

**COMPETITION TRIBUNAL OF SOUTH AFRICA**

**Case NO: 81/LM/Jul08**

In the matter between

**Mobile Telephone Networks Holdings (Pty) Ltd** Primary acquiring firm

And

**Verizon South Africa (Pty) Ltd** Primary target firm

And

**Allied Technologies Limited** Intervening party

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Panel : N Manoim (Presiding Member); U Bhoola (Tribunal Member) and Y Carrim (Tribunal Member)

Heard on : 08 January 2009

Decided on : 08 January 2009

Reasons Issued : 06 March 2009

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**Reasons for Decision**

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**Approval**

[1] On 08 January 2009 the Competition Tribunal issued a Merger Clearance Certificate unconditionally approving the merger between Mobile Telephone Networks Holdings (Pty) Ltd and Verizon South Africa (Pty) Ltd. The reasons appear below.

**Parties**

[2] The primary acquiring firm is Mobile Telephone Networks Holdings (Pty) Ltd ("MTN"), a wholly owned subsidiary of MTN Group Ltd ("MTN Ltd").

[3] MTN Ltd is a public company which is listed on the JSE and does not have a controlling shareholder. The shareholders holding in excess of 5% of MTN Group's issued share capital are: The Public Investment Corporation ("PIC"), which holds a 13.27% interest; Newshelf 664 (Pty) Ltd; which holds a 13.06% interest; and Lomard Odier Darier Hentsch & Cie (M1 Limited); which holds a 9.82% interest.

[4] MTN Ltd controls a number of subsidiaries, including but not limited to MTN Holdings, and MTN Management Services (Pty) Ltd. MTN Holdings in turn controls a number of subsidiaries three of which are relevant for the purposes of the current transaction namely Mobile Telephone Networks (Pty) Ltd (“MNO”); MTN Service Provider (Pty) Ltd (“MTN SP”) and MTN Network Solutions (Pty) Ltd (“MTN NS”).

[5] MTN is a multinational telecommunications provider and offers services in the Information Communication and Technology (“ICT”) sector. It provides communications, cellular network access and business solutions. MTN is a mobile network operator that provides mobile voice and data services. MTN SP is a service provider to the MTN network. MTN NS provides “managed network services” (“MNS”) and internet access.

[6] The primary target firm is Verizon South Africa (Pty) Ltd (“Verizon”), a company registered in accordance with the laws of the Republic of South Africa.<sup>1</sup> The shareholders in Verizon are Verizon European Holdings Ltd (“VEHL”)<sup>2</sup> (69.38%); Clidet No 554 (Pty) Ltd (“Clidet”) (30.07%) and Fox Court Nominees Ltd (“Fox Court”) (0.1%). VEHL is a company registered in accordance with the laws of England and Wales.<sup>3</sup> Verizon South Africa offers the following products and services in the South African market: Voice over Internet Protocol (“VoIP”) services; data and IP services; internet access; network security and IT infrastructure services.

[7] The intervening party in this merger is Allied Technologies Ltd (“Altech”), an investment holding company involved in the telecommunications, multi-media and information technology industries. Altech’s holding company is Allied Electronics Corporation Ltd (“Altron”) which is incorporated in South Africa. Altech is involved in the design, development, convergence, manufacture, installation and distribution of telecommunications equipment, multi-media systems, IT solution, electronic components, cellular telephony and industrial electronic products.

## **Transaction**

[8] In terms of the proposed transaction, VEHL and Fox Court are selling their respective interests in Verizon SA to MTN. Pursuant to the proposed transaction, Clidet will also sell its

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<sup>1</sup> Verizon was previously known as UUNet (SA) (Pty) Ltd. UUNet changed its name on 23 January 2006 to Verizon South Africa (Pty) Ltd.

<sup>2</sup> Verizon European Holdings was known as MCI European Holdings Ltd until 20 March 2006.

<sup>3</sup> Verizon SA controls the following subsidiaries in South Africa and the African region: Verizon Namibia (Pty)Ltd; Verizon Botswana (Pty)Ltd; Moneyline 445(Pty)Ltd; Satellite Data Networks Ltd; Satellite Data Networks (Pty) Ltd; Satellite Data Networks (Ghana) Ltd; Satellite Data Networks(Tanzania) Ltd; UUNet Uganda Ltd; UUNet Nigeria Ltd; UUNet Communications Ltd; UUNet Kenya Ltd and UUNet Zambia Ltd.

shareholding to MTN at which point MTN will assume full ownership and sole control of Verizon SA.

### **Rationale for the Transaction**

[9] The acquiring firm submits that there has been a worldwide trend of expanding global data networks driven by customer demand for increased connectivity. In line with this trend MTN's strategy is to provide integrated communications solutions to its customers in its market of operation. MTN further submits that while MTN NS has established a small but meaningful presence in South Africa corporate data market, pure organic growth is not enough to achieve critical mass in that market to effectively compete. MTN argues that the proposed acquisition is aligned to this strategy and is expected to bolster the scale and product offering of MTN NS while strengthening its regional presence.

[10] Verizon Business is focussed on the global managed network services market for large multinational corporations and considers Verizon SA's customer base to lack the necessary scale to be consistent with Verizon's global focus.

### **Background to the hearing**

[11] This merger was filed with the Commission as a large merger on 8 July 2008. During its investigation the Commission had received a number of objections, Altech being one of the objectors. The Commission nevertheless recommended that the merger be approved without conditions on 14 October 2008.

[12] A pre-hearing in this matter was held on 22 October 2008, and the objectors who had raised concerns during the Commission's investigations were invited to attend. All objectors, except Altech indicated that they did not wish to participate further in the merger proceedings.

