigned, ceded or in any way transferred, and the control of an individual licence*

⁹ *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

¹⁰ *Fedsure* *Ibid* at para 56.

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”.*

3.10. 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.

3.11. 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 notice¹¹;*
- (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."*

3.12. 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 –

¹¹ Government Gazette No. 47282 of 10 October 2022

- (a) *in the format as set out in Form G;*
 - (b) *accompanied by the applicable fee; and*
 - (c) *submitted by the prospective transferor.*
- (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 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 hearing.*
- (3) *The Authority will not consider an application if the licensee is in arrears with respect to any fees prescribed by the Authority or legislated in terms of the Act.*
- (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 HDP's."*

3.13. Further to the above, section 12 of the ECA governs the surrender of individual licences. In this regard, section 12 provides that *"a licensee may, at any time, by written notice surrender an individual licence in accordance with the requirements set out in the individual licence or in the manner prescribed by the Authority"*.

3.14. Regulation 13 of the Licensing Regulations sets out the applicable procedure for surrender as prescribed by the Authority and states as follows:

- "(1) A licensee may surrender its Licence by submitting a notice;*
- (2) The notice referred to in regulation 13 (1) must be submitted on no less than ninety (90) days prior to the date determined by the licensee on which the surrender of its Licence will take effect and on which it will cease to provide the services in respect of which the Licence was granted.*
- (3) A licensee that intends to surrender its Licence must take appropriate steps to inform end-users of the cessation of the licenced services.*
- (4) Upon receipt of a notice referred to in regulation 13 (1), the Authority may stipulate the steps to be taken by the licensee to comply with its obligations in terms of regulation 13 (3).*
- (5) A licensee whose Licence is to be surrendered must pay to the Authority any outstanding fees and contributions which may be due and payable by the date on which the surrender of the Licence is to take effect.*
- (6) All amounts payable in terms of regulation 13 (5) must be paid to the Authority within one month of the date on which the services provided in terms of the Licence are discontinued,*

except where the Authority, upon the request by the licensee, extends the time period in this regard.”

- 3.15. Section 31(2A) of the ECA provides 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.”*
- 3.16. 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 a radio frequency spectrum licence¹² or [obtaining] permission to assign, cede, share or in any way transfer or transfer control of a radio frequency spectrum licence as contemplated in terms of section 31(2A)¹³.
- 3.17. 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, which provides 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.*

¹² Section 31(3)(b) of the ECA.

¹³ Section 31(3)(c) of the ECA.

- (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 extended application procedure in terms of Annexure E, must provide information as set out Annexure E.*
- (4) *The Authority will take 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”.*

3.18. Regulation 15(7) further 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.

3.19. 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%."

3.20. The ECA is silent on the surrender of radio frequency spectrum licences. The Radio Frequency Spectrum Regulations¹⁴ contain provisions which deal with this aspect. Such provisions are set out in Regulation 13. Regulation 13 provides that:

"(1) A licensee seeking to surrender his licence must, in writing, submit the following to the Authority:

(a) A completed application form;

¹⁴ The Radio Frequency Spectrum Regulations 2015, published in General Notice. 279, Government Gazette No. 38641 on 30 March 2015

- (b) *The original of the radio frequency spectrum licence and information on any other conditions imposed on the licence;*
 - (c) *A migration plan for any consumer that may be affected and an analysis of the impact on consumers as well as a communications plan to consumers;*
 - (d) *An inventory of radio apparatus and an e-waste management plan; and*
 - (e) *The proposed date from which the radio frequency spectrum licence shall become void, which will in any case not be any earlier than thirty (30) days from the receipt of the application for surrender.*
- (2) *After receipt of the application for Notice of Surrender, the Authority may:*
 - (a) *request further information from the applicant;*
 - (b) *conduct a public consultation process; or*
 - (c) *impose conditions on the licensee with respect to provisions for end users before the Notice of Surrender can be approved by the Authority.*
- (3) *If a licensee has a service licence, the surrender of the radio frequency spectrum licence does not absolve the licensee from any obligations he or she may have under the service licence.*
- (4) *subject to regulation 10 (7) of these regulations, a licensee seeking to surrender his radio frequency spectrum licence must inform his or her end-users, if any, within its geographic*

coverage of its decision no later than two (2) months before the expiry of its radio frequency spectrum licence”.

3.21. The import of the above legislative framework is that DFA was required to obtain various regulatory approvals from the Authority as a result of the lodgement of the Consolidated Transfer Application and surrender applications (i.e., the SADV Surrender Application and RFS Surrender Application). In terms of the legislative framework, the Authority was required to approve:

3.21.1. the application in terms of sections 13(1) and 13(2) of the ECA read with Regulation 11 of the Licensing Regulations¹⁵ for the transfer of ownership of the Service Licences held by DFA to NEWCO (the aforementioned Licence Ownership Transfer);

3.21.2. the application in terms of sections 13(1) and 13(2) of the ECA read with Regulation 11 of the Licensing Regulations¹⁶ for the transfer of control of the Service Licences held by DFA to Vodacom pursuant to the acquisition by Vodacom of an indirect control interest in NEWCO (the aforementioned Licence Control Transfer);

3.21.3. the application in terms of Regulation 13 of the Radio Frequency Spectrum Regulations¹⁷ for the surrender of the RFS Licence held by DFA (the aforementioned ‘RFS Surrender Application’); and

3.21.4. the application in terms of section 12 of the ECA read with Regulation 13 of the Licensing Regulations for the surrender

¹⁵ GNR. 522 of 14 June 2010: Licensing Processes and Procedures Regulations, 2010 (*Government Gazette* No. 33293).

¹⁶ GNR. 522 of 14 June 2010: Licensing Processes and Procedures Regulations, 2010 (*Government Gazette* No. 33293).

¹⁷ GN 279 of 30 March 2015: Notice regarding the Radio Frequency Spectrum Regulations (*Government Gazette* No. 38641).

of SADV's Service Licences (the aforementioned SADV Surrender Application)

4. CONSIDERATION OF THE APPLICATIONS

- 4.1. The Consolidated Transfer Application was accompanied by a request that certain information contained therein be treated as confidential information in terms of the provisions of section 4D of the Independent Communications Authority of South Africa Act, No 13 of 2000 ("**ICASA Act**").
- 4.2. The Applicant's abovementioned confidentiality claim was considered and approved by the Authority on 12 May 2022.
- 4.3. On 20 May 2022, the Authority published notice of the Consolidated Transfer Application and RFS Control Application under General Notice 1041 of 2022 in *Government Gazette* 46391 ("**the Notice of DFA's Applications**").
- 4.4. On 28 March 2022, DFA submitted the RFS Surrender Application.
- 4.5. In terms of the Notice of DFA's Applications, the Authority called upon interested parties to make written representations to it regarding the Applications. Such representations were to be submitted to the Authority within a period of fourteen (14) working days from publication of the Applications i.e., 9 June 2022. The Applicant was in turn given seven (7) working days to respond to any written representations received pursuant to the publication of the Notice of DFA's Applications.
- 4.6. By the closing date of 9 June 2022, the Authority received written representations solely from ISPA.
- 4.7. On 21 June 2022, the Authority received DFA's responses to the aforementioned written representations. The responses were accompanied by an additional request for confidentiality in terms of

section 4D of the ICASA Act, which application was granted by the Authority

- 4.8. On 24 June 2022, the Authority notified all relevant stakeholders regarding its intention to conduct a public hearing on the Consolidated Transfer Application and RFS Control Application.
- 4.9. On 27 June 2022, DFA delivered a notice to the Authority, *inter alia*, withdrawing its RFS Control Application (the aforementioned Withdrawal Notice). As set out above, the withdrawal of the RFS Control Application is a unilateral legal act and nothing in the Authority's empowering legislation stipulates or provides that such withdrawal requires the approval of the Authority nor does the empowering legislation enjoin the Authority to consider the RFS Control Application despite the withdrawal thereof by DFA.
- 4.10. Following the Authority's notification regarding a public hearing, ISPA indicated that it did not intend to make oral representations at the hearing. DFA, on the other hand, requested that the hearing be postponed owing to the absence of several important members from its team. The Authority granted DFA's request and postponed the public hearing to 12 July 2022.
- 4.11. Notwithstanding ISPA's decision not to participate in the public hearings, the Authority determined that it was necessary to convene the hearing to clarify any issues pertaining to the Consolidated Transfer Application, the RFS Surrender Application, and/or Withdrawal Notice, including matters traversed in DFA's written submissions and responses to ISPA's written representations.
- 4.12. On 23 June 2022, the Authority, acting in terms of section 4(4) (a) read with section 17 of the ICASA Act, established a special committee ("**the Committee**") to, *inter alia*, consider the Applications, conduct public hearings, and make recommendations to Council regarding the Applications.

- 4.13. On 12 July 2022, the Authority held a public hearing regarding the Consolidated Transfer Application, at which hearing the Authority also dealt with the DFA's RFS Surrender Application.
- 4.14. Subsequent to the public hearing, SADV submitted the SADV Surrender Application in respect of its Service Licences on 27 July 2022.
- 4.15. In light of the interrelated nature of the abovementioned Applications (i.e., by virtue of the fact that they relate to and are necessary for the finalisation of the Proposed Transaction), the Authority took a decision to consider and determine the Applications together.

