



competitiontribunal
SOUTH AFRICA

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM109Jul18

In the matter between

Community Investment Ventures Holdings Proprietary Limited Primary Acquiring Firm

and

Vumatel Proprietary Limited Primary Target Firm

Panel : N Manoim (Presiding Member)
: Y Carrim (Tribunal Member)
: A Wessels (Tribunal Member)
Heard on : 08, 12, 15, 25 April 2019
Order Issued on : 29 April 2019
Reasons Issued on : 28 August 2019

REASONS FOR DECISION

Introduction

- [1] On 29 April 2019 The Competition Tribunal ('Tribunal') conditionally approved a transaction in terms of which Community Investment Ventures Holdings Proprietary Limited ("CIVH") acquired sole control of Vumatel Proprietary Limited ("Vumatel").
- [2] Vumatel is primarily active in the provision of fibre to the home (FTTH) and to a lesser extent in the provision of fibre to the business (FTTB). Dark Fibre Africa

(Pty) Ltd (DFA), a subsidiary of CIVH, is the largest provider of backhaul services to the FTTH and FTTB providers in South Africa. CIVH also has a minority interest in Octotel (Pty) Ltd ("Octotel") which is a competitor to Vumatel in the FTTH and FTTB markets.

- [3] The Competition Commission ("Commission") was concerned that the transaction raised the likelihood of unilateral effects, foreclosure and information exchange concerns and sought a conditional approval of the merger. The Tribunal, after hearing evidence from the merging parties and Octotel (which has been permitted to participate in the hearing) ultimately approved the merger on conditions attached hereto as Annexure A.
- [4] The reasons for the approval follow.

Background

- [5] On 25 June 2018, the Commission was notified of a large merger whereby CIVH intends to acquire 65.1% of the shares in Vumatel.
- [6] In accordance with section 14A of the Competition Act ("Competition Act"), the Commission recommended the approval of CIVH's proposed merger with Vumatel subject to several conditions.
- [7] On 6 March 2019, the Tribunal received a letter from Octotel indicating their intention to intervene in the matter. Octotel sought a prohibition of the merger as it believed no condition would address its concerns.
- [8] Octotel was granted leave to intervene in the merger proceedings pursuant to a directive issued by the Tribunal on 13 March 2019 and argument was to be heard on 08, 12, and 15 April 2019.
- [9] Octotel argued that the merger would give rise to a structural, and irreversible, change in the relevant markets, and would enable the merged entity to prevent

competition in the markets in which it operates, including the foreclosure of other FTTH competitors.

- [10] The Tribunal heard evidence from Octotel's CEO, Mr. Gilmour and the Chairman of Vumatel, Mr. Schoeman. The merging parties also called Mr. Mulder, the CEO of DFA, a subsidiary of the primary acquiring firm, CIVH.
- [11] Throughout the course of the hearing, the Commission's recommended conditions went through several iterations, until ultimately a draft was submitted to the Tribunal on 25 April 2019.
- [12] The merging parties largely accepted the Commission's proposed conditions, taking issue with only two provisions. Their concerns were centred around whether Octotel should be considered part of the acquiring firm or not (the Commission recommended a condition believing it was) and whether the obligation to provide open access services (one of the centre pieces of the conditions) should be imposed in low income areas.
- [13] Octotel however remained steadfast in its position throughout the various iterations of the conditions that the merger should be prohibited.

Parties to the transaction

Primary Acquiring Firm

- [14] CIVH is jointly controlled by Industrial Electronic Investment (Pty) Ltd ("IEI") with a 51% shareholding and New GX En Commandite Partnership II ("New GX") with a shareholding of 31.9%.¹
- [15] IEI is controlled by VenFin (Pty) Ltd ("VenFin"), which is in turn controlled by Remgro Ltd ("Remgro"). Remgro is a public company listed on the Johannesburg Stock Exchange and is not controlled by any single firm.

¹ Other shareholders in CIVH include New GX Fund I (Pty) Ltd (■■■■%), Community Investment Holdings (Pty) Ltd (■■■■%), Chlanlich (Pty) Ltd (■■■■%), Consolidated Capital Investments (Pty) Ltd (■■■■%).

- [16] Remgro, as an investment firm, has interests in and controls several firms in the telecommunications industry. Relevant to this transaction is its control of two firms, RSAWEB (Pty) Ltd, and Seacom (Pty) Ltd.
- [17] New GX, which exerts minority control of CIVH, is controlled by Main Street 651 (Pty) Ltd (“Main Street”). Main Street is in turn controlled by New GX Investments (Pty) Ltd (“New GX Investments”). New GX Investments is controlled by New GX Capital Holdings (Pty) Ltd (“New GX Holdings”). New GX Holding is wholly owned and controlled by the Khuno Share Trust. Of relevance to the assessment of the transaction is that New GX Holdings also controls Dartcom SA (Pty) Ltd (“Dartcom”).²
- [18] CIVH itself controls several firms. Of relevance to the analysis of this transaction are two of its subsidiaries; DFA and SA Digital Villages (Pty) Ltd (“SADV”).
- [19] DFA is a provider of dark fibre network in both metropolitan and long-haul telecommunications markets. DFA operates as an open access fibre optic company, leasing its backhaul fibre and secure transmission infrastructure whilst maintaining, building, installing, managing, and financing these dark fibre networks. DFA is the dominant provider of metropolitan dark fibre in South Africa. Dark fibre is an input into the operations of downstream FTTH operators such as Vumatel and Octotel.³
- [20] DFA controls SADV which provides FTTH to Internet Service Providers (ISPs) as well as ISP services to end-users.