[13] At that pre-hearing Altech indicated it wished to intervene in the merger proceedings. A timetable was agreed to by the parties which *inter alia* provided for dates for the filing of the intervention application, discovery affidavits and witness statements. The merger was set down for hearing from 8 to 14 January 2009. On 1 December 2008, Altech brought an application before this Tribunal for leave to intervene and participate in the merger proceedings in terms of section 53(1) (c) (v) of the Competition Act 89 of 1998 ('the Act')

read with rule 46 of the Competition Tribunal Rules. The application to intervene was opposed by the merging parties and was heard on 9 December 2008. On 10 December 2008 the Tribunal granted Altech leave to intervene on limited grounds and reserved the issue of costs.

[14] By all accounts preparations for the hearing were on track and the parties had on the face of it complied with the timetable. However on 7 January 2009, a day before the hearing, Altech withdrew its participation in the merger proceedings. It provided no reasons for its withdrawal from a matter which it had, until that point, claimed would cause serious harm to it and to competition in the telecommunications industry. Altech's intervention and its subsequent withdrawal on the eleventh hour are dealt with more fully in our reasons dealing with the costs order granted by us against Altech.<sup>4</sup> Suffice to say that Altech did not pursue its initial grounds of objection, did not file its witness statements under oath as directed by this Tribunal and did not appear before this Tribunal at the hearing of the matter. In these reasons we nevertheless deal with the alleged competition concerns raised by it.

[15] This merger takes place against a background of significant regulatory developments in the telecommunications industry. In these reasons we do not traverse in great depth the implications of the recent de-regulation of the Value Added Network Services ("VANS") industry by the Ministerial determinations of 2005<sup>5</sup> but note that since then the issue of whether or not VANS could self provide has been resolved in favour of VANS by the High Court. Subsequent to that development the Independent Communications Authority of South Africa ("ICASA") commenced its process of converting current licenses issued under the Telecommunications Act of 1996 as amended into new order licenses envisaged in the Electronic Communications Act 36 of 2005 ("ECA"). At that time ICASA seems to have envisaged granting a limited number of Individual Electronic Communications Network Services ("i-ECNS") licenses to VANS licensees (who would be roughly equivalent to Electronic Communications Service ("ECS") licensees under the ECA) through a competitive bidding process. However Altech and its fellow applicants succeeded in obtaining a High Court ruling to the effect that all current VANS licensees are entitled to have all their existing VANS licences converted into i-ECNS licences and Individual Electronic Communications Service ("i-ECS") licences under the ECA. ICASA amended its process and gave notice that it intended to convert all current VANS licenses into ECS licenses and to grant all these

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<sup>4</sup> See *Altech Technologies Limited and Mobile Telephone Networks Holdings (Proprietary) Limited; Verizon SA (Proprietary) Limited; The Competition Commission; In re the large merger between: Mobile Telephone Networks Holdings (Proprietary) Limited (acquiring firm and Verizon SA (Proprietary) Limited (target firm) Tribunal Case No 81/LM/Jul08*

<sup>5</sup> See *Telkom/BCX* for an overview of Telecommunications Regulatory Reform

licensees i-ECNS licences. Subsequent to that decision and at the time of the writing of these reasons ICASA granted over 500 ECS and i-ECNS licenses to operators and VANs licensees alike.<sup>6</sup> We deal with these developments in more detail later.

[16] The merger also takes place in the context of the industry experiencing rapid changes. In general telecommunications infrastructure markets are characterised by high barriers to entry due to high sunk costs and regulatory requirements. In addition, the industry in South Africa has until now been characterised by extremely high regulatory barriers the outcome of which has been, until recently, an industry dominated by Telkom, with limited competition in the VANs and mobile sectors. Regulatory reform commenced slowly, in piece meal fashion, with the Telecommunications Amendment Act, which provided for the licensing of a competitor to Telkom, and then rapidly gained ground in 2005 through the Ministerial determinations resulting in the de-regulation of the VANs industry. Finally the adoption of the ECA led to a frenzy of optimism which has now culminated with ICASA issuing more than 500 ECNS licenses. While it remains to be seen whether all of this translates into increased competition and lower telecommunications costs for the South African consumer, regulatory reform to date has certainly reduced the extent to which licensing constitutes a barrier to entry. The merger is also taking place against the backdrop of significant structural changes in the industry– it comes some two years after Neotel's entry in the market, in the wake of Vodacom and MTN committing to the roll out fixed line infrastructure,<sup>7</sup> in the midst of various initiatives such as the Dark Fibre Africa (“DFA”) project and in the shadow of the Telkom/Vodacom unbundling.

[17] A peculiar nature of the telecommunications industry is that it is technology driven and is usually regulated by sector regulations. This poses unique challenges for product market definition, not least of these being the acronyms and technical jargon associated with it. For ease of convenience we have attached a glossary of terms in annexure “A” to these reasons.

### **Summary of concerns**

[18] During the Commission's investigations the concerns raised by competitors and industry participants related to a number of horizontal and vertical issues and the avoidance of regulation.<sup>8</sup> However large customers of the merging parties expressed support for the

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<sup>6</sup> See GG No.31803 16 January 2009

<sup>7</sup> See <http://www.busrep.co.za/index.php?fArticleId=4026244> last visited on 26 February 2009

<sup>8</sup> See Commission record pages 30-33

merger arguing that it would be pro-competitive in a market dominated by one or two large players.

[19] Altech was the most vociferous in its objections to the merger. This came as no surprise as it emerged later in the proceedings that Altech had unsuccessfully competed with MTN in its bid for the acquisition of Verizon. Some of the concerns raised by Altech in the course of the Commission's investigation were shared by others such as Internet Solutions and Vox Telecom. At the request of Altech, RBB Economics had prepared a preliminary report outlining potential competition concerns raised by the vertical components of the transaction.<sup>9</sup> This report was used in support of Altech's application for intervention.