5. SUMMARY OF WRITTEN REPRESENTATIONS

- 5.1. As indicated in paragraph 4.5 above, the Authority received written representations from ISPA on 9 June 2022 regarding the applications lodged by DFA in response to the notice published by the Authority on 20 May 2022.
- 5.2. In the main, ISPA's written representations, which are discussed in more detail below, traversed the Consolidated Transfer Application and the impact thereof on competition in the relevant market(s).
- 5.3. **Written Representations by ISPA**

In its written representations, ISPA submitted, *inter alia*, that:

- 5.3.1. In relation to the section 31(2A) application lodged by DFA (the aforementioned 'RFS Control Application':
 - 5.3.1.1. it is a requirement of an application for transfer of control over a licence that the holder of the licence does not change, i.e., DFA remains the licensee;

- 5.3.1.2. following the proposed acquisition, DFA will go from being held 100% by CIVH to 100% by NEWCO (with CIVH and Vodacom as shareholders). Consequently, DFA's licence would need to be updated to reflect the new ownership structure;
 - 5.3.1.3. according to the application, control of the DFA RFS licence would be transferred to Vodacom. ISPA further asserts that in its understanding "...control over DFA will vest in both CIV-H and Vodacom" unless it is the case that the conditions of the Proposed Transaction give Vodacom full control over NEWCO; and
 - 5.3.1.4. in the circumstances, in ISPA's view, the application should have been for either the transfer of ownership of the spectrum licence to NEWCO or the transfer of control of the spectrum licence to NEWCO;
- 5.3.2. In relation to competition concerns arising from the Proposed Transaction, ISPA made the following submissions –
- 5.3.2.1. the Proposed Transaction will alter the structure of the South African fibre market and constitute a material risk to the ability of ISPA members to compete in the retail market for delivery of internet access and related services;
 - 5.3.2.2. the Proposed Transaction contemplates a merger between dominant players in the fixed and mobile markets and, given the significant competition law issues arising from the Proposed Transaction, the

competition authorities should take action to prevent the proposed merger as the transaction's horizontal and vertical implications may have dire consequences for smaller ISPs who rely on Vumatel and DFA for fibre connectivity. These concerns stem from ISPA's understanding that Vumatel is the top Fibre Network Operator (FNO) player in the South African market, with 38.6% market share and subsequent to the transaction, Vumatel and Vodacom would jointly hold 43.6% demonstrating dominance in the upstream FNO market i.e., the wholesale market;

5.3.2.3. the proposed merger raises three significant areas of unilateral effects concerns:

5.3.2.3.1. **Retail fixed, fixed-wireless and mobile services:** Vodacom is the largest provider of retail mobile services in South Africa by a significant margin, and is acquiring two retail fixed and fixed-wireless service providers, being SADV and Herotel, through the Proposed Transaction. While these are differentiated services to some extent, fixed and mobile services already place a competitive constraint on one another, and it is likely that this competitive constraint will expand in the future.

5.3.2.3.2. **Wholesale metro, backhaul, long distance and international fixed-line and fixed-wireless**

infrastructure: There are horizontal overlaps between the merging parties' fibre infrastructures, including subsea cables, long distance and metro / backhaul, infrastructures. This will give the merging parties the ability to raise prices for these services.

5.3.2.3.3. **Wholesale FTTH / FTTB, fixed-wireless and wholesale mobile services:** Vodacom provides a range of wholesale mobile and fixed-wireless services, and CIVH / Vumatel / SADV provide a range of **FTTH / FTTB** services, while Herotel provides fixed-wireless services. Vodacom is largest provider of mobile services in South Africa and has been reluctant historically to provide wholesale access to its mobile network, and Vumatel is the largest provider of Fibre to the Home services in South Africa.

5.3.2.4. there is very little competition in the industry generally. The Proposed Transaction's increase in concentration in each of these markets will almost certainly result in a significant reduction or elimination of competition;

5.3.2.5. in addition to the unilateral effects highlighted above, the proposed merger could lead to coordinated effects in the market. In this regard, the merger will also increase the likelihood of competitor coordination (may increase the

likelihood of tacit coordination or explicit cartel behaviour). The increase in concentration upstream in respect of long distance, metro and access fibre services as well as mobile broadband services may make it easier to reach a collusive agreement or understanding, monitor it and enforce it. In its analysis of the potential coordinated effects that could arise from the Proposed Transaction, ISPA further analysed the following factors:

5.3.2.5.1. Likelihood of market failure;

5.3.2.5.2. Market structure conducive to coordination;

5.3.2.5.3. Focal point for collusion; and

5.3.2.5.4. Likelihood of disruption / barriers to entry.

5.3.2.6. Vertical theory of harm: input foreclosure -

5.3.2.6.1. Vertical foreclosure concerns arise frequently within the telecommunications sector, given the substantial economies of scale and network effects in the sector. A common vertical theory of harm involves refusal to supply an input to a downstream competitor or to lessen the conditions under which the input is provided, such as through higher prices or lower service levels. This ultimately impacts the input of network infrastructure in

this sector which is crucial to enabling firms to provide their services to their customers;

5.3.2.6.2. In particular, the Proposed Transaction involves Vodacom, the largest retail mobile broadband service provider to consumers and businesses in South Africa, SA Digital Villages (SADV), a large vertically integrated fibre network operator and internet service provider, and Herotel, a largely rural / small town wireless ISP, among others. The Proposed Transaction may increase Vodacom, Herotel and SADV's **ability and incentive** to leverage CIVH's metro and access fibre assets (including those owned by Vodacom, Vumatel and DFA) to exclude rivals at the retail level, including ISPs and fixed network operators (FNOs).

5.3.2.6.3. In addition to the above, ISPA sought to highlight the following vertical foreclosure concerns:

5.3.2.6.3.1. Foreclosure of access to ducts / infrastructure within buildings or precincts: DFA, for example, would – following the Proposed Transaction – have a greater ability and incentive to refuse or constructively refuse

access to ducts or
infrastructure within
buildings or precincts;

5.3.2.6.3.2. Foreclosure of access to
last mile fibre
infrastructure: Vodacom,
Vumatel, DFA and SADV
last-mile fibre
infrastructure might be
foreclosed to rivals;

5.3.2.6.3.3. Foreclosure of access to
last-mile mobile
infrastructure: following
the Proposed Transaction,
Vodacom will have an even
greater incentive to refuse
access to its mobile
infrastructure, via APNs or
otherwise;

5.3.2.6.3.4. Foreclosure of access to
metro and backhaul fibre:
CIVH / DFA – following the
Proposed Transaction –
would have a greater
ability and incentive to
foreclose access to metro
and backhaul fibre;

5.3.2.6.3.5. Foreclosure of long
distance or subsea cable
access: Seacom has a

greater ability and incentive to refuse or constructively refuse (by charging high prices or offering poor service, for example) access to its infrastructure;

5.3.2.6.3.6. Foreclosure of construction services to FNOs: following the Proposed Transaction, the merging parties would have a greater ability and incentive to foreclose access to Britelink MCT and DFA construction services; and

5.3.2.6.3.7. Foreclosure of OSS / BSS services: The merging parties would, following the Proposed Transaction, have a greater ability and incentive post-merger to foreclose access to AEX's OSS / BSS services.

5.3.3. In relation to public interest issues, ISPA submitted that the Proposed Transaction may also have an impact on employment, or on firms that are SMEs or are owned by historically disadvantaged persons (HDPs), or on an industry or region, or on the spread of ownership of the ICT sector; and

5.3.4. With regard to barriers to entry, ISPA further provided an overview of barriers to entry in the sector, including for mobile services, which it contended were equally relevant for the assessment of the Proposed Transaction. The barriers referred to by ISPA are set out below:

5.3.4.1. Access to radio frequency spectrum: the main barrier to entry for mobile and fixed-wireless service providers is access to radio frequency spectrum used to serve customers. Without radio frequency spectrum, a mobile or fixed-wireless service is not possible.

5.3.4.2. Network infrastructure: A further barrier to entry is economies of scale relating to the construction of network infrastructure. In respect of mobile networks in a country the size of South Africa, thousands of high sites (towers, rooftops, etc.) are needed in order to compete effectively, and very large usage volumes (voice calls, data, etc.) would need to be sold to repay the investment cost. This means that there are likely only a small number of national mobile network service providers capable of providing wholesale access to their network. This means that markets for mobile network services are highly concentrated in many countries.

5.3.4.3. Marketing, access to distribution networks: There may be a range of additional entry barriers, including access to distribution networks (means by which consumers can buy airtime, for example) and marketing costs. The latter costs are sunk in nature, which means they cannot be recovered in

the event that the firm exits the market, which in turn makes entry riskier (and less likely).

5.3.4.4. Network effects: Network effects occur where the value to one user of a good or service depends on the number of other users of a product or service. In economic terms there is a positive external benefit (externality) from an additional person joining a network, as the network thereby becomes more valuable to all of its members. It is widely accepted that network effects can produce competition problems largely because they can enhance the market power of one or more firms. In markets for mobile telecommunications services, this means that operators can build and maintain positions of market power in respect of offering voice services, unless there are rules requiring that operators interconnect with one another and set charges for doing so (mobile termination rates) at reasonable, cost-based levels. In South Africa, retail on-net prices offered by mobile operators are often well-below termination rates, which indicates that termination rates are not yet at cost-based levels.

5.4. **DFA's response to the written representations by ISPA**

5.4.1. DFA responded to ISPA's representations relating to, among others, the status of RFS Control Application, competition issues and public interest issues as set out below.