² Dartcom is a distributor of fibre optic communications technologies such as accessories, batteries, telecommunication access and termination equipment as well as outside plant hardware and software systems.

³ These terms and the nature of the relationships between these firms are expanded upon in the ‘Industry Overview’ section at para [29] to [47] below.

[26] During the hearing, the issue was raised as to whether Octotel, by virtue of PRIF's shareholding in it, should be considered part of the acquiring firm for the purposes of the analysis of the merger. The Commission, in its assessment submitted that it should be. We ultimately found that it did not. Our analysis of this question can be found at paras [55] to [63] below.

Proposed transaction and rationale

[27] In terms of the transaction, CIVH will acquire the remaining 65.1% shares of Vumatel. On completion of the proposed transaction, CIVH will wholly own and solely control Vumatel. On the possibility that CIVH does not acquire the entire 65.1% in Vumatel, BPESA V GP Ltd, the management shareholding vehicle will retain a balance of less than 5% of shares, with CIVH having the ability to acquire the BPESA V GP shares within an option period.

[28] Regarding the rationale, the merging parties submitted a joint rationale considering the growing demand and government policies in terms of broadband penetration. DFA indicated that the merger would unlock synergies as DFA and Vumatel's footprints were complementary and the increased scale of the combined entity would provide a competitive advantage in high growth markets. Furthermore, a combined entity will be well positioned for further growth due to a stronger balance sheet and lower cost of capital. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Industry Overview

[29] The provision of a range of services, including voice, internet and other network services requires the presence of a fixed line network. The fixed line

⁴ Tribunal Transcript of Proceedings CIVH & Vumatel ('Transcript') p554 line 3- p556 line 17.

infrastructure can comprise of a variety or combination of technologies including copper, wireless or fibre technologies. End users make use of these services through multiple devices which are connected to a local or home network.

[30] This local network is then connected from the end-user to a local exchange which splits different type of network traffic from many different network users and aggregates it into a single high-speed link signal for transmission further upstream into the network.

[31] The connection between the end-users and the local exchange is known as the access layer, or “last mile” of the infrastructure.

[32] Where this last mile consists only of fibre, it is known as fibre to the home/business. (FTTH/FTTB).⁵ FTTB is a fibre connection between a single end-user business and a point of interconnection⁶ and is typically characterised by higher service level agreements.⁷ Last mile or access layers may also be provided through DSL technology or wireless technologies or a mix of technologies.

[33] Fibre can be referred to as either lit fibre or dark fibre. Dark fibre refers to access to unused optical fibre capacity that is potentially available for use, and over which no services are currently provided. Dark fibre is not connected to any network and no data is being transferred over such. It was submitted throughout the hearing that due to the high cost of any fibre installation, dark fibre is normally planned for and installed at a significantly greater rate than what is necessary to provide for future expansion and provide for network redundancy.

[34] When dark fibre is connected to termination points and thus begins transmitting data, it is called lit fibre. Lit fibre can be used by service providers to provide

⁵ The term FTTx is used to indicate either FTTH or FTTB services.

⁶ Transcript p724.

⁷ Transcript p487.

capacity for customer applications including internet, email, file sharing, web hosting, data backup etc.

- [35] Fibre infrastructure is segmented into four levels namely international, national, metro (within which backhaul fibre plays a role), and access layer (last mile).
- [36] The international fibre infrastructure network connects South Africa to the rest of the world. Since neither of the merging parties are active at this level it need not be considered further.
- [37] The national fibre infrastructure network, also referred to as long-haul, comprises high capacity fibre transmission links between cities and towns. DFA is active at this level.
- [38] Metropolitan fibre network infrastructure is an optic fibre which connects the access layer to larger switches and aggregation points in a metropolitan area, normally providing high-speed broadband connection. These fibres are often leased out by providers to other companies. DFA is active at this level too.
- [39] Within the metropolitan fibre network infrastructure level, exists the need for what is referred to as Backhaul fibre.
- [40] Backhaul fibre refers to a connection between a FTTH service provider's Point of Presence ("POP") to a point of interconnection. Such connections can be self-supplied by a FTTH provider who may connect one POP to another with its own fibre and then connect one of these POPs to metropolitan backhaul.
- [41] Backhaul fibre needs to be resilient as it carries large amounts of data that has been aggregated through the FTTH providers POPs. To increase robustness, backhaul fibre is buried deeper than FTTH fibre and uses more expensive transmission equipment than FTTH networks.
- [42] The last mile fibre infrastructure network level then refers to the final or last-mile connectivity leg between the individual customer and the telecommunication service provider or local exchange. This is the connection from the local exchange or street cabinet to the individual customer's home.

Both the acquiring firm, through its subsidiary SADV, Octotel and Vumatel are active at this level.