[20] At that stage of the proceedings the competition concerns included several theories of harm, consisting of both horizontal and vertical concerns. The horizontal concerns pertained to the markets in which the merging parties' activities overlapped. It was also alleged that the merger would lead to a lessening of competition in the upstream market for the provision of network infrastructure because Verizon was a potential entrant into and future rival to MTN in this market. In relation to the vertical implications of the proposed merger it was argued that the merger will enhance MTN's ability to leverage its dominance in the upstream provision of wireless data into the downstream VANs and MNS markets. This would be done it was alleged, by a combination of tying, bundling and margin squeeze strategies. An additional concern raised by Altech at the time of intervention was that MTN sought, through this merger to increase the price of voice over data networks (VoIP) so as to discourage its use on MTN networks.

[21] At the time of preparation of trial and after witness statements had been filed, it became apparent that Altech's concerns had migrated away from those that it had raised during the Commission's investigations and in the intervention application and were now limited to a concern around Verizon's international gateway for Voice Over Internet Protocol ("VoIP"). We deal with this later in our reasons.

### **Competition Analysis**

[22] The Commission's assessment focussed on five markets in which there are horizontal overlaps and three markets in which there are potential vertical or conglomerate effects. The horizontal markets identified by the Commission consisted of Internet Protocol

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<sup>9</sup> See RBB report 22 August 2008.

("IP") multi-protocol layer switching ("MPLS") virtual private networks ("VPNs"), VOIP services, data hosting services, wholesale internet access services and retail business internet access services. The Commission further identified other relevant markets namely mobile voice telephony services; mobile data services and end to end leased lines in which the merging parties could potentially compete.

### **Relevant geographic market**

[23] The merging parties submit that both MTN and Verizon SA provide services throughout South Africa and Africa. They therefore consider the markets to be at least national. The Commission did not conclude on the geographic market definition but analysed the transaction from the perspective that the relevant markets were national. We accept that a national geographic market, which would necessarily be narrower than a regional or continental market, is an appropriate basis to assess any competition effects of this transaction.

### **Horizontal Analysis**

#### ***MNS, MPLS/IP VPN Services***

[24] Large businesses, government and other organisation which have a multi-branch footprint rely on a telecommunications network for internal communications. Managed network services are services rendered by service providers over these networks to enable inter branch communication. Prior to 2005, most of these services were provided over Wide Area Networks ("WANs") by VANs<sup>10</sup> providers. Usually WANs comprise of enterprise owned private networks where the enterprise obtains the leased lines comprising of the network directly from Telkom and the managed services are rendered by another service provider. WANs utilised legacy non-IP technology which includes technology such as Frame Relay, ATM or x.25. VPNs rely on MPLS/IP technology. However since the de-regulation of the VANs industry in 2005, the WAN model has started migrating to a shared notion of a private network utilising IP technology, referred to as VPN.<sup>11</sup> VPNs make use of a shared data network that the enterprise's sites can link into through a point of presence ("POPs") of the shared data network. An enterprise need no longer obtain its own telecommunications

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<sup>10</sup> This was a licence category under the Telecommunications Act, roughly equivalent to the ECS licence category under the ECA.

<sup>11</sup> Often described as moving from a strings to a cloud model.

infrastructure. It can now obtain an entire *communications service* from a service provider who owns the infrastructure and is able to provide the managed services over that infrastructure.<sup>12</sup> .

[25] The merging parties submitted that the relevant market definition for this transaction was the MNS market rather than a narrow VPN market. They argued for an MNS market which would include a number of technologies including MPLS, x.25 (Telkom's Saponet-P product), Frame Relay and ATM. Excluded from this definition would be WANs. The Commission's investigations on the other hand suggested that a large number of industry players see MPLS/IP VPN as a separate market. Even though the technologies may address different requirements of a customer,<sup>13</sup> Frame Relay and ATM are seen as layer 2 technologies (legacy) and MPLS as a layer 3 technology. Migration from legacy technologies such as Frame Relay and ATM is occurring only in the direction of IP technology and there was minimal demand side substitution between legacy technology and MPLS VPNs. A new entrant into the market is unlikely to consider implementing Frame Relay or ATM.

[26] From a supply side perspective, the Tribunal has previously stated that in identifying a MNS *services* market, there may be sufficient supply side substitution between VPN and WANs services to suggest a common market.<sup>14</sup> The merging parties disagreed with this approach arguing that the skills set required for managing an IP network (VPN), seen as level 3 services, were different from those required to manage WANs, seen as level 2 services. However there is no need for us to decide this issue conclusively since we have evaluated the merger on the narrow market definition of MPLS VPN rather than the broader MNS market.

[27] The Commission also considered whether there was any supply side substitution between MPLS VPN and 1st tier internet access providers. First tier internet service providers provide data services to corporate and large enterprises over IP fixed lines which they lease from telecommunications operators such as Telkom.<sup>15</sup> The reason for the investigation lies in the fact that MPLS VPNs and internet service provision are both IP based. Hence, it is assumed that first tier internet service providers, because of their knowledge of managing an IP network, would have the requisite skills set and ability to build and offer the MPLS VPN more easily. The Commission concluded that there were some

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<sup>12</sup> For a fuller description of the WAN and VPN market see *Telkom/BCX*

<sup>13</sup> For example Frame Express provides a service on copper wire of up to 2mpbs and ATM a service over optic fibre of speeds greater than 2mpbs,

<sup>14</sup> See *Telkom/BCX* paragraph 134 page 42

<sup>15</sup> See below for a fuller discussion of internet service providers



indications of supply-side substitution between these two markets but that on either market definition it found that there was no lessening of competition.