5.4.2. In relation to ISPA's contentions regarding the status of the RFS Control Application –

5.4.2.1. it is correct that DFA will continue to hold its 26GHz radio frequency spectrum licence subsequent to the transaction. It is equally correct that, following the internal restructure which forms part of the transaction, DFA (currently wholly owned by CIVH) will be wholly owned by NEWCO, which is currently wholly owned by CIVH. Following the implementation of the transaction, CIVH will continue to control DFA on an indirect basis through NEWCO;

5.4.2.2. as DFA's current sole shareholder, CIVH already controls DFA. As such, there is no requirement to get approval from the Authority for CIVH to acquire a control interest in DFA. Pursuant to the transaction involving Vodacom, CIVH will retain a majority interest in and control over NEWCO and DFA, but Vodacom will acquire a direct minority shareholding interest in NEWCO, with certain negative control rights over in DFA, amongst others. This acquisition by Vodacom is characterised under the ECA as a transfer of control because Vodacom will have acquired some control, even

though CIVH will retain majority control;

5.4.2.3. the transfer of control (including partial control) of an RFS licence requires the Authority's prior approval. Accordingly, DFA has applied for the transfer of control of its RFS licence to Vodacom;

5.4.3. on competition issues, DFA stated that ISPA's concerns are misplaced and addressed each concern under the headings set out below:

5.4.3.1. on ISPA's concern that, *fixed and mobile services may become closer substitutes with the advent of 5G with the potential for a loss of competition from a merger between major players in the fixed and mobile markets;*

5.4.3.1.1. there are substantial technical differences between FTTH and mobile services including in terms of the much greater capacity of FTTH networks with consequent benefits to realised speeds and reliability while mobile networks offer customers the benefit of mobility (i.e., customers' ability to use the service anywhere within the operator's coverage area);

5.4.3.1.2. South Africa is recovering from a spectrum deficit that is more than a decade old. With large 2G and 3G customer bases and limited 5G device

take-up over forthcoming years, the spectrum assigned by ICASA this year will largely be used to address the historical 4G spectrum deficit with a measured 5G deployment scaled according to demand premised on device affordability. Further, available mobile network capacity will always be a contended service shared by many customers versus fixed which is a dedicated offering and can provide much more capacity and faster speeds; and

5.4.3.1.3. in countries which have had more spectrum assigned for longer and where 5G take-up is much more advanced than South Africa, market evidence of limited and declining shares of mobile-only households (which do not also have fixed access subscriptions) and the views of regulators confirm that 5G and FTTH do not provide a sufficient constraint on each other to warrant them being considered as part of a single market.

5.4.3.2. on ISPA's concern that *the transaction may give rise to unilateral effects in wholesale FTTH, retail fixed (including FWA) and mobile services:*

5.4.3.2.1. as regards wholesale FTTH services, virtually all of NEWCO's wholesale FTTH services are supplied in areas

where Vodacom's FTTH network is not present and hence the transaction would not materially change the competitive constraint on NEWCO's network. To the extent that there is competition in wholesale FTTH services, it is driven by overbuild by other FNOs (particularly Openserve) and by the host of fibre network providers deploying new FTTH. The transaction is likely to benefit ISPs and end-customers by supporting NEWCO in deploying fibre more widely and more quickly and savings in ongoing costs of FTTH provision which can be expected to be passed through into wholesale prices and support increased FTTH take-up;

- 5.4.3.2.2. at the retail level, the only horizontal overlap between the parties included in this transaction is in relation to the retail residential *fixed* internet access (i.e. the market for the retail supply FTTH, DSL and FWA). The transaction would not adversely impact retail competition because of the large number of other competing providers, low barriers to entry, the parties' small market shares and the fact that Vodacom's retail ISP business will remain separate from NEWCO. More ISPs gaining access to Vodacom's FTTH assets will be pro-competitive;

5.4.3.2.3. neither party offers wholesale FWA. As such, the transaction does not affect these services;

5.4.3.2.4. the transaction will not change ownership in the supply of mobile services. As such, wholesale mobile access is not relevant to the assessment of this transaction;

5.4.3.3. on ISPA's concern that *the transaction could foreclose access to wholesale FTTH services:*

5.4.3.3.1. there is no basis for a concern that the transaction would adversely impact access to wholesale FTTH. The transaction would not lead to any unilateral anti-competitive effects in relation to wholesale FTTH services. As such, the transaction would not create or increase any ability of NEWCO to foreclose. There is a clear commercial incentive for NEWCO to grow take-up of its network and CIVH would have no incentive to allow NEWCO to sacrifice profits by restricting wholesale FTTH access. ISPs will, in fact, benefit from being able to access NEWCO's expanding FTTH network while incurring only the cost of a single network-to-network interface;

5.4.3.4. on ISPA's concern that *the transaction raises coordinated effects concerns in wholesale FTTH, retail fixed and mobile services:*

5.4.3.4.1. in relation to wholesale FTTH services, there is no evidence of pre-existing coordination: multiple operators are making substantial investments in new FTTH infrastructure with significant changes in shares of homes passed; FTTH subscriptions are growingly rapidly; and pricing dynamics are not consistent with coordinated outcomes. Market features also explain why coordination on wholesale offers and deployment is unlikely to arise as a result of the transaction: there are a large number of competitors with significant differences between them (in terms of their sizes/network coverage, deployment strategies, connectivity rates, types of areas/premises covered, cost structures, financial positions and whether they are wholesale-only or vertically integrated) and post-transaction, there would remain four other major providers in addition to NEWCO as well as a host of smaller providers;

5.4.3.4.2. there is also no material risk of the transaction leading to coordinated effects in retail residential fixed internet access given the parties' small shares of the market and that the proposed transaction will not change the ownership of Vodacom's retail ISP business. The market is highly

fragmented; and the transaction will not materially change incentives or ability to coordinate;

5.4.3.4.3. given that NEWCO does not offer mobile services, there is no reason to consider that the transaction would create any incremental risk of coordination between South Africa's mobile operators;

5.4.3.5. on ISPA's concern that *the transaction may give rise to unilateral effects in wholesale metro, backhaul, long distance, international fixed-line and FTTB infrastructure:*

5.4.3.5.1. of these activities, the transaction is only combining the parties' wholesale metro and FTTB services. In the market for access to wholesale metropolitan fibre, Vodacom's fibre is small nationally, and in each region Vodacom has limited market shares. More important is the fact that the Vodacom metropolitan fibre that is transferred to NEWCO, will become available to the market on an open access basis. There are no structural changes in either the national long-haul or international markets, as these assets of Vodacom are not included in the transaction;

5.4.3.5.2. in the FTTB market, Vodacom has a very small market share, which means the market structure does not change substantially and NEWCO will not gain

pricing power. More importantly, Vodacom does not currently offer wholesale access to this infrastructure. Thus, there is technically no overlap in the market for wholesale FTTB services between the Parties. The only change is that NEWCO will have a slightly larger network post-transaction. This additional infrastructure will now become available to the market on an open access basis;

5.4.3.6. *on ISPA's concern that the transaction could foreclose access to wholesale long-distance, metro and FTTB services:*

5.4.3.6.1. NEWCO will have neither an ability nor incentive to engage in input foreclosure post transaction, in any of the relevant markets, i.e., long-haul fibre, mobile backhaul fibre supplied to mobile operators to connect base stations (i.e., FTTS) and metro backhaul fibre.

5.4.4. on public interest concerns raised by ISPA in its representations, DFA stated as follows:

5.4.4.1. the suggestion by ISPA that the Proposed *Transaction* may give rise to negative public interest effects is wholly unsubstantiated;

5.4.4.2. to the extent that the Authority takes the public interest considerations into account in the *performance* of its regulatory functions, DFA, CIVH and Vodacom do not agree that the Proposed

Transaction will have a negative impact on the public interest. There are no facts to support such a concern.

5.4.5. In relation to Employment, DFA stated that:

5.4.5.1. the Proposed Transaction will have no negative effects on employment, and no retrenchments will occur as a result of the Proposed Transaction. Vodacom's employees who are associated with the FTTH business, the FTTB operations and fibre access networks will remain employed by Vodacom and will be redeployed within the Vodacom group; and

5.4.5.2. the Proposed Transaction will have no negative effect on the employees of CIVH and its subsidiaries.

5.4.6. In relation to HDP ownership, DFA stated that:

5.4.6.1. the percentage ownership by Black people (who are HDPs) in NEWCO and DFA will, in fact, be almost exactly the same as DFA's current percentage HDP ownership following the implementation of the Proposed Transaction;

5.4.6.2. in this regard, based on CIVH's and Vodacom's current broad-based black economic empowerment (**B-BBEE**) certificates (including the most recent B-BBEE certificate issued to Vodacom on 27 May 2022, which was issued after the applications were submitted to the Authority) the total equity ownership (voting rights and economic interest) of Black people in NEWCO and

DFA following the proposed transaction will be 43.39% on the basis that:

5.4.6.2.1. 49.5% exercisable voting rights will be held by Black people; and

5.4.6.2.2. 43.39% economic interest will be held by Black people;

5.4.6.3. in particular, not only will the Proposed Transaction result in a net increase in the value of the shareholding of HDPs in NEWCO (as explained in the cover letter submitted with the applications), the broad-based nature of the HDP ownership of NEWCO will also be enhanced through the Proposed Transaction because of the HDP ownership in Vodacom through YeboYethu Limited, a listed B-BBEE company, which has a substantial broad base of public black shareholders, including Vodacom employees.