- [43] The above-mentioned levels must link with one another for telecommunications and internet service providers to provide services to end consumers to allow the end consumer to connect to the internet and/or access other telecommunications services.
- [44] The acquiring group, across all levels, and the target firm operate using what is referred to as an 'open access' model. This model entails that a supplier of fibre (either dark or lit) is willing to lease their fibre to other network service providers on a non-discriminatory wholesale basis. A supplier of fibre infrastructure can either choose to lease its fibre infrastructure to third parties or utilise the fibre infrastructure internally.
- [45] When a fibre supplier chooses to only make its fibre infrastructure available internally, this is a closed access model. Telkom, through its subsidiary Openserve, does not make its dark fibre available to any third party and thus in the provision of dark fibre services it operates a closed access model. It does however make lit fibre available to third parties and thus in that space can be said to operate an open access model.
- [46] Important to note is that before such fibre can be installed, providers of backhaul or FTTH fibre require certain approvals. These may include municipal wayleaves or approvals from road agencies, gated communities or environmental agencies. Such approvals sometimes allow for only one fibre network to be installed in an area.
- [47] Once all approvals have been procured, the fibre network can be installed in the area. Installation may take various forms including laying the fibre in trenches, drilling under roads, via telephone ducts, storm water or sewerage drains or stringing the fibre aerially over poles, commonly referred to as "aerial fibre".

Relevant market and impact on competition

[48] Having conducted a thorough investigation into the segmentation of the various markets involved in the merger, the Commission defined the relevant markets for the assessment of the merger as:

- 48.1 The regional metropolitan market for the supply of upstream metropolitan backhaul fibre infrastructure;
- 48.2 The market for the intermediate supply of last-mile fibre infrastructure to either FTTB or FTTH. In its recommendation, the Commission did not conclude on the exact geographic scope of this market,⁸ but throughout its recommendation and the subsequent hearing, the Commission tended to aggregate upwards to regional markets in relevant metropolitan areas, with its focus resting on Cape Town, Johannesburg and Durban;
- 48.3 The market for the retail supply of ISP services which reflects the size of the intermediate last-mile geographic market;
- 48.4 The national upstream market for the supply of manholes and ducts and a national market for downstream broad fibre infrastructure in general.

[49] These relevant markets were broadly accepted by the parties involved in the hearing.

⁸ Its rationale for this was that assessing a too localised market would result in many deemed monopolies and thus it tended to aggregate upwards to regional markets in relevant metropolitan areas.

Theories of harm

- [50] The Commission, in its recommendations, examined six potential theories of harm emanating from the merger.
- [51] In assessing the potential unilateral effects of the merger, the Commission investigated:
- 51.1 Whether the merger would result in the removal of the competitive constraints between Octotel and Vumatel, resulting in unilateral price effects in the Cape Town metropolitan FTTH market;
 - 51.2 Whether the merger amounted to the removal of a potential competitor (Vumatel) to SADV (from the acquiring firm) in the FTTB market;
 - 51.3 Whether the merger would result in the removal of an effective potential competitor in the metropolitan fibre backhaul market;
- [52] When assessing the vertical overlaps presented in the merger, the Commission investigated:
- 52.1 Whether the merger would result in a significant lessening of competition (“SLC”) arising from the newly created vertical relationship between DFA as a provider of metro fibre infrastructure backhaul services and Vumatel as the provider of FTTH infrastructure;
 - 52.2 Whether the merger would result in a SLC as a result of the vertical relationship between Vumatel as a provider of FTTH services and SADV as an ISP;
 - 52.3 Whether the merger would result in a SLC as a result of the vertical relationship between Dartcom, as a supplier of fibre optic related products and Vumatel.

[53] Octotel did not align itself with the Commission's unilateral effects concerns but did raise concerns about being foreclosed from accessing backhaul services from DFA post-merger.

[54] We turn to assessing each of these theories in turn. In doing so we refer to the diagrammatic representation of the pre and post-merger relationships between the parties attached as Annexure B hereto.

Unilateral price effects

[55] The Commission, in its investigation, found that Remgro directly controls both the primary acquiring firm, CIVH, as well as Octotel's minority shareholder, a firm called PRIF SAVest Mauritius Limited ("PRIFMU").

[56] The Commission held that notwithstanding the minority shareholding, PRIFMU could veto the appointment of Octotel's CEO, CFO, and MD. In addition, PRIFMU has the power to veto the approval of Octotel's budget and annual business plan. This control, the Commission argued, should be considered material influence over Octotel's policy as contemplated in section 12(2)(g) of the Act.

[57] The theory ran that because of this control, Octotel should be considered part of the acquiring firm for the purpose of assessing market share accretion arising from the merger. The merger would thus result in the combination of Octotel and Vumatel's market share in the market for the provision of FTTH services in Cape Town, resulting in a high post-merger market share.

[58] The Commission argued that Vumatel and Octotel would be likely to exploit this market share by, post-merger, leveraging their market power in a co-ordinated, anti-competitive price strategy to benefit the acquiring group.