**Table 1: Commission's estimates of market shares: IP/MPLS VPN services, 2007**

	Revenue (R Million)	Market Share
Internet Solutions	236.0	40.1%
Vox Telecom	3.8	1.6%
AT&T	64.4	11.0%
Telkom	192.7	32.8%
<b>MTN NS</b>	<b>44.7</b>	<b>7.6%</b>
<b>Verizon</b>	<b>22.0</b>	<b>3.7%</b>
Gateway	15.5	2.6%
Gijima AST	9.0	1.5%
Total Market ( excluding resellers)	588	
HHI pre-merger	2886	
Change in HHI	57	

Source: Commission's calculations based on responses to Commission's questionnaire

[28] On the basis of the narrow MPLS VPN market definition the merged entity will have a post merger share of approximately 12%. While the market is concentrated with a pre-merger HHI of 2886, the change in HHI is relatively low at 57.

**Table 2: Market shares in combined IP/MPLS VPN and internet access markets, 2007**

	<b>Revenue (R Million)</b>	<b>Market Share</b>
Internet Solutions	743.0	29.1%
Vox Telecom	145.3	5.7%
AT&T	75.4	2.9%
Telkom	1162.1	45.4%
<b>MTN NS</b>	<b>137.7</b>	<b>5.4%</b>
<b>Verizon</b>	<b>294.0</b>	<b>11.5%</b>
Total	2557.6	
HHI pre-merger	3111	
Change in HHI	124	

Source: Commission's calculations based on table 4 and 9 of the Commission's report

[29] Again the market on this table appears highly concentrated and the change in HHI is significant. However the concentration analysis needs to be seen in context. The merged entity will be the third largest provider of these services in South Africa enjoying a post merger market share of approximately 17%. However the relative market position of the merged entity remains unchanged since Verizon was the third largest player in the market prior to the merger – relative to the two largest players, Telkom and IS, it is still post merger a small number three.

[30] Apart from the competition the merged entity will continue to face from the two large players it still faces competition from established players such as AT & T and GijimaAST. Missing from the Commission's table, and hence why the concentration levels may seem more alarming than market reality suggests, are the shares of new entrants such as Neotel and Vodacom Business.<sup>16</sup> It would be appropriate to note here that since our decision in

<sup>16</sup> Although the Commission did not reflect this in its table, press reports confirm that Neotel entered the MNS market in 2008.

*Telkom/BCX*, almost two years ago, Neotel has gained a foothold in the MNS market and has launched both its wholesale and retail businesses. While the Commission did not reflect any market shares for Neotel and Vodacom Business, it confirmed through a survey of the players in the market that both Neotel and Vodacom Business, despite having entered the market recently, were seen as significant potential competitors.<sup>17</sup>

### ***Fixed location including VOIP***

[31] Voice over IP (VoIP) is a voice service that can be offered over data lines but is distinct from the provision of a data network itself. VoIP services may be provided over an enterprise WAN, bundled into a VPN offering or offered on their own. While VoIP relies on IP and packet switched networks, and is offered over data lines, it is identical to traditional voice services in that it shares the ability to make and receive calls at a “fixed location”. The merging parties argue that from a demand side, VoIP and traditional voice services would fall into the same market at a retail level.

[32] The Commission makes a distinction between VoIP services that are provided over an IP VPN which requires specific customer premises equipment and VoIP services such as those provided by Skype for retail consumers. In this merger we are concerned with the former. The Commission engaged in a cost comparison between VoIP and traditional voice concluding that while the variable cost of VoIP was lower than traditional voice for a business, the fixed costs would be substantially higher in that the business would have to obtain a VoIP capable PABX, and VoIP enable routers. Such costs could be anywhere between R20 000 and R1m depending on the size of the business. At the hearing Mr Brierley testified that VoIP was not yet a complete substitute for fixed line voice or mobile voice services because of the difficulties associated with quality. We return to this issue later in the reasons. However given that the relative percentage of voice over internet revenue as a fraction of total revenue for the merging parties is very small, this horizontal effect raises no competition concerns.<sup>18</sup>

### ***Data hosting services***

[33] The declining cost of bandwidth and the ability to utilise IP technology on shared networks (VPN) has also encouraged the use of off-site or outsourced data centres. Outsourced data hosting services allow an enterprise to share the cost of operating a data centre with a number of other enterprises. The data centre service provider can achieve

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<sup>17</sup> See Commission's recommendation page 24.

<sup>18</sup> Verizon's revenue was only R1.1m (0.26%) and MTN NS R2.2m (1.1%). See the Commission's report at page 24.

economies of scale by hosting a number of enterprises' data centres, off-site thus enabling savings to each of its customers. Hosting can be bundled with a VPN offering. However there are many hosting providers who do not offer VPN services although a small part of their service would be a very limited MNS service (managing the links between the centre and the client's premises). In our view data hosting services could be viewed as a separate market from the broader MNS market. The market consists of various kinds of hosting such as websites, applications (software) as well as basic or shared hosting, complex managed hosting and co-location. The merging parties relied upon a report prepared by BMI-T to estimate market shares of the merging parties based upon revenue excluding revenue for infrastructure and applications.