5.4.7. in relation to industry specific considerations, DFA stated as follows:

5.4.7.1. the Proposed Transaction cements the sustainability of the fibre sector as it provides significant capital to extend fibre networks on an open access wholesale basis across South Africa. This is a significant transaction combining investment capital with a long-term operator. The fibre infrastructure sector is a capital-intensive sector which is crucial to supporting growth of the South African economy and ensuring South Africa's global competitiveness;

5.4.8. in relation to objectives of the Authority, DFA stated as follows:

- 5.4.8.1. the Proposed Transaction will be beneficial to the ICT sector by assisting in the achievement of the Authority's regulatory objective of ensuring that all South Africans have access to a wide range of high-quality communication services at affordable prices;
- 5.4.9. specifically in relation to the Authority's strategic objectives, DFA stated as follows:
- 5.4.9.1. *the promotion of competition:* the Proposed Transaction will extend access to Vodacom's FTTH (more than 140 000 homes) and transmission assets (more than 5 000 km's) for other ISPs, by including them in CIVH's open access network;
- 5.4.9.2. *the promotion of the digital agenda:* the Proposed Transaction promotes the delivery of universal broadband access to consumers through expansion of Vumatel's (Vumatel) lower and middle LSM product offering (**VUMA Reach**); and
- 5.4.9.3. *improvement of the stakeholder and consumer experience:* the Proposed Transaction will contribute to social cohesion and nation-building through increasing NEWCO's corporate social responsibility and enterprise development partnerships as it expands its network, contributing to B-BBEE and social upliftment by closing the digital divide;
- 5.4.10. in relation to SMEs, the DFA stated as follows:

- 5.4.10.1. the new capital that will be available to NEWCO following the transaction will enable NEWCO to accelerate and expand its FTTH in all market segments, especially the lower and middle LSM product offerings. These products deliver high-speed and affordable access to a much broader segment of the population, including small and medium enterprises. In line with CIVH's purpose of positively and tangibly impacting the quality of people's lives in South Africa, CIVH's continued expansion into underserved areas and lower LSM homes will assist in narrowing the "digital divide" by providing previously underserved homes with internet connectivity;
- 5.4.10.2. Vumatel further uses and will continue to use small to medium enterprises to roll-out fibre;
- 5.4.10.3. insofar as the Proposed Transaction may impact on Vodacom's suppliers for build, Aggregation and Spurs and Entries, Vodacom has put measures in place to mitigate the effect on these suppliers, including the redeployment of some of these suppliers to other areas of Vodacom's network as well as other projects, and by facilitating engagements between these suppliers and the management of Vumatel as well as DFA to explore the prospects of them being considered for onboarding as suppliers; and
- 5.4.11. DFA and Vodacom reiterated the above submissions during the oral representations at the public hearing conducted on 12 July 2022.

6. ANALYSIS AND FINDINGS

6.1. In considering ISPA's representations and DFA's responses, the Authority is of the view that:

6.1.1. the horizontal overlaps in the relevant markets, i.e., wholesale long haul fibre, metro fibre, last mile fibre as well as the retail fixed internet access services markets may actually be beneficial to the entire market structure as a consolidated upstream infrastructure network can exploit enhanced economies of scale. Vodacom's fibre infrastructure that was not open access prior to the Proposed Transaction, as per DFA's commitment, will, post-transaction, be available on an open access basis, meaning that third party providers will have more ready access to these assets. Lower costs could then potentially filter to the downstream retail markets and result in lower cost of service provision by retailers to consumers; and

6.1.2. the vertical overlaps arising from the Proposed Transaction are unlikely to result in input and/or customer foreclosure given the parties' combined market shares, the presence of other competing firms as well as the commitment (written and verbal) by the parties to the merger to open access principles (as is currently the case with DFA and Vumatel). Further, to mitigate fears of input and/or customer foreclosure arising from Vodacom's "significant" minority stake in NEWCO, the Authority has determined that it will give effect to NEWCO's commitment regarding open access by translating those commitments into licence conditions in NEWCO's I-ECNS licence.

6.2. The detailed rationale for the Authority's findings in relation to the Applications is set out below.

- 6.3. The Authority evaluated the applications for the Licence Ownership Transfer and the Licence Control Transfer based on the following criteria, *inter alia*, as prescribed in terms of the ECA read with the Processes and Procedures Regulations:
- 6.3.1. promotion of competition in the ICT sector;
 - 6.3.2. interests of consumers; and
 - 6.3.3. equity ownership by HDPs.
- 6.4. As set out above, DFA's RFS Control Application was not evaluated because it was formally withdrawn on 27 June 2022. As a result, the Authority also did not consider ISPA's written representations relating to the RFS Control Application.
- 6.5. The Authority believes that the transfer of ownership and control of DFA's Service Licences is unlikely to negatively impact the market and would in fact result in NEWCO being an effective player in the market. The approval of the Proposed Transaction is therefore in the best interests of consumers, is likely to promote competition in the ICT sector and meets the threshold requirement for 30% equity ownership by HDPs.
- 6.6. DFA is a provider of wholesale, open access passive (dark) fibre infrastructure and managed network services connectivity in both metropolitan and long-haul telecommunications markets. Its primary activity is deploying metro fibre networks and providing wholesale access to this infrastructure to FNOs and Mobile Network Operators ('**MNOs**')¹⁸.

¹⁸ Appendix 8.6 of FORM G of DFA's Consolidated Transfer Application, pg 171

- 6.7. DFA holds I-ECS¹⁹ and I-ECNS²⁰ licences issued on 12 August 2009 (the Service Licences) as well as an RFS licence in the 26 GHz RF spectrum band issued on 2 July 2018 in terms of the ECA. The Service Licences form the subject of the Consolidated Transfer Application lodged by DFA on 6 April 2022.
- 6.8. Vumatel provides open access FTTH and limited FTTB services at the last mile level to ISPs and has a controlling interest in VumaCam (Pty) Ltd (VumaCam) which supplies CCTV solutions.
- 6.9. CIVH is an investment holding company of a group of companies with DFA and Vumatel being the major operating subsidiaries²¹.
- 6.10. Vodacom is a private company providing mobile and fixed services and holds licences duly issued to it by the Authority in terms of the ECA.
- 6.11. According to the Consolidated Transfer Application, Vodacom will have a 30% minority controlling shareholding in NEWCO (with the option to increase to 40%) once the Proposed Transaction is finalised²².

DFA's Rationale for the Transaction

- 6.12. In the Consolidated Transfer Application, DFA advanced the following reasons, amongst others, for the Proposed Transaction:
- 6.12.1. to promote investment in new fibre infrastructure in particular, the cash investment by Vodacom by virtue of its subscription for shares in NEWCO will enhance NEWCO's capacity to fund investment in new infrastructure and new deployment²³;

¹⁹ Individual Electronic Communications Service Licence 0400/IECS/AUG2009

²⁰ Individual Electronic Communications Network Service Licence 0400/IECNS/AUG/2009

²¹ <https://www.crunchbase.com/organization/community-investment-ventures-holdings>

²² Page 8 of the Non-Confidential Consolidated Transfer Application

²³ Page 318 of the Non-Confidential Consolidated Transfer Application

- 6.12.2. the Proposed Transaction will promote access to, and thus more efficient use of Vodacom's existing fibre assets²⁴;
- 6.12.3. the Proposed Transaction will stimulate investment in new fibre infrastructure by improving NEWCO's capacity to fund infrastructure investments²⁵. The disposal of Vodacom FTTH business and fibre assets will enable these assets to be incorporated into NEWCO and this, in the Applicant's view, will have a beneficial effect on the business operations of NEWCO by maximising return on these assets²⁶; and
- 6.12.4. network synergies are expected to arise from the Proposed Transaction in the form of cost savings. For instance, through increased economies of scale and scope from managing a larger network, costs will be spread over a wider base, which will lower costs for provision and lead to better prices downstream ²⁷.

Impact/ Benefits of the Transaction

Table 1: Impact/Benefits of the Transaction

Party	Impact
CIVH	<ul style="list-style-type: none"> • Widespread increase in direct and indirect socio-economic upliftment for the majority of South Africans. • Connect as many people as possible from all walks of life throughout the entire country. • Accelerate high impact positive change to its direct and indirect stakeholders. • Empowerment of HDPs (LSM, LLSM), Schools, Youth (skills development) and SMMEs.

²⁴ Page 352 of the Non-Confidential Consolidated Transfer Application.

²⁵ Page 178 of the Non-Confidential Consolidated Transfer Application.

²⁶ Page 189 of the Non-Confidential Transfer Application

²⁷ Page 235 of the Non-Confidential Consolidated Transfer Application

Party	Impact
Vodacom	<ul style="list-style-type: none"> • Opportunity to accelerate fibre build and to invest alongside CIVH in a partnership to create a more sustainable infrastructure company benefitting both parties, as well as competitors, resellers, ISPs, consumers, and importantly, black investors. • Increased need for fibre to the site for infrastructure players in South Africa as 5G becomes more universal, and the transferee will provide infrastructure on an open access basis to facilitate this. • Support transformation by creating value for Black shareholders through the combined entities²⁸ / HDP players to benefit from the shared infrastructure in DFA including more homes and businesses that ISPs will be able to sell due to the increased investment.
Consumers	<ul style="list-style-type: none"> • Will benefit from the fresh capital injection and significantly scaling up the reach of NEWCO's various fibre networks, including in peri-urban, rural and underserved areas. • Significant cost savings to enable lower prices for consumers.
Country/Industry	<ul style="list-style-type: none"> • High speed, uncapped connectivity infrastructure at scale, to connect as many people as possible from all walks of life countrywide. • Rapid and widespread increase in direct and indirect socio-economic upliftment for the majority of South Africans.
Public Interest	<ul style="list-style-type: none"> • Transaction to empower the following public interest groups HDPs (LSM LLSM); increase number of connected schools; Youth (skills development) and SMMEs.