[59] The merging parties and Octotel opposed this theory of harm. The merging parties submitted that (i) Remgro does not have the ability to direct the conduct of Octotel because it only possesses an indirect minority shareholding in

[REDACTED]

[60] Octotel aligned itself with the merging parties on this point, arguing that the relevant corporate structure, at best for the Commission, constructed a 'double layer of indirect control.'⁹ This form of attenuated control, on Octotel's version could not amount to an exertion of influence of budgets, business and a control of the day to day management and operation of Octotel to the extent that it would be able to exercise the form of anti-competitive price strategy envisioned by the Commission.

[61] Both the merging parties and Octotel referenced the fact that Octotel's intervention in the proposed merger should be dispositive of any theory that Octotel stood to benefit from the merger and that Remgro could exercise any form of control over the management decisions of Octotel. We indeed found it a powerful argument that if Remgro had the ability to exercise control over Octotel, it would have surely done so to curtail any intervention and smoothen the tracks for approval of its merger with Vumatel.

[62] Given our finding on control this meant the Commission's theory of harm relating to the post-merger unilateral price concerns in Cape Town were unfounded and no condition was required to remedy such.

[63] For this reason, the draft conditions provided to us containing references to Octotel were edited to remove any obligation on Octotel.

Removal of an effective competitor from the FTTB market.

[64] The Commission, in its recommendation, investigated whether the merger would amount to the removal of a potential competitor in the FTTB market.

⁹ Transcript p730 lines 5-6.

[65] The Commission acknowledges that Vumatel did not view the traditional FTTB market in South Africa as one into which it would enter because the market traditionally serviced large business precincts in South Africa. This was supported by the testimony of Mr. Schoeman [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED] ¹⁰

[66] Vumatel does however offer FTTB services to smaller and medium sized business, [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] ¹¹

[67] The Commission found that such FTTB subscribers amounted to approximately [REDACTED] % of Vumatel's total subscriber base but seems to accept that the market for the provision of FTTB services could thus be further segmented to that for the provision of services to 'Enterprise Businesses' (the 'gold plated' services referenced by Mr. Schoeman) and the provision of FTTB services to SMME's. The Commission advances the theory that the merger may present the removal of a potential competitor *only* in the SMME FTTB market.

[68] To classify DFA as active in this space, the Commission relies on a slide from a DFA board presentation which stipulates that [REDACTED]

[REDACTED]
[REDACTED]

¹⁰ Transcript p541.
¹¹ Transcript p579 lines 1-9.

[69] The Commission thereafter argued that [REDACTED] [REDACTED] it seems likely that there may be competition between DFA and Vumatel in the SMME FTTB market segment absent the merger.¹²

[70] The Commission goes on to note that although the merger may result in the removal of potential competition, the prevalence of alternative sources of competitive constraints in the form of other players in the FTTB market as well as the greater degree of countervailing power that FTTB clients may possess mitigates the potential harm of such removal. The Commission concludes its investigation into this issue by stating that:

“without additional evidence, the Commission is unable to categorically conclude on whether the removal of a potential competitor in the FTTB market is likely to result in substantial harm to competition or consumers”¹³

[71] Octotel, taking a more direct approach, sought to advance the argument that Vumatel was a potential entrant to the FTTB market broadly, [REDACTED]
[REDACTED]
[REDACTED]

[72] Mr. Schoeman explained this as:
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

¹² Competition Commission Recommendations in the Large Merger Between Community Investment Ventures Holdings (PTY) Ltd and Vumatel (PTY) LTD ('CC Recommendations') p111.

¹³ *ibid* p112.

¹⁴ Merger Record p314 "Other revenue streams" section of undated Vumatel management presentation pack.

[REDACTED]

15

[73] Under cross examination, the following exchange took place:

[REDACTED]

16

[74] We found Mr. Schoeman's testimony compelling. Whilst it may have explored the option at an early stage, Mr. Schoeman's testimony indicated that it lacked the intent to follow through with the idea. Absent any further evidence of an intent to enter this Enterprise FTTB market, we were unpersuaded that Vumatel could be considered a potential competitor in the enterprise FTTB market

[75] We turn then to consider the Commission's more nuanced argument, i.e. whether the merger caused the removal of a potential competitor in the SMME FTTB market segment. The European Commission's Horizontal Merger guidelines,¹⁷ in determining mergers with potential competitors holds that such merger will most likely cause a significant lessening of competition in instances where (i) the potential competitor already exert a constraining influence and (ii) there is a lack of other potential competitors which could maintain competitive pressure after the merger.¹⁸

[76] To the first requirement, we note here that it was Vumatel, the target firm, which was active in this segment in to which DFA, of the acquiring firm, was looking

¹⁵ Transcript p583 line 15- p584 line 5.

¹⁶ Transcript p586 lines 8-17.

¹⁷ European Commission: *Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings* (2004/C 31/03) P5 -18.

¹⁸ *Ibid* para 60.

to enter. No evidence was led to indicate that DFA's potential entry exercised any constraint on Vumatel in this market segment and *vice versa*.

[77] To the second element, if Vumatel's activity in the SMME FTTB market was ancillary to its FTTH business, it is of logical consequence that any FTTH provider could provide a similar competitive service. Additionally, it is apparent that any party active in the Enterprise FTTB segment would have the capability to offer SMME FTTB services, thus broadening the competition in such a segment even further.