**Table 3: Market shares in market for hosting**

	<b>Revenue (R Million) 2007</b>	<b>Market Share</b>
Internet Solutions	165	25%
Mweb	56	9%
Telkom	54	9%
<b>Verizon SA</b>	<b>37</b>	<b>6%</b>
IBM	34	5%
Vox Telecom	33	5%
Hetzner Africa	17	3%
BCX	9	1%
Other	222	36%
<b>MTN ( part of "other")</b>	<b>11</b>	<b>2%</b>
<b>Total</b>	<b>619</b>	<b>100%</b>

Source: Genesis Report, based on "BMI-T, Internet Services Market Overview 2007"  
January 2008

[34] MTN NS' market share is included under "Other". The merging parties submitted that the revenue of R11m includes all hosting revenue and that the market share was overstated. Verizon's market share is estimated at 6%. The market is populated by one large player (IS) with a market share of 25% and a number of smaller players, the next largest of these being Telkom and MWeb with market shares of 9%. The change in HHI is a mere 20 points to 2080 and the combined market share post merger would be at the most 8%. Verizon was the fourth largest player in the market pre-merger but the merged entity retains that position post merger. The merged entity will continue to face competition from large players such as IS and a slew of smaller but established players such as Telkom, MWeb, BCX, Vox and IBM.

### ***Internet Access***

[35] Internet services can be seen to consist of a three tier value chain. The first tier consists of the telecommunications access portion which links the end-user to the ISP and is provided by telecommunications operators. The second tier is the internet connectivity component which allows the end user to surf the web, send and receive email and use other internet based applications such as Skype. This component is provided on IP networks. The third component includes retail services such as re-selling, billing and support. Genesis, on behalf of the merging parties, argued that a customer seeking internet access services requires their ISP to provide both wholesale and retail services, whether or not the former are provided directly by the ISP or purchased on the wholesale market. However the retail and wholesale components form complements along the value chain and are provided in distinct competitive settings – wholesalers will compete on an infrastructure basis as opposed to resellers who compete on a marketing basis. Wholesale internet access providers are called tier 1 providers. We accept that wholesale internet access providers and retailers are in distinct markets.<sup>19</sup>

### ***Wholesale internet access***

[36] The merging parties estimated market shares on the basis of revenues. Not included in the table above were players such as Sentech, Gateway, Neotel, BCX and other ISPs

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<sup>19</sup> See also in this regard *MWeb/Tiscali* Case No: 72/LM/Sep04.

such as MWeb who self provide certain elements of the wholesale internet connectivity services. In addition MTN NS largely provides internet services to MTN for the provision of retail mobile internet services and therefore was not seen as a substantial competitor in this market. Hence the market shares could be seen as an overestimation.

**Table 4: Genesis estimates of wholesale internet connectivity**

	<b>Revenue (R Million)2007</b>	<b>Market Share</b>
Telkom	R832	39%
Internet Solutions	R590	28%
<b>Verizon</b>	<b>R272</b>	<b>13%</b>
Vox Telecom	R207	10%
Vodacom	R128	6%
<b>MTN NS</b>	<b>R93</b>	<b>4%</b>

Source: Genesis report

[37] The Commission arrived at its own calculations of the relative market shares on the over-estimated revenues and concluded that Verizon had a market share of 13.6% and MTN NS 4.7%, assuming that MTN NS was competing directly in the wholesale market. On the worst case scenario, the merged entity would have a combined market share of approximately 19%. The Commission's calculations revealed that the merged entity would face competition from large players such as IS and Telkom and that it would still occupy third place in the market. Moreover the merged entity would face considerable competition from new entrants such as Neotel.

**Table 5: Commission’s estimates of market shares and HHIs for market for wholesale internet access, 2007**

	<b>Revenue (R Million)</b>	<b>Market Share</b>
Internet Solutions	507	25.4%
Vox Telecom	142	7.1%
Telkom	969	48.6%
<b>MTN NS</b>	<b>93</b>	<b>4.7%</b>
<b>Verizon</b>	<b>272</b>	<b>13.6%</b>
AT&T	11	0.5%
<b>Total</b>	1994	
HHI pre-merger	3269	<b>4%</b>
Change in HHI	127	

Source: Commission’s calculations based on responses to the Commission’s questionnaire

***Retail business internet access***

[38] The Commission estimated the market share accretion in this market to be relatively low with MTN NS having a pre-merger market share of 2.4% and Verizon 17.8%. The merged entity will continue to occupy fourth place in the market albeit with a slightly increased market share. However the merged entity will continue to face competition from existing players such as Telkom and Internet Solutions which remain considerably larger than the merged entity as well as from new entrants such as Neotel and Vodacom.

**Potential Competition in the upstream markets**

[39] In the markets discussed thus far the merger does not raise any substantial competition concerns. We deal now with Altech’s concern that the acquisition of Verizon will

result in the removal of a potential future entrant in the upstream infrastructure market (ECNS). The relevant test for potential entry has three essential components, namely that the potential competitor is likely to enter the market, would do so within a reasonable period of time and would enter the market on such a scale as to present a competitive constraint on the acquiring firm.<sup>20</sup> At the hearing of the application to intervene, Altech's counsel argued that the harm to competition envisaged by Altech in the upstream infrastructure market was analogous to the harm considered by this Tribunal in the *Telkom/BCX* merger in that the merger would result in the removal of credible potential competitor. The analogy however is misplaced. There are significant differences between that merger and the one under consideration, not least of these being the dynamic regulatory framework in which the transaction is occurring.

[40] Altech's arguments rest on the recent developments which have taken place namely that ECS licensees can now self-provide infrastructure and are entitled to have their licenses converted into i-ECNS licenses by ICASA<sup>21</sup> and that operators such as MTN and Vodacom have indicated their decisions to roll out fixed line infrastructure.

[41] In May 2004, the Minister of Communications issued a Ministerial determination which permitted the value added network services (VANs) licensees to obtain telecommunications infrastructure other than from Telkom or the Second Network Operator ("SNO") (which subsequently became Neotel). Subsequent to that determination the Minister attempted, through a press conference, to suggest that the determination did not grant VANs a right to self-provide and that they were still required to obtain their leased lines from a licensed ECNS operator.<sup>22</sup> Altech has successfully obtained a High Court declaratory order to the effect that it, also a VANs licensee, is entitled to self provide its own telecommunications facilities. During 2007, ICASA began a process of converting existing licenses, issued under the Telecommunications Act, into licenses under the ECA. The ECA provides for technology neutral license categories which may differ in content to those issued under the Telecommunications Act.