²⁸ Page 192 of the Non-Confidential Transfer Application

Party	Impact
CIVH	<ul style="list-style-type: none"> • Widespread increase in direct and indirect socio-economic upliftment for the majority of South Africans. • Connect as many people as possible from all walks of life throughout the entire country. • Accelerate high impact positive change to its direct and indirect stakeholders. • Empowerment of HDPs (LSM LLSM), Schools, Youth (skills development) and SMMEs.
Vodacom	<ul style="list-style-type: none"> • Opportunity to accelerate fibre build and to invest alongside CIVH in a partnership to create a more sustainable infrastructure company benefitting both parties, as well as competitors, resellers, ISPs, consumers, and importantly, black investors. • Increased need for fibre to the site for infrastructure players in South Africa as 5G becomes more universal, and the transferee will provide infrastructure on an open access basis to facilitate this. • Support transformation by creating value for Black shareholders through the combined entities²⁹ / HDP players to benefit from the shared infrastructure in DFA. • Including more homes and businesses that ISPs will be able to sell due to the increased investment.
Consumers	<ul style="list-style-type: none"> • Will benefit from the fresh capital injection and significantly scaling up the reach of NEWCO's various fibre networks, including in peri-urban, rural and underserved areas. • Significant cost savings to enable lower prices for consumers.
Country/Industry	<ul style="list-style-type: none"> • High speed, uncapped connectivity infrastructure at scale, to connect as many people as possible from all walks of life countrywide.

²⁹ Page 192 of the Non-Confidential Transfer Application.

Party	Impact
	<ul style="list-style-type: none"> • Rapid and widespread increase in direct and indirect socio-economic upliftment for the majority of South Africans.
Public Interest	<ul style="list-style-type: none"> • Transaction to empower the following public interest groups HDPs (LSM LLSM); increase number of connected schools; Youth (skills development) and SMMEs.

Compliance and Status of Licences

6.13. Regulation 12 of the Licensing Regulations provides that the Authority may refuse to renew or transfer a licence if the licensee has not complied with one or more of the following:-

6.13.1. where the licensee has been found guilty of a contravention and has not complied with the order by the Authority in terms of section 17 of the ICASA Act;

6.13.2. where the licensee has not paid the licence fees due and payable at the date of the application; or

6.13.3. where the ownership and control of the transferee (in a transfer application) or applicant (in a renewal application), by historically disadvantaged persons is less than 30%.

6.14. Upon diligent search of its records, the Authority determined that:-

6.14.1. as at the First Licences Issue Date, DFA had not been found guilty of any contravention by the CCC; and

6.14.2. as at the Second Licences Issue Date, DFA has not been found guilty of any contravention by the CCC.

- 6.15. The Authority has determined that as at the date of the Applications, DFA was compliant and had no outstanding licence fees due and payable.
- 6.16. The Authority further determined that DFA and/or NEWCO:-
- 6.16.1. as at the First Licences Issue Date, were compliant with the 30% minimum HDP requirements prescribed in terms of section 9(2)(b) read with section 13(6) of the ECA and Regulation 12 of the Licensing Regulations; and
 - 6.16.2. as at the Second Licences Issue Date, remained compliant with the 30% minimum HDP requirements prescribed in terms of section 9(2)(b) read with section 13(6) of the ECA and Regulation 12 of the Licensing Regulations.
- 6.17. In relation to the RFS Control Application, as indicated, the Applicant lodged an application for the surrender of its RFS Licence on 28 March 2022 and formally withdrew the RFS Control Application on 27 June 2022. Thus, as there was no RFS Control Application before it due to the Withdrawal Notice, the Authority did not assess the compliance requirements prescribed by the ECA in relation to the RFS Control Application.

7. OWNERSHIP BY HISTORICALLY DISADVANTAGED PERSONS AND BROAD-BASED BLACK ECONOMIC EMPOWERMENT (B-BBEE)

- 7.1. Section 4(3) (k) of the ICASA Act stipulates that the Authority may make regulations on empowerment requirements to promote broad-based black economic empowerment (B-BBEE).
- 7.2. The provisions of section 4(3)(k) are over and above the general provisions of section 4(3)(j) which provides that *"the Authority may make regulations on any matter consistent with the objects of this Act*

or the underlying statutes or that are incidental or necessary for the performance of the functions of the Authority”.

- 7.3. The underlying statutes, as defined, include the ECA, which assigns to ICASA additional responsibilities and obligations specifically pertaining to the regulation of electronic communications within the Republic of South Africa. The primary object of the ECA as set out in section 2 thereof includes, inter alia, to promote broad-based black economic empowerment, with particular attention to the needs of women, opportunities for youth and challenges for persons with disabilities.
- 7.4. Section 9 of the ECA makes provision for the application and the granting of individual licences, whereas section 13 provides for the transfer of individual licences, the transfer of control of individual licences or the change of ownership with regard to such licences.
- 7.5. Section 9 (2)(b), with regard to granting individual licences, stipulates that the Authority must *“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 condition or higher percentage as may be prescribed under section 4 (3)(k) of the ICASA Act”.*
- 7.6. Section 13 (3)(a), which deals with limitations or restrictions on the ownership and control of individual licences, stipulates that the Authority *may* by regulation, set a limit on, or restrict, the ownership or control of an individual licence, in order to promote the ownership and control of electronic communication services by historically disadvantaged groups and to promote broad-based black economic empowerment.
- 7.7. In fulfilment of the foregoing sections (i.e., section 4(3)k of the ICASA Act read with sections 9(2) and 13(3)(a) of the ECA), the Authority published the Regulations in respect of the Limitations of Control and Equity Ownership by Historically Disadvantaged Groups (“**HDGs**”) and

the Application of the ICT Sector Code³⁰ ("**the HDG Regulations**") to promote equity ownership and control by HDGs and to promote Broad Based Black Economic Empowerment ("B-BBEE"). The applicable provisions of the HDG Regulations to the Consolidated Transfer Application are dealt with below.

7.7.1. Regulation 3(4) of the HDG Regulations stipulates that "*An Individual Licensee must have a minimum of 30% of its ownership equity held by historically disadvantaged groups as required in terms of the EC Act, determined using the Flow Through Principle*".

7.7.2. Regulation 3(6) governs how parties are required to prove compliance with the HDG Equity requirement³¹ prescribed by the HDG Regulations. Regulation 3(6) provides as follows:

"Proof of compliance with the HDG Equity Requirement will, subject to regulation 3(7), be by way of:

(a) *a B-BBEE Verification Certificate confirming ownership equity held by Black People determined using the Flow Through Principle; and/or*

(b) *a credible assurance report issued by a SANAS recognised and accredited verification agency confirming ownership equity held by historically disadvantaged groups (excluding Black People if a B-BBEE certificate is provided in terms of regulation 3(6)(a) determined in accordance with Appendix 1*".

7.7.3. Regulation 3(7) provides as follows: "*Proof of compliance with the HDG Equity Requirement by Individual Licensees who are*

³⁰ As amended by Government Gazette No. 46245 of 14 April 2022

³¹ **HDG Equity Requirement** – means the requirement that each Individual Licensee must have a minimum of 30% of its ownership equity held by historically disadvantaged groups as set out in regulation 3(4);

recognised as EMEs or QSEs under the ICT Sector Code may be by way of a sworn affidavit or CIPC issued certificate, issued in accordance with the ICT Sector Code, confirming the Individual Licensee's annual Total Revenue and level of ownership equity percentage held by Black People determined using the Flow Through Principle".

7.7.4. Regulation 4(4) provides that Individual Licensees and Class Licensees must have a minimum B-BBEE Contributor Status Level of four.

7.8. The Authority determined, based on its calculations relating to NEWCO's post transaction empowerment status (as more fully set out below), that NEWCO met the minimum 30% HDPs ownership requirement and maintain the B-BBEE Contributor Status Level of four, as required in terms of the HDG Regulations.

Analysis of the Parties with Respect to equity ownership by HDPs

7.9. Post the implementation of the Licence Control Transfer, CIVH will hold 70% shareholding in NEWCO with Vodacom holding 30% shareholding.

7.9.1. With respect to the requirement for a minimum of 30% equity ownership by HDPs, D. S. Fourie J in the matter between *Telkom SA SOC Limited v Dr Stephen Mncube NO and Others*³² explained as follows at paras 78 and 80 respectively:

7.9.1.1. "Section 13 makes provisions for the transfer of control of an individual licence and subsection (6) thereof provides that the provisions of section 9(2) to (6) apply, with the necessary changes, to section. Given the use of the word "must" in section 9(2)(b), it appears that the provision of

³² *Telkom SA SOC Limited v Dr Stephen Mncube NO and Others; Mobile Telephone Networks (Pty) Ltd v Pillay NO and Others; Cell C (Pty) Limited v The Chairperson of ICASA and Others; Dimension Data Middle East & Africa (Pty) Ltd t/a Internet Solutions v ICASA and Others* (55311/2015; 77029/2015; 82287/2015) [2016] ZAGPPHC 93 (26 February 2016)

this section, with regard to the minimum requirement of 30% equity ownership, are peremptory.”