[78] This led us to conclude that even if there was the removal of a competitor in the FTTB SMME segment as a result the proposed transaction, it was unlikely to result in a significant lessening of competition.

Removal of an effective competitor in the Metropolitan fibre backhaul market

[79] In assessing the unilateral effects, the Commission concluded that the merger would not lead to the removal of an effective competitor in the metropolitan fibre backhaul market.

[80] The Commission could find no evidence of Vumatel's potential entry into the market for the provision of backhaul services to third parties, finding that it only ever laid backhaul fibre for the purposes of self-service and that its current assessment is indicative of the fact that it would only be able to offer a small constraint on any incumbent metropolitan backhaul providers.¹⁹

[81] [REDACTED]

[82] [REDACTED]

¹⁹ CC Recommendations (note 12 above) p114 para 278.

[88] Turning then to the assessment of the broader strategy.

Can other FTTH providers source metropolitan backhaul from other sources?

[89] The Commission's answer, in short, is no. On the Commission's calculation, DFA commands shares of 30-35%, 25-30%, and 35-40% in Cape Town, Durban and Johannesburg respectively of the market for the provision of backhaul services. These percentages increase to 65-70%, 40-45% and 40-45% respectively if these backhaul services are defined as the provision of dark fibre only (recall that the provision of dark fibre refers to the installation of a fibre line which has not been 'lit' with traffic).

[90] In addition, the Commission provides a wealth of testimony from FTTH providers which indicate that the services provided by DFA are unrivalled by its supposed closest competitor, Telkom's Openserve, which does not offer the option to purchase 'dark fibre'.

[91] Octotel indicates that up to ■% of the backhaul it utilises is provided by DFA and Octotel's entire revenue is dependent on the backhaul ultimately procured from DFA.²⁰ It goes on to state that it is not commercially feasible for an entity of Octotel's size to self-fund the construction of metropolitan dark fibre backhaul capacity it requires for its FTTH services²¹ and that the City of Cape Town, on which Octotel relies for the remaining ■% of its backhaul, is not expanding its coverage any further owing to capital constraints.²²

Would the merged entity possess the incentive to engage in an input foreclosure strategy?

²⁰ Witness Statement of Mr. Rob Gilmour ('Mr. Gilmour witness statement') para 64.

²¹ Mr. Gilmour witness statement para 68.

²² Mr. Gilmour witness statement para 64. Corroborated by Exhibit B *Letter from T Bosman of the City of Cape Town's Telecommunications Branch R.E Provision of City telecommunications services* dated 12 July 2018.

- [92] To this question, the Commission's answer is yes. The Commission argues that in relation to current FTTH customers, DFA would have the incentive to increase the prices it charges for metropolitan backhaul. Recall that FTTH service providers have already invested large amounts of capital in their networks on the back of the DFA backhaul and it would be nearly impossible to switch backhaul service providers. In this context, if faced with a choice of switching backhaul providers or paying DFA's increased fee, customers of DFA would most likely pay the fee. The Commission accepts that whilst DFA could theoretically increase its prices pre-merger its incentive to do so is somewhat tempered by DFA's inability to provide the downstream FTTH services. This incentive would change post-merger because DFA would now have a downstream FTTH competitor in its stable.
- [93] Regarding future FTTH providers entering new geographic markets, the Commission advances that the post-merger entity would have the incentive to refuse service to FTTH providers which compete with Vumatel, opting instead to enter the 'greenfields' geographic areas to the benefit of Vumatel only.
- [94] The Commission thus concludes that the post-merger entity would have both the ability and incentive to engage in a foreclosure strategy and thus the merger would result in a significant lessening of competition. This conclusion is disputed by the merging parties who launch a wide array of counter arguments to the Commission's conclusions.
- [95] However, given that the merging parties tendered conditions in the merger and these were accepted by the Commission, it is not necessary for us to make a determination on the presence of an SLC derived from this vertical overlap, but rather whether we could approve the merger on the basis that the conditions proposed would address the potential harm identified.
- [96] When viewing the issue through this paradigm, it is important to examine several other extraneous effects that the Commission and Octotel submitted would arise from the overlap.

[97] This first was referred to as the 'first mover advantage concern' and had two components. The first component was that the proposed merger would enable Vumatel to have advance warning of DFAs backhaul service rollout which would provide downstream player Vumatel, with a first mover advantage relating to new areas. The second component was that Vumatel, through DFA, would have access to the planned FTTH rollout of its competitors which had approached DFA to provide backhaul services. This, on the Commission's version, would allow Vumatel to enter new areas ahead of their competitors.

[98] [REDACTED]

[99] In his witness statement, Mr. Gilmour described the FTTH market historically operated as a 'winner takes all' market, at least in respect of individual suburbs. The Commission aligned itself with this characterisation.²⁴

[100] The Tribunal heard that there is a high input capital cost required to lay fibre infrastructure. This fact combined with the diminishing return of being the second FTTH provider in an area meant that FTTH suppliers generally avoid overbuilding the other's network as far as possible.