[42] In terms of section 93 of the ECA, ICASA is required to convert existing licences into new order ECA categories. In its initial draft licence conversion matrix of 5 November 2007

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<sup>20</sup> Often the question is asked whether the potential competitor was likely to enter the market and whether such entry was both timely and sufficient.

<sup>21</sup> Individual licences allow the holder to roll out and operate a network of national (or provincial) scope and would attract individual licence conditions specific to that licence holder over and above general conditions whereas class licences allow the holder to roll out and operate a network no bigger than a municipal area and would be regulated under general licence conditions.

<sup>22</sup> See the Minister's Announcement dated 31 January 2005 where the Minister stated "The issue of self provisioning was issued in the government's policy determinations only in relation to mobile cellular operators in terms of fixed links".



ICASA sought to “map” new specific licences onto existing licences. At that stage it appeared that ICASA intended for the licensing process to be a competitive one and envisaged that only a small number of VANs licences ought to be converted into I-ECNS licenses. Verizon SA was one of those applicants as were Internet Solutions, DataPro (aka Vox Telecom), MWEB, Global Webintact and Fleetcall.<sup>23</sup> However on 18 November 2008, after Altech’s successful High Court case in which the court found that all VANs licensees were entitled to have their licenses converted into I-ECNS licences, ICASA published a notice announcing its intention to convert all VANs licenses into ECS and ECNS licenses and asked for comments from the public by 5 December 2008.<sup>24</sup> According to some industry players, Altech’s court victory beckoned a new era in the South African telecommunications market never witnessed before –

*“The High Court ruling effectively turns South Africa into one of the most progressive and competitive telecoms markets in the world and dispels the regulatory uncertainty that has stifled the industry since 2005,” Silber said on Monday.*

*“As many as 500 but more likely only 50 or so new players could enter the telecoms infrastructure market, many of them regional operators that tailor their services to the needs of local communities as a result of the shift in the regulatory landscape,” Silber added.”<sup>25</sup>*

[43] On 19 December 2008 ICASA published a notice announcing the final framework for conversion of VANs licenses to ECS and ECNS licenses.<sup>26</sup> At the time of writing of these reasons, on 16 January 2009, ICASA published a notice indicating which entities had been granted and issued I-ECNS licenses.<sup>27</sup> Verizon is one of the VANs licensees that has been granted an I-ECNS license, as are entities such as Internet Solutions, GijimaAST, Gateway Communications, MNT NS, Vodacom, Vox Telecom, and Storm Telecom. All in all the I-ECNS licenses, which include the previous operators such as Telkom, Neotel, MTN, Vodacom, Cell C, WBS and Sentech, total in excess of 500.

[44] Given this multitude of potential competitors, it can hardly be said that the merger, even if would lead to the removal of a potential entrant in the infrastructure market, would lead to any anti-competitive outcomes. Of course one can anticipate that not all of these licensees will necessarily roll out infrastructure and may be constrained by the limited availability of spectrum, the price thereof, limited rights of way or sites for wireless links and

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<sup>23</sup> Source [http://www.alignafrica.com/library/who\\_will\\_take\\_on\\_telkom.htm](http://www.alignafrica.com/library/who_will_take_on_telkom.htm) last visited on 04 March 2009

<sup>24</sup> See GG 31611 dated 17 November 2008. See also [www.icasa.org.za/licensing/](http://www.icasa.org.za/licensing/)

<sup>25</sup> See “SA wins telecoms market battle” article in News24 dated 25/11/2008 at [http://www.news24.com/News24/Technology/News/0,,2-13-1443\\_2432154,00.html](http://www.news24.com/News24/Technology/News/0,,2-13-1443_2432154,00.html) last visited on 04 March 2009

<sup>26</sup> See GG 31746 dated 19 December 2008.

<sup>27</sup> See GG 31803 dated 16 January 2009.

the possible universal service obligations that ICASA may seek to impose on such licensees. Moreover infrastructure roll out is expensive and involves significant sunk costs. Operators would be required to achieve economies of scale and scope sufficient to recoup these sunk costs. Given this it is highly likely that these smaller licensees, faced with high capital costs, will utilise a shared backbone along which they can provide their services. Indeed this is the business model upon which the Dark Fibre Africa (“DFA”)<sup>28</sup> project has been conceived. DFA (a shared broadband infrastructure company) owns, builds, maintains, secures and monitors the dark fibre network infrastructure, which is then leased to telecoms operators. The company finances and constructs ducting infrastructure and resells this capacity to individual telecoms licensees. The operators are then responsible for commissioning and “lighting” the fibre and selling the capacity on to their customers. DFA has used mechanised trenching technology, which it said minimised the time and disruption involved with digging trenches and laying cable in roads and pavements.<sup>29</sup> The company has laid down more than 350 kilometres of fibre infrastructure in Johannesburg alone, and progress has already been made in Cape Town, Durban and Pretoria. Such a shared model would facilitate ease of entry in the infrastructure and downstream services markets such as MNS, VPN and VoIP.

[45] But let us nevertheless consider whether there is any factual basis for the argument that the merger will lead to a removal of a potential *credible* entrant in the form of Verizon.