7.9.1.2. *“In our view the language of section 9(2)(b) presupposes that an applicant must arrive at ICASA’s door with a minimum of 30% BEE shareholding. An applicant does not have an opportunity to garner the necessary shareholding after the application has been made, let alone after the application has been approved.”*

7.10. From the above, read with the HDG Regulations, it is evident that the Authority’s empowering legislation places a 30% peremptory requirement on the transferee for equity ownership by HDPs.

7.11. In the Consolidated Transfer Application before the Authority, NEWCO was the transferee with 43.39% HDP equity³³. Equity ownership held by HDPs was made up of 31.35% in CIVH and 12.04% in Vodacom.

7.12. Below is a detailed breakdown of the calculation of the 43.39% interest held by HDPs in NEWCO post the Proposed Transaction:

CIVH

7.13. The percentage ownership by Black people through CIVH in NEWCO will be 31.35% (44.78% x 70%).

Vodacom

7.14. The percentage ownership of Black people through Vodacom into NEWCO will be 12.04% (40.14% x 30%³⁴).

7.15. In its submissions, DFA averred that the 43.39% ownership interest to be held by HDP in NEWCO has been calculated on a flow-through basis

³³ Applicant’s correspondence to the Authority dated 7 June 2022 and pg. 11 PowerPoint presentation dated 12 July 2022.

³⁴ In terms of the updated B-BBEE certificate of Vodacom provided to the Authority on 14 July 2022.

as provided for in the HDG Regulations³⁵. This averment was substantiated by the submission of B-BBEE certificates reflecting the ownership interests held by HDPs in Vodacom and CIVH³⁶.

7.16. Based on the information submitted by DFA, the presentations made at the public hearing and the Authority's calculations, the Authority determined that NEWCO indeed:-

7.16.1. as at the First Licences Issue Date, met the minimum 30% HDP requirement and that the calculation of its compliance with the above requirement has been done in accordance with the Flow Through Principle prescribed by the HDG Regulations; and

7.16.2. as at the Second Licences Issue Date, still met the minimum 30% HDP requirement and that the calculation of its compliance with the above requirement has been done in accordance with the Flow Through Principle prescribed by the HDG Regulations³⁷.

7.17. Further, the Authority was satisfied that DFA and/or NEWCO are compliant with the B-BBEE Contributor status requirement as prescribed by the HDG Regulations on the basis that CIVH is on level 2 and Vodacom level 1 both of which are above the minimum level 4 provided for in the HDG Regulations.

8. COMPETITION

8.1. In terms of the provisions of the ECA read with the ICASA Act, the Authority has concurrent jurisdiction with the Competition Commission in relation to the regulation of competition within the electronic communications sector. As such, the Authority bears a statutory duty

³⁵ 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 published in Government Gazette 44382 of 31 March 2021.

³⁶ Pgs. 584, 618 and 119 of the Consolidated Transfer Application.

³⁷ Regulation 3(4) of the HDG Regulations.

to independently consider the issue of competition before it makes a decision regarding the Applications. The courts have described this duty as follows:

*"... the statutory obligation to promote competition within the ICT sector implies an obligation to also consider and take into account competition which is part of the decision-making process and cannot be delegated or deferred to another organ of state"*³⁸.

- 8.2. The competition analysis undertaken by the Authority in relation to the Proposed Transaction has considered the objects set out in section 2(d), (f), (n) and (p) of the ECA. It further took cognisance of the requirements of Regulation 11(4) of the Licensing Regulations which states that:

"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 HDPs."*

- 8.3. In addition to the above, the Authority conducted various engagements with the Competition Commission in terms of the memorandum of understanding between the two regulators to, *inter alia*, discuss the Proposed Transaction and various aspects pertinent thereto.

- 8.4. The Authority's competition analysis in respect of the above criteria as at the date of the approval of the Proposed Transaction on 21 October 2022 is set out below.

³⁸ *Telkom SA SOC Limited v Dr Stephen Mncube NO and Others; Mobile Telephone Networks (Pty) Ltd v Pillay NO and Others; Cell C (Pty) Limited v The Chairperson of ICASA and Others; Dimension Data Middle East & Africa (Pty) Ltd t.a Internet Solutions v ICASA and Others* (55311/2015; 77029/2015; 82287/2015) [2016] ZAGPPHC 93 (26 February 2016).

Promotion of consumer interests

- 8.5. This aspect links to the object set out in section 2(n) of the ECA as well as Regulation 11(4) of the Licensing Regulations. In the Authority's assessment, in terms of customer benefits, the Licence Control Transfer is likely to lead to a positive impact on consumer interests in the relevant markets. In this regard, the Authority is of the view that, if implemented in accordance with the submissions made by the parties, the Licence Control Transfer could lead to increased access to wholesale network infrastructure, a wider choice of retail service providers, a wider range of consumer products, and a reduction in operational costs on the upstream or wholesale portion of the supply chain. By exerting a positive impact on the aspects identified above, the Authority is of the view that the Licence Control Transfer is likely to promote wider consumer interests in the relevant markets.
- 8.6. In addition to the promotion of consumer interests at a broader level, the Authority (having assessed the consumer impact reports prepared on behalf of the parties by FTI Consulting (on behalf of CIVH) and Compass Lexecon (on behalf of Vodacom)) accepts the submissions of DFA that the Licence Control Transfer will benefit its existing and prospective consumers. The Authority is of this view based on its analysis that the Licence Control Transfer creates synergies between the parties' respective businesses and coupled with NEWCO's enhanced and almost pervasive network post-transaction (pursuant to the disposal of Vodacom's fibre assets to DFA and Vumatel which is a feature of the Licence Control Transfer) which are likely to result in an enhanced value proposition for the relevant wholesale and retail markets, namely the service providers and consumers.
- 8.7. The Authority anticipates that the service scope offered to wholesale customers will improve due to the significant economies of scale (i.e., cost-efficient ways of producing or delivering a product) that will arise and accrue to NEWCO from the combined fibre assets pursuant to the Licence Control Transfer. The combination of essentially complementary

network assets (dark and lit fibre), as well as increased investment in infrastructure will most likely result in more service offerings on infrastructure routes that would otherwise not be offered in the counterfactual.

- 8.8. Following from the preceding analysis, in the Authority's view, there is unlikely to be any deterioration in the service quality, terms and prices, but rather a potential improvement in the overall market structure as a result of the merged infrastructure.

Promote competition within the ICT sector

- 8.9. One of the primary objects of the ECA as espoused in section 2(f) is to "*promote competition in the ICT sector*". DFA and Vodacom submit that the Licence Control Transfer will likely lead to significant economies of scale required to enable NEWCO to provide fibre infrastructure services at a lower cost to retail service providers on an open access basis. Given the fact that DFA is currently subject to an open access framework due to the Competition Tribunal's ruling in relation to a previous merger involving DFA³⁹, the facilities leasing legislation⁴⁰, and the imposition of the aforesaid open access conditions on NEWCO's I-ECNS licence pursuant to the Authority's approval of the Licence Control Transfer, the Authority is of the view that the Licence Control Transfer is likely to promote competition in the upstream wholesale and downstream retail markets due to greater efficiencies and pro-competitive benefits in relation to fibre service due to an enhanced network.

Investment

- 8.10. DFA, in the Consolidated Transfer Application, indicated that in addition to meeting the criteria stipulated in the applicable regulations, the Licence Control Transfer will further many of the regulatory objectives detailed in section 2 of the ECA (and specifically section 2(d)) which provide to "...*encourage investment, including strategic infrastructure*

³⁹ Community Investment Ventures Holdings Proprietary Limited and Vumatel Proprietary Limited, Case No: LM109Jul18

⁴⁰ Electronic Communications Facilities Leasing Regulations of 31 May 2010 GG No. 33252

investment, and innovation in the communication sector". Having analysed the information submitted by DFA to support the above submission along with the written representations of ISPA, the Authority is of the view that the Proposed Transaction is likely to encourage and/or stimulate investment in new fibre infrastructure by improving NEWCO's capacity to fund infrastructure investments. Further, the parties posit that the Licence Control Transfer is likely to promote access to and result in more efficient use of Vodacom's fibre assets by ensuring that the aforementioned fibre assets are immediately available to NEWCO's customer base following the implementation of the Proposed Transaction. Thus, a large number of operators could potentially have access to these assets, unlocking value for Vodacom and the industry as these assets, according to the parties, are currently not being utilised to their full potential.

- 8.11. DFA has indicated that the transferee (i.e., NEWCO) will be an open access provider of fibre infrastructure and services, leasing its fibre infrastructure to other network service providers in a transparent and non-discriminatory manner (i.e., open access basis)⁴¹. To give effect to this commitment, the Authority has decided that it is appropriate to impose open-access conditions upon NEWCO's I-ECNS licence.
- 8.12. From the submissions made by DFA and the independent competition analysis reports contained in the Consolidated Transfer Application as well as the Authority's own research and analysis, the Authority is satisfied that the provisions of section 2(d) of the ECA which relate to encouraging the investment, including strategic infrastructure investment, and innovation in the communications sector, are likely to be met.

Relevant Markets

- 8.13. CIVH and Vodacom submitted Competitive Assessment Reports prepared by FTI Consulting on behalf of CIVH, and Compass Lexecon

⁴¹ Paragraphs 328 to 333 of DFA's non-confidential Consolidated Transfer Application at pages 227 to 228.

on behalf of Vodacom on the proposed acquisition (“**The Competitive Assessment Reports**”). In the Competitive Assessment Reports, the parties indicated that the relevant markets affected by the Licence Control Transfer are the following: (i) wholesale national long-haul fibre, (ii) wholesale metro fibre, (iii) wholesale last mile fibre (i.e., FTTH and FTTB) and (iv) retail fixed internet access services to enterprises. These markets were explained by the parties extensively in the Competitive Assessment Reports⁴². In brief, the parties explained the markets as follows:

Relevant Upstream Markets

(i) Wholesale National Long-Haul Fibre

8.13.1. This market involves fibre links that carry internet traffic from the submarine landing stations across the country. It comprises high-capacity fibre transmission links between different cities and towns and/or service providers’ POPs⁴³ across the country.