[101] Adding to the increased input capital cost required, Octotel submitted that many municipal authorities have a 'dig once' policy, which would prevent a second, trenched provider entering a localised geographic area.²⁵

[102] This does not mean that firms never lay down fibre in areas where there is an existing provider or where barriers of cost and time could be reduced. The industry term utilised to this kind of entry is 'overbuilding'. In general firms would choose to overbuild in areas where they face weak competition. [REDACTED]

²³ Transcript p85 line 20- p86 line 3.

²⁴ CC Recommendations (note 11 above) p130 para 340.

²⁵ Mr. Gilmour witness statement para 74.

[REDACTED]

[103] We did however come to understand that these were the exceptions, rather than the norm in this market and that generally firms would look to strengthen any advantage they had to be the first movers in a geographic area.

[104] The first mover advantage concern raised by the Commission and Octotel was that the merger would result in a situation in which Vumatel would acquire knowledge of DFA's future roll-out plans and accordingly pre-empt its FTTH competitors in rolling out FTTH infrastructure in the relevant areas. Vumatel could also pre-emptively rollout FTTH networks in new areas on the assurance that DFA would extend its metropolitan backhaul fibre network to connect those areas in due course. In this manner, so the concern went, Vumatel could execute a "land grab" of new rollout areas before it would be commercially feasible for competitors to contest those areas and thereby ensure a dominant position in those markets.

[105] A corollary of the first mover advantage (and land grab) concern was the issue of information sharing raised by Metro Fibre Network (MFN), a FTTH provider competing with Vumatel and Octotel. [REDACTED]

[REDACTED]

²⁶ Transcript p89 lines 15-20.

[REDACTED]

[REDACTED].²⁷

[106] A related and second concern raised by market participants is that the combination of CIVH's large balance sheet and the ability to source cheap backhaul through vertical integration will confer an unassailable advantage onto the merged entity. This unassailable advantage would enable the merged entity to easily assume risk and move into areas in which uptake, i.e. the percentage of houses passed by the network which are willing to access the network, is much lower than any of its competitors.

Do the conditions tendered address the concerns raised?

[107] To remedy the potential SLC brought about by the vertical overlaps between DFA as a metropolitan fibre backhaul provider and Vumatel as an FTTH supplier, the merging parties tendered what has been referred to an 'open access' condition.

[108] The condition primarily obliged the merged entity to (i) not refuse access to DFA services to third party FTTH suppliers; and (ii) provide such services on terms and conditions which are transparent and non-discriminatory in terms of price and other terms. If services were refused, written reasons would need to be provided. The duration of the condition tendered was 5 years. In addition, the conditions required the merged entity to publish all relevant information regarding the expansion of its fibre infrastructure network expansion programmes relating to DFA services on its website at least twice weekly, without favouring its own entities.

[109] Importantly, these conditions contained a qualifier that the merged entity was not obliged to provide open access services to a competitor if said competitor *"refuses to offer equivalent access, infrastructure or services to the merged*

²⁷ [REDACTED]

entity on a reciprocal basis where it is objectively, reasonably capable of doing so.”

[110] The Commission was of the view that the conditions adequately addressed the concerns arising from the first vertical overlap. Octotel did not.

[111] Octotel argued broadly that behavioural conditions were inadequate to address the structural market changes resulting from the merger and persisted with its request that we prohibit the transaction.

[112] More specifically to the concerns arising from the vertical overlap, Octotel argued that the five-year time period was inadequate to address the concern; that the conditions failed to address the first mover advantage of the merged entity; that the reciprocity required of firms accessing DFA services would render such toothless; that compliance with each of the conditions could not adequately be monitored; that the conditions did not address the potential for information exchange; and the failure of the conditions to address the refusal to provide services.

The adequacy of behavioural conditions

[113] The Tribunal, in the context of imposing behavioural conditions to vertical mergers presenting foreclosure concerns has indicated that:

“in most cases it is preferable to have remedies that address structure rather than conduct. But there are, in our view, circumstances where the presence of certain market factors together with conditions imposed by the antitrust authorities will effectively address specific competitive concerns. These are circumstances where either divestiture or prohibition might be too drastic a remedy and where other remedies exist that could address the anti-competitive effects adequately without imposing an unreasonable burden on the Competition authority to monitor.”²⁸

²⁸ *Astral Foods Limited and National Chick Limited Tribunal Case number 69/AM/Dec01 Judgement dated 20 February 2003 p11.*

[114] The Act gives the Tribunal broad powers to perform a balancing act as to whether to approve or prohibit a merger.²⁹ These broad powers should be exercised on a case-by-case basis.³⁰

[115] The merging parties submitted that they were willing to tender conditions to address the competition concerns raised by the Commission and market participants but that due consideration ought to be given by the Tribunal to the potential pro-competitive gains and the significant public interest gains that would arise from the merger. [REDACTED]

[REDACTED]

[REDACTED].³¹ Further the presence of alternatives, the ability of the industry to adapt and innovate, and the presence of long-term contracts between current FTTH providers and DFA, which regulate the service level provision of DFA go some way to softening the concerns raised by Octotel.

[116] The question thus to be considered was whether the competition concerns raised were addressed by the conditions proposed. When examining the conditions, we found that principally, they did. Ensuring open access provisions maintained the pre-merger status quo of DFA, insulating its business practice from the altered incentive structures of the mergers.