[46] Verizon is a first tier internet service provider providing data services to corporate and large enterprises over fixed lines which it leases from telecommunications operators such as Telkom. Verizon’s business comes predominantly from existing contracts with what was formerly UUNet’s corporate customer base. It was a typical VANs provider rendering managed network services to large corporate customers. Several of its major customers are in the financial services and government sectors. While Verizon had a substantial high capacity fixed line backbone of IP VPN, as well as international connectivity, often its clients had difficulties with access to its VPN through the last mile. This is because the core backbone could only be accessed through dedicated telecommunications infrastructure traditionally consisting of copper lines obtained directly by the client from Telkom. It was in this area that the longest delays occurred and where Verizon could not guarantee quality of service to its clients.

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<sup>28</sup> Dark fibre” can be described as an optical fibre infrastructure which has been installed but is not being used. Fibre optic cable is the medium through which transmission equipment transmits data via light forms – “dark fibre” refers to unlit optical fibre. As there’s no light being transmitted on dark fibre it can be described as being “unlit”. See <http://www.dfafrica.co.za/DFA.aspx?id=1>, last visited on 24 February 2009.

<sup>29</sup> See <http://www.engineeringnews.co.za/article/dark-fibre-africa-sees-growth-after-court-allows-vans-to-selfprovide-2008-11-13> last visited on 24 February 2009.

[47] As early as May 2005 Verizon was of the view that it could self provide but had not done so because given the significant sunk costs involved in infrastructure rollout Verizon SA would have had to obtain approval from its parent company. The parent company Verizon Business had not approved of such a strategy for South Africa and it was unlikely to approve of such an initiative.<sup>30</sup> Verizon SA had nevertheless participated in the early i-ECNS application process because it sought to increase its rights under the ECA and intended to use the VANs conversion process as an opportunity to enter the upstream infrastructure market solely for the provision of “last mile” access for its own customers where no suitable infrastructure was available and to shorten the lead times between signing a deal and implementing Verizon’s products. It had also considered Wi-Max as a potential technological solution for self-provisioning the local loop. Wi-Max was suitable for last mile access or as backup to the fixed line technology but was inappropriate for its corporate customer base which requires transfer of vast amounts of data.<sup>31</sup> Verizon would continue using fibre MPLS IP technology over its core network and would lease lines from various providers in order to manage its costs.

[48] Verizon’s internal strategic documents seem to bear out this approach. While mention is made of the new ECNS regime and rights to self-provide nowhere do we see any detailed business plan indicating where and when Verizon plans to roll out its own national network and no factual basis has been established that the merger would lead to the removal of a credible potential entrant.

### **Conclusion on horizontal analysis**

[49] In our view the merger does not raise any concerns of a substantial lessening of competition in any of the relevant markets discussed above. The merged entity’s combined market share remains less than 20% in all these five markets. There were a number of existing players in each market with some of these being significantly larger than the merged entity. New entrants such as Neotel and Vodacom presented significant potential constraints on the merged entity post merger. Moreover regulatory barriers to entry were declining at a rapid pace with ICASA having issued more than 500 ECS and I-ECNS licences. As far as the upstream network infrastructure market is concerned, if we were to accept that Verizon and MTN are potential competitors then we would have to accept that at the very least Telkom, MTN, Vodacom, Cell C, WBS, Sentech, Neotel, IS, the various USALs and hundreds of ECS licensees who hoped to succeed in obtaining an i-ECNS

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<sup>30</sup> See paragraph 7.35 of Thompson’s statement on page 218 of the witness statements file

<sup>31</sup> See the discussion on the disadvantages of wireless technology for large data transfers in *Telkom/BCX* and *Genesis 29 Dec08* pages 128-129

license are potential competitors in the network infrastructure market. Given the hundreds of potential competitors in this market, on this basis alone there would be no lessening of competition.

### **Vertical & Conglomerate Analysis**

[50] As discussed above RBB Economics put forward two broad theories of harm arising from the vertical aspects of this transaction namely some form of anti-competitive bundling and input or customer foreclosure. In its report of 22 August 2008 RBB acknowledges that the various theories of harm it posits are speculative at the very least and should be explored further for reasons of “compelling logic”.<sup>32</sup> No basis was established by RBB in that report or in any subsequent report as to the likelihood of harm caused by the merger. The Commission nevertheless interrogated the feasibility of these theories.

### ***Bundling as an exclusionary strategy***

[51] In general bundling is the practice of selling two or more goods as a package rather than selling each good separately. Mixed bundling refers to a strategy where the goods included in a bundle can still be purchased separately. Pure bundling refers to a strategy where the goods included in the package are not available separately. Tying refers to a situation where the sale of one good (the tying good) is conditional on the purchase of another good (tied good). However the tied good would still be available for purchase separately. The practice of bundling/tying is not considered to be inherently anti-competitive because it could result in increased consumer welfare through lower prices to customers. It is only in certain circumstances that a bundling strategy could lead to anti-competitive outcomes by reducing rivals’ ability to compete and thereby permitting the bundling firm to raise prices in the long run. Conceivably MTN could bundle mobile network services with mobile voice & data services or vice versa. The Commission and the merging parties’ expert economist Mr James Hodge identified a number of possible bundling strategies available to MTN, post merger, which we discuss below.

[52] The merging parties argued that MTN’s ability to bundle MNS and mobile services is not merger specific since it is already doing so through MTN NS. MTN’s internal strategic documents reveal that its future strategy is to grow its market share in the MNS market. This seems motivated by a number of factors including the lower cost of data transmission

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<sup>32</sup> See record page 226.

following the Ministerial determination, increased use of VoIP, diminishing ARPU in a mobile industry approaching maturity, insufficient fixed line capacity in metro areas, potential convergence in the ICT sector and the threat of mobile termination rates regulation.<sup>33</sup> There are clear indications that MTN intends to bundle products and services absent the merger in order to respond to emerging market conditions.<sup>34</sup>

[53] However MTN NS's pre-merger attempts at bundling MNS with mobile voice and data have met with little success thus far and have failed to give it a competitive edge or gain market share away from other MNS providers.<sup>35</sup> The Commission nevertheless took the view that the merger would provide MTN with a greater ability to bundle services because of Verizon's sizeable presence in the market.