(ii) Wholesale Metro Fibre

8.13.2. Metro fibre connects the national long-haul network and the last mile network. It is typically used to carry large amounts of data that has been aggregated through the FTTH/FTTB providers’ POPs, or to provide backhaul to MNO base stations, (i.e. mobile backhaul).

(iii) Wholesale Last Mile Fibre – FTTB and FTTH

8.13.3. In respect of last mile fibre, the parties have stated that it is important to understand the difference between FTTH and

⁴² See from page 680 of the Consolidated Transfer Application.

⁴³ Point of Presence

FTTB. In this regard, the parties have indicated that the commercial requirements of FTTB make the service significantly more expensive than FTTH due to amongst others, higher costs needed to support lower contention ratios, enhanced customer support, additional costs of deploying within office parks or business environments and the added management functionality offered to businesses. Thus, services included in a FTTB package would typically offer more advanced functionalities demanded by business consumers. The parties have therefore concluded on separate relevant markets for FTTB and FTTH.

Relevant Downstream Market

(i) Retail Fixed Internet Access Services

8.13.4. In this market, ISPs provide value-added services to end consumers, using wholesale infrastructure and/or services as an input. These value-added services come in a number of dimensions, either separately or bundled, and can include or exclude metered-voice, data (capped or uncapped), varying levels of speeds, or access to other services (e.g. emails, file sharing web hosting, data back-up, video, VOIP, etc.).

Relevant Geographic Markets

8.13.5. *National Long-Haul Fibre*: according to the parties, due to the limits on demand and supply side substitution, the geographic market may be narrower than national in scope and may be limited to individual routes. The parties have therefore analysed this market on specific routes as well as nationally.

8.13.6. *Metro Fibre*: the parties have assessed this market regionally (three largest metros, i.e. Cape Town, eThekwin (Durban)

and Johannesburg) also locally (in some of the relevant metro areas).

8.13.7. *Last Mile Fibre*: the parties have assessed local markets, i.e. business parks, malls, gated residential estates and residential suburbs for both FTTB and FTTH markets.

8.13.8. *Retail Fixed Internet Access Services*: the parties have assessed this market nationally.

8.14. After evaluating the relevant product and geographic markets, the Authority is satisfied with the relevant products and geographic markets as defined by the parties.

Competition Assessment

8.15. The Competitive Assessment Reports in summary, state that the Licence Control Transfer will promote competition in the ICT sector.

8.16. The Competitive Assessment Reports further state that the Licence Control Transfer does not give rise to any substantive competition concerns in the identified wholesale and retail markets where the parties' activities overlap. Further, it is stated that the Licence Control Transfer is also unlikely to lead to any anti-competitive vertical effects. The competition assessment conducted by the parties is discussed below.

Horizontal Assessment

(i) Wholesale National Long-Haul Fibre

8.17. The parties have submitted that Vodacom's national long-haul fibre will not form part of the Transfer Assets (i.e. assets to be transferred by Vodacom to NEWCO) and will therefore not be transferred to NEWCO. Accordingly, Vodacom and NEWCO will continue to compete

independently in this market post-merger. Nonetheless, an assessment was conducted in this market, and it was found that Vodacom and NEWCO's market shares are relatively small (less than 7%). The market shares of the parties based on revenue were similarly found to be small. The parties would further continue to face competition from other players such as Open Serve (which has the highest market shares), Broadband Infraco, Liquid Telecom, MTN and Seacom/FibreCo.

(ii) Metro Fibre

- 8.18. According to the parties, there is a direct overlap in the activities of the parties in relation to this market as Vodacom's metro fibre will be included in the Transfer Assets. In terms of the network distances between the parties' respective networks, it was found that at the regional level, the overlap between the networks is minimal (ranging between less than 1% and 6%). In relation to market shares at the relevant metros, the parties combined market shares are estimated as follows: (i) Cape Town (43%), (ii) Durban (33%) and (iii) Johannesburg (39%). In all the three metros Vodacom's share is minimal - specifically in Durban and Johannesburg (at less than 2%). Post-merger, the merged entity will continue to face competition from other players such as Openserve, Liquid Telecom and Link Africa.

(iii) Last Mile Fibre

FTTB

- 8.19. According to the parties, pre-merger Vodacom did not sell access to its FTTB infrastructure – this infrastructure was only used by Vodacom to self-supply, i.e., Vodacom did not compete in this market. However, Vodacom's FTTB infrastructure will form part of the assets to be transferred to NEWCO and this infrastructure will post-merger, become available to the market on an open access basis. In terms of market shares, the parties estimate Vodacom's share to be negligible at 1% whilst NEWCO has approximately 19%. The Licence Control Transfer

will therefore lead to a small increase in market shares post-merger. Further, the parties will still face competition from a number of competing firms such as Open Serve, Liquid Telekom, Frog Foot, Link Africa, Metrofibre, Seacom and others.

FTTH

- 8.20. The parties indicated that there is an overlap in respect of this market as Vodacom and NEWCO are active in providing wholesale FTTH services. According to the parties, the extent to which the parties' respective networks overlap is, however, limited i.e. equivalent to 5% of Vodacom's network and less than 1% of NEWCO's network. The parties further indicate that other competitors such as Open Serve, Frog Foot, Metro Fibre Networks ("MFN"), Evotel and Octotel, are present in these areas of overlap.

(iv) Retail Fixed Internet Access Services

- 8.21. The parties indicate that Vodacom's retail business will not be transferred to NEWCO and that the parties will therefore continue to compete independently post-merger. The parties further indicate that the retail market is very competitive with numerous ISPs providing internet access to businesses/consumers. In terms of market shares, the parties submit that they have minimal shares nationally for retail FTTB (less than 7% for both FTTB and FTTH). The other competing firms in this market include larger players such as Dimension Data, Frog Foot, Afrihost, WebAfrica, MTN and many others.

NEWCO Vertical Assessment

- 8.22. In the Competition Assessment Reports, the parties further assessed the vertical concerns that could arise as a result of the proposed transaction. According to the parties' submission, potential vertical effects may arise because NEWCO will be an upstream provider of

national long-haul, metro backhaul and last mile fibre infrastructure to Vodacom's competitors in mobile and fixed services and Vodacom is an actual or potential customer of NEWCO's competitors.

- 8.23. In relation to input foreclosure, a potential concern is that NEWCO could foreclose Vodacom's downstream competitors from accessing NEWCO's fibre infrastructure by for example ceasing supply to such competitors, increasing prices or reducing the quality of service. However, in the national long-haul market NEWCO is a relatively small player and Vodacom's infrastructure will not form part of the transaction. In the metro fibre market, the transaction results in a modest market share increase for the parties as Vodacom's share is small. The Parties will similarly have small market shares for both the FTTB and FTTH markets. In addition, in all these relevant markets, there are numerous firms who will continue to constrain the merged entity's behaviour in the markets post-merger.
- 8.24. In relation to the incentive to foreclose, the parties submit that there is no incentive to foreclose due to *inter alia* that (i) NEWCO which is vertically integrated, has not previously restricted access to its infrastructure (its business model is that of providing open access and therefore getting as many customers/buyers as possible), (ii) the aim of the transaction is to make available Vodacom's infrastructure on an open access basis (which was not previously the case) and therefore any attempt to foreclose would undermine the rationale for the transaction.
- 8.25. Similarly, in relation to customer foreclosure, the parties submit that customer foreclosure is unlikely as neither Vodacom nor NEWCO is an important customer for any fibre provider nationally or at metro levels. Further, there are many alternative providers who will continue to pose as a competitive constraint on the merged entity post-merger.

Other Relevant Factors considered in the Competition Assessment Reports

- 8.26. In addition to the above assessment, the Competition Reports further assessed other factors that affect competition in the relevant markets, such as unilateral effects, barriers to entry and coordinated effects.

Unilateral Effects

- 8.26.1. In relation to unilateral effects, potential concerns include *inter alia* that Vodacom's minority controlling stake and investment in NEWCO may create an incentive for Vodacom to raise prices of its fibre post-merger and potentially divert sales to NEWCO. However, the Licence Control Transfer does not result in significant increase in market shares. Therefore, the strategy of diverting sales to NEWCO is unlikely to work.
- 8.26.2. Further, the parties noted that if sales were to be diverted to NEWCO for instance in the national long-haul market, the results would be that for each of customer that switches to NEWCO, Vodacom would lose 100% of its revenue but gain only 30% of the revenue through NEWCO for those customers that could switch. Furthermore, customers of the merged entity would be able to switch to other competitors in the event of prices increases post-merger because in all the affected markets there are several credible competing firms who customers can turn to for fibre supply. In addition, the parties have submitted that as open access provider, NEWCO (DFA) sets prices nationally and that it is therefore unlikely that any loss of competition at for instance the metro level (which is also no likely to occur) would lead to higher prices nationally.