[117] However, we did note shortcomings in the duration of the proposed conditions and the reporting obligations contained therein. Such shortcomings were not however insurmountable and in our analysis of Octotel's concerns below, we detail how the conditions were amended to resolve the issues.

²⁹ Section 12A.

³⁰ *Imerys South Africa (Pty) Ltd and Another v Competition Commission (147/CAC/Oct16, IM013May15) [2017] ZACAC 1 (2 March 2017) para 42.*

³¹ Transcript p364 lines 9- 15:

[REDACTED]

Duration of the condition

[118] In motivating the conditions, the merging parties and Commission advanced that the industry in which this merger takes place is a new, dynamic one which has seen rapid expansion and growth and is burgeoning with potentially new and disruptive technology in the form of 5G.³²

[119] Octotel was more circumspect in its description of the landscape. Mr. Gilmour testified that in his view the fibre wars were only in their infancy, with rollout of fibre networks expected to take at least 10 years.³³ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

.³⁵ The problems besetting spectrum availability have become public knowledge with mobile operators lamenting the impact of delays in licensing on their ability to provide affordable high speed data services.

[120] In our view, the provision of DFA services are vital to the roll out of a network. Whilst it may be true that there has been a rapid expansion of such networks, it cannot be extrapolated that the necessity of backhaul fibre will be rendered nugatory in the next 5 years. As to the entrance of 5G technology, such an occurrence is too uncertain and its impact too unpredictable on the necessity of fibre that we did not find it a persuasive reason to limit the imposition of the condition.

[121] How long then should the period be? The Commission argued that an indefinite condition would prove overly burdensome on them to enforce. On this point, we agreed. Once DFA has entered into a contract for the provision of backhaul

³² Transcript p8-9.

³³ Transcript p328 lines 7- 15.

³⁴ Transcript p92 line 15- 93 line 7.

³⁵ DFA presentation *Project Peppermint Crisp- Board discussion material* p323 of Merger Record.

to an FTTx³⁶ service provider, it would expend a large amount of capital to place backhaul fibre along a route with the FTTx service provider's POP at the end of such route. We are comforted that this capital expenditure and the specificity of the destination would somewhat constrain DFA in terminating contracts with the relevant FTTx service providers.

[122] The impact of the above on the duration of the condition is that the condition imposed on open access to backhaul should protect FTTH providers for as long as it is predicted that the roll out of fibre networks will take place. Considering the development of the fibre network thus far and the characteristics of the industry, we found a 10-year period to be appropriate.

First mover advantage

[123] The merging parties and Commission sought to address the concerns relating to vertical foreclosure and first mover advantage through two conditions. The first obliged the merged entity to publish all relevant information about its fibre infrastructure network expansion at least twice weekly without providing this information to its own FTTH or ISP entities prior to publication.

[124] The second obliged the merged entity to use any competitively sensitive information solely for the service of the third party and to ensure that the respective planning departments of DFA and Vumatel will not be integrated with one another to ensure that no competitively sensitive information is shared.

[125] Octotel was not satisfied. It argued that the conditions were unenforceable and did little to remedy the concern because there may well be instances where Vumatel learns of DFA's plans before the rest of the market.

[126] In our view, both these concerns were not sufficient to warrant the prohibition of the merger. Whilst it may be that the merged entity may seek to flout the conditions, through verbal communications or other bad faith actions, this will still amount to a contravention of the conditions of the merger and may prove

³⁶ Recall that FTTx is a generic term used to indicate either FTTH or FTTB services.

grounds to unbundle the merger. That there exists a potential for firms to breach the conditions does not militate against the imposition of conditions, nor have we been provided any evidence to indicate that there will be a strategy of flouting the imposed conditions moving forward.

[127] We are comfortable that, on our reading of the conditions, the two clauses sufficiently address the concerns from third parties that DFA will use information gained from Vumatel's competitors to the benefit of Vumatel. These conditions thus sufficiently neutralised the first mover advantage concern as it relates to the competition concerns arising from the overlap.

Carve-outs

[128] The merging parties presented two clauses which could conceivably operate to carve out certain instances from the application of these conditions. [REDACTED]

[REDACTED]

[REDACTED] We agreed with this carve-out in principle but noted that the originally proposed threshold at the beginning of the hearing was higher than that ultimately proposed by the merging parties and accepted by the Commission at the end of the hearing.

[129] The second carve-out was that the open access provisions would not apply to a competitor of the merged entity which refused to offer equivalent access, infrastructure of services to the merged entity on a reciprocal basis where it is objectively, reasonably capable of doing so.

[130] The purpose of these conditions, so it was explained by Mr. Mulder of DFA was to ensure that in the instance where a purchaser of backhaul fibre sought the provision along a certain route along which the purchaser may have existent

infrastructure, DFA could reasonably require access to that route fibre and would not be expected to lay out fibre along a route which a competitor to Vumatel may have existent infrastructure.³⁷

[131] We must thus be clear that this condition should not be used as a cudgel by DFA to beat away a smaller competitor of Vumatel which may not have the equivalent infrastructure to DFA.

[132] Noting this clarity, we found the second carve out to be unobjectionable.


Monitoring provisions

[133] Clause 3.3 of the conditions included two components. The first was a boiler plate clause excluding the obligation to provide open access services to any entity which refuses or fails to adhere to objectively reasonable commercial terms. The second was the clarification that nothing in the conditions shall be interpreted to create an obligation on the merged entity to build infrastructure or make investments outside of the its normal course of business to facilitate access to specific third parties.

[134] Whilst simple in principle, the breadth of the two 'trigger' phrases for the application of the exclusions - 'objectively reasonable commercial terms' and 'normal cause of business'- conceivably created some difficulty in monitoring and enforcement. The same could be said for the phrasing of 'objectively, reasonably capable of doing so' the phrase used in the second carve out discussed above.

³⁷ Transcript p462 lines 2-18:

MR QUILLIAM: ... It is in the instance where, according to the condition a competitor refuses access to Vumatel, then in terms of the condition, DFA is at large to refuse that FTTH provider access to its infrastructure, if I am understanding you correctly. Would that instance occur in your mind and how would that be resolved that the refusal is to Vumatel, what would DFA then do in refusal of access to the competitor of Vumatel?



[135] Because of the danger that this vague language might weaken the conditions we decided to impose an improved monitoring condition which can be found in clause 8 of the conditions. This obliges the merged entity to provide information to the Commission should there be a complaint of failure to abide by the conditions. For instance, clause 8.4.6 requires the merging parties to provide, on an annual basis, a report which details the reasons as to why its services may have been refused to a party.

[136] This report should adequately assist the Commission in facilitating an effective monitoring over the implementation of the conditions.

Conclusion on the first vertical overlap

[137] The open access provisions tendered adequately addressed the competition concerns raised by the vertical overlap presented by the proposed transaction. Whilst there are carve outs of the application of such open access provisions, the carve outs are adequately specific and the monitoring regime constructed by the conditions adequately ensures that such provisions are not exploited.

Vertical relationship between Vumatel as a provider of FTTH services and SADV as an ISP

[138] The second vertical overlap investigated by the commission was that between Vumatel as an FTTH provider and SADV as an ISP. The commission found that Vumatel would have the ability and incentive post-merger to favour SADV as its designated ISP. The Commission found that Vumatel would have the ability to foreclose third party ISP's in areas where no alternative FTTH providers were active and thus, for the same reasoning, read with the relevant changes described in paragraphs [92] to [106] above, the Commission found that the merging parties were incentivised to pursue a foreclosure strategy.

[139] To remedy these concerns, the open access conditions discussed above were tendered to apply not only to Backhaul-to-FTTH stage of the value chain, but also in the FTTH-to-ISP stage of the value chain. Given the extensive discussion above, there is no need to further address how these conditions

resolved the concerns, save to indicate that the analysis above would apply *mutatis mutandis* to the concerns related to this vertical overlap.

- [140] We thus found that whilst there was concern around the vertical overlap, the conditions, as amended, sufficiently addressed such concerns.

Third vertical overlap: Dartcom, as a supplier of fibre optic related products and Vumatel

- [141] The third vertical overlap assessed was that between Vumatel as an FTTH provider and Dartcom, a provider of fibre related equipment. The concern ran that NewGX, which also controls CIVH would have the ability and incentive to foreclose competitors of DFA for the supply of manhole covers and fibre ducts.

- [142] This concern was previously assessed in the New GX /Dartcom merger.³⁸ In that merger, the Commission imposed a condition that Dartcom would supply all customers on a non-discriminatory basis until [REDACTED]. This condition has been extended by these conditions for two years after the implementation of the merger or until such a time as New GX no longer controls Dartcom.

Public interest

- [143] The merging parties submitted that one of the positive externalities of the merger would be that Vumatel, with the extended cash backing of CIVH would have the ability to further expand into previously underserved and low-income areas.

- [144] This entrance manifested in two undertakings related to the public interest. [REDACTED]
- [REDACTED]
- [REDACTED]

³⁸ Transaction between New GX and Dartcom, notified to the Commission under case number 2016Oct0554 and approved on 19 January 2017.

[145] In addition, the merging parties tendered to provide access to Vumatel services to every school that it passed.

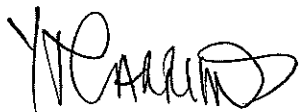
[146] Whilst these undertakings were initially put up informally, the Tribunal probed whether these conditions could be formalised in the way of public interest conditions. The merging parties obliged, and we thus accepted the conditions as tendered.

[147] It is notable that these public interest conditions seek to serve the community in which the merged entity will operate. They provided additional comfort to the Tribunal that the merger should be approved subject to conditions which thus permeated our assessment of the competition concerns.

Conclusion

[148] In light of the above, we concluded that whilst the transaction presented a number of competition concerns, these were adequately addressed by the conditions tendered. Furthermore, the positive public interest undertakings made by the merging parties, to roll out access to schools and low-income communities, are substantial in nature and would not be achieved without the merger. Thus, although the conditions required to ameliorate possible anticompetitive effects have needed to be complex and will require careful monitoring, this burden is justified by the extent of the public interest gain,

[149] We thus approved the merger subject to the conditions provided.



Ms Yasmin Carrim

28 August 2019

Date

Mr. Norman Manoim and Mr. Andreas Wessels concurring.

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