Coordinated Effects

8.26.3. Coordinated effects could arise through information exchange in which for instance NEWCO acts as a hub through which, for instance, Vodacom and other customers of NEWCO may learn of the activities and plans of their competitors. The parties have, however, indicated, and the Authority is satisfied, that coordination through the sharing of information that is proprietary in nature and competitively sensitive ("**the Competitively Sensitive Information**") between NEWCO and Vodacom is unlikely to occur as the draft Memorandum of Incorporation and Shareholders' Agreement (both of which would be put into effect upon the Licence Control Transfer becoming effective) have strict provisions in place, *inter alia*, (1) to prevent Vodacom, as a shareholder, from receiving the Competitively Sensitive Information that relates to a business or operations in respect of which NEWCO and Vodacom are in a horizontal relationship (i.e. compete with each other) except under very limited circumstances and (2) requiring Vodacom to ensure that directors nominated by Vodacom to the board of NEWCO execute a non-disclosure agreement (NDA) restricting them from sharing the Competitively Sensitive Information except under very limited circumstances.

Barriers to Entry

8.26.4. The parties have noted that barriers to entry in relation to deployment of fibre are high, due to capital and regulatory requirements. However, according to the parties, once fibre has been installed, wholesale access can easily be supplied as capacity on fibre optic cables is not a constraint. The parties have further indicated that this means that competing firms to Vodacom and NEWCO (who already have fibre installed) have sufficient capacity and would find it profitable to expand their output in the event of a price increase.

8.27. NEWCO

- 8.27.1. The Authority notes and agrees with the Competition Assessment Reports provided by CIVH and Vodacom that the Licence Control Transfer is unlikely to result in any horizontal concerns in relation to any of the identified markets. Vodacom's market shares in the relevant markets are minimal and there are other alternative firms in all the identified markets who will continue to independently compete with the merged firm post-merger. In relation to vertical effects, the Authority notes that NEWCO is unlikely to have the ability or incentive to engage in input or customer foreclosure post the Licence Control Transfer, in any of the identified relevant markets.
- 8.27.2. Further, vertical mergers such as envisaged in terms of the Licence Control Transfer can generate significant efficiencies, in particular better co-ordination of investment and operations, as well as economies of scope. Further, empirical studies to date have not found widespread evidence of such harms and as such these mergers are rarely challenged by competition authorities⁴⁴.
- 8.27.3. Therefore, any overlaps that do exist are outweighed by the benefits mentioned above as well as South Africa's need to achieve an increased broadband penetration rate and to roll out services in order to service the growing increase in national demand for data services.

⁴⁴ OECD Competition Committee. 2022. OECD Handbook on Competition Policy in the Digital Age. 2022, p. 50-51

- 8.27.4. As already indicated above, pre-transaction NEWCO (DFA and Vumatel) is already vertically integrated and DFA's infrastructure is subject to open access already. Further, the parties submits that NEWCO will not have a stake in the profits of Vodacom's downstream retail business, with which to recoup lost profits. This means that NEWCO has no incentive for an input or customer foreclosure strategy in the identified markets post-transaction. In addition, the Authority is satisfied that foreclosure is unlikely to occur due to the fact that the Authority has imposed open access conditions in NEWCO's I-ECNS licence.
- 8.27.5. The Authority is further of the view that the Licence Control Transfer will in fact promote competition and consumer interests in the relevant markets. This conclusion is also supported by the expert evidence of Compass Lexecon and FTI Consulting as presented in the Competition Assessment Reports submitted to the Authority.
- 8.27.6. The analysis provided in the Competition Reports furthermore signals that the Proposed Transaction potentially has substantial benefits for the ICT sector (growth in investment, prevention of duplicate infrastructure, increased delivery of better services and offerings, enhanced effective competition in the downstream retail market and will, in turn, further likely benefit consumers and the country at large.
- 8.27.7. In conclusion, the Authority is satisfied with the competition assessment conducted by the parties that the Licence Control Transfer is unlikely to result in a substantial lessening and/or prevention of competition in any of the markets affected by the Licence Control Transfer.

8.27.8. The Authority further agrees with the parties' assessment that the Licence Control Transfer is likely to promote competition and result in pro-competitive efficiencies such as making available Vodacom's fibre infrastructure on an open access basis and improve NEWCO's capacity to fund infrastructure investments. In addition, as more service providers are likely to have access to the merged entities' infrastructure, the Licence Control Transfer is likely to also benefit consumers who will have a wider choice in terms of service providers and product choices.

9. RADIO FREQUENCY SPECTRUM AND TECHNICAL ANALYSIS

- 9.1. On 27 June 2022, DFA delivered a notice to the Authority in terms of which it withdrew the RFS Control Application. The import of the Withdrawal Notice is that there is no RFS Control Application before the Authority.
- 9.2. In the circumstances, the Authority did not consider the RFS Control Application. As a result, this Reasons Document does not address nor analyse the RFS Control Application lodged by DFA.

Surrender of RFS Licence

- 9.3. On 28 March 2022, DFA submitted the RFS Surrender Application to the Authority in terms of which it sought to surrender its RFS licence.
- 9.4. Having considered the RFS Surrender Application and the supporting documents provided by DFA, the Authority was satisfied that it had duly complied with the requirements of Regulation 13 of the Radio Frequency Spectrum Regulations and accordingly decided to approve same.

10. SADV SURRENDER APPLICATION

- 10.1. On 27 July 2022, SADV submitted the SADV Surrender Application in terms of which it sought to surrender its Service Licences in terms of section 12 of the ECA read with Regulation 13 of the Licensing Regulations.
- 10.2. In relation to the requirement to inform consumers of the intended surrender, SADV stated in the SADV Surrender Application that it would utilise the Service Licences held by NEWCO pursuant to the provisions of clauses 4.3⁴⁵ and 3.3⁴⁶ thereof, which provide that: *"the Licensee and any or all of its Subsidiaries shall be entitled by virtue of this Licence to provide all or any of the Services together with all or any other rights granted to it under this Licence"* and therefore, that it would not cease to provide services to the consumers as a result of such surrender.
- 10.3. Having considered the SADV Surrender Application and the supporting documents provided by SADV, the Authority was satisfied that it had duly complied with section 12 of the ECA read with Regulation 13 of the Licensing Regulations and accordingly approved the surrender with effect from 1 December 2022.

11. REGULATORY REASONS FOR REFUSAL- TRANSFER APPLICATIONS

- 11.1. In addition to its general discretion in terms of the ECA and the ICASA Act, regulation 12 of the Licensing Regulations provides that 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 of the Authority in terms of section 17 of ICASA Act; or*

⁴⁵ I-ECS Licence.

⁴⁶ I-ECNS Licence.

- b) *Where the Licensee has not paid the licence fees due and payable at the date of the application; or*
- c) *Where the transferee's ownership and control by historically disadvantaged persons is less than 30%."*

- 11.2. Upon diligent search of its records, the Authority determined that DFA has not been found guilty of any contravention by the CCC as at the First Licences Issue Date. The Authority further confirmed that DFA has not been found guilty of any contravention by the CCC as at the Second Licences Issue Date.
- 11.3. The Authority has determined that DFA has paid all the licence fees due and payable at the date of the application.
- 11.4. In relation to the HDP requirement prescribed in Regulation 12 and the HDG Regulations, post the Proposed Transaction the equity ownership held by historically disadvantaged persons (HDPs) in NEWCO will be 43.39%⁴⁷.

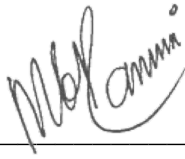
12. AUTHORITY'S DECISION

- 12.1. The Authority believed that the approval of the Proposed Transaction will be in the best interests of consumers, promote competition in the ICT sector and meets the requirement for 30% equity ownership by HDPs.
- 12.2. The Authority further believed that the transfers contemplated in terms of the Consolidated Application are unlikely to negatively impact the market and would, in addition to the benefits to the consumers and wider public interest benefits (improved broadband penetration rate, increased employment, a boost in the level infrastructure investment in the sector *etcetera*), in fact make NEWCO more effective player in the market.

⁴⁷ In terms of the additional information provided by the Applicant on 7 June 2022.

- 12.3. In light of its analysis and findings as set out above, on 21 October 2022, the Authority decided to approve the Consolidated Transfer Application (i.e., both the Licence Ownership Transfer and the Licence Control Transfer, with the latter approval being subject to licence conditions relating to, *inter alia*, open access), the RFS Surrender Application and the SADV Surrender Application.
- 12.4. As pointed out in paragraph 1.8, the Licence Ownership Transfer was implemented with the issuing of new / amended I-ECS and I-ECNS licences on the First Licences Issue Date.
- 12.5. The Authority's approval of the Licence Control Transfer was subject to the condition precedent that NEWCO accepts, or NEWCO and the Authority agree upon, the following licence conditions that the Authority had determined need to be imposed upon NEWCO's I-ECNS licence:
- 12.5.1. inclusion of open access conditions in the I-ECNS licence; and
- 12.5.2. inclusion of a 40% ownership limitation on Vodacom's shareholding, as well as a requirement that the directors appointed or nominated to the board of NEWCO by Vodacom shall not, cumulatively exercise more voting rights than those cumulatively exercised by the directors appointed or nominated by CIVH.
- 12.6. The Authority and NEWCO completed the negotiations in relation to the I-ECNS licence conditions referred to in paragraph 12.5 above during early November 2025.

12.7. The amended I-ECS and I-ECNS licences were approved by Council on 20 November 2025 and issued to NEWCO on 21 November 2025 the Second Licences Issue Date.



MOTHIBI G. RAMUSI
CHAIRPERSON

DATE: 21 / 11 / **2025**