[54] Bundling is not uncommon in the South African ICT sector with operators and re-sellers bundling both services and equipment or devices. Since the mid-90s, commencing with the mobile industry which bundled services with handsets, the current communications market has seen an increasing incidence of bundling. We see various products offered by mobile operators such as on-net bundles<sup>36</sup> and SMS bundles<sup>37</sup> and more recently bundles being offered by one operator of a complement of their services or bundles of products sourced from different service providers.<sup>38</sup> Some bundles are more logical and technologically feasible than others. For example, VPN providers are able to provide, post de-regulation, traditional voice, VoIP, data and internet access and hosting over fixed line infrastructure. Given that the ICT sector is moving towards convergence the incidence of bundling is likely to increase.

[55] Nevertheless we are of the view that bundling as a result of this transaction is unlikely to be exclusionary of rivals or result in a lessening of competition. Post merger MTN and Verizon would have less than 20% market share in each of the horizontal markets. In the VPN market the merged entity will only have a post merger market share of 17% compared to that of Telkom at 45.4% and IS at 29.1%.<sup>39</sup> If MTN were to leverage its market power (assuming this for argument's sake) in the mobile voice market into the MNS market by bundling mobile voice services with MNS services, it would in the first instance have to engage in a prolonged and expensive strategy to take market share away from its two larger

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<sup>33</sup> See ICASA enquiry into mobile termination markets. See Commission's report page 38

<sup>34</sup> See record page 1935 slides 26 and 27

<sup>35</sup> See Brierley evidence and Commission's report page 38

<sup>36</sup> The price of monthly subscription included free minutes of airtime provided these were calls made on-net.

<sup>37</sup> A specified amount of Short message services were included in a bundle for a monthly subscription.

<sup>38</sup> See for e.g. Telkom Closer products, Neotel consumer products, Vodacom & MTN 3G offered with handsets and laptops by re-sellers, computer offerings bundled with internet access,

<sup>39</sup> See the Commission's report page 23 table 5

competitors. Secondly, both Telkom and IS have the financial and operational muscle to respond with their own bundles, either matching those of MTN or creating more attractive offerings. In the event of a pure bundling strategy by MTN NS, customers could easily obtain MNS services from any of the other players in the VPN market including other rivals, such as GijimaAST, Vox Telecom and BCX, who albeit being relatively small, have credible reputations in that market.<sup>40</sup> As far as mobile voice services are concerned, MTN faces competition from Vodacom and the smaller Cell C from whom these services could be obtained. Furthermore, the target market for MNS services are large enterprises, relatively sophisticated consumers who tend to procure their services on tender and from a variety of service providers. MTN NS's unsuccessful attempt to offer SAB bundled services suggests that MNS bundled with mobile services are not attractive to these types of consumers.

[56] A bundling strategy with APN services for business internet services is hardly likely to be attractive for operators and customers alike. In the MNS and VPN markets, enterprises tend to utilize fixed line infrastructure, usually a copper connection obtained from Telkom or ADSL, rather than mobile wireless data services for access to their VPNs or internet. Mobile Access Point Name (APN) services constitute a small part of the MNS or VPN market.<sup>41</sup> MTN NS also re-sells Vodacom's APN Services in the MNS market thus making its own share of the market minuscule.

#### ***Input Foreclosure of rivals downstream***

[57] MTN could potentially foreclose those of its rivals in the VPN market who utilized mobile voice and data services and fixed links. As far as fixed links are concerned, MTN does not enjoy market power in that market and will face competition from Telkom, by far the dominant player in that market, as well as Neotel, Vodacom, DFA and a host of I-ECNS licensees who have declared their intention to enter the upstream market. In the VPN market itself it enjoys less than 20% market share. Given this factual matrix, the merged entity is unlikely to embark on a foreclosure strategy because it would have to capture a huge market share at great cost. Even if it did embark on such strategy, its rivals will be able

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<sup>40</sup> The Commission calculates that a mixed bundling strategy would not be profitable for MTN using the following reasoning: Assume that a firm, say MTN, had a monopoly over 3G broadband mobile data services and was trying to decide whether or not to bundle its VPN solutions, which we assume is perfectly competitive, with mobile data services. We need to assess whether there is a price  $p^*$  for a bundle of 3G and VPN solutions that is greater than the prices for these products separately. Assume the price = marginal costs for VPN solutions; assume the marginal cost of VPN is  $R1$ . Further assume that the firm does not make 3G available unless it also bought with VPN. First, note that consumers would only be willing to bundle if they valued the 3G at greater than  $p^* - 1$  (they could otherwise simply buy the VPN for  $R1$  in the competitive market and not buy a bundle from MTN). MTN would do at least as well if it sold its 3G at  $p^* - 1$ . Customers could still buy 3G at  $p^* - 1$  and VPN  $R1$ . MTN thus has no reason to bundle its products.

<sup>41</sup> See our discussion below.

to turn to other upstream suppliers. Mobile voice services are not inputs in the VPN market so foreclosure in this market is unlikely.

[58] Mobile data services are used to a limited extent by businesses to access their VPN or internet. As discussed above wireless data services are used to a limited extent by businesses. Historically the main data services provided by mobile (GSM) operators were short message services. Since then with the advent of new technology such as GPRS, EDGE, 3G and HSDPA wireless speeds have advanced tremendously and data services now available from mobile operators include internet or VPN access and business technology applications such as vehicle tracking, points of sale or ATM connection. A mobile operator provides APN services by providing a wireless link through which end users can connect to their core network. Private APNS are used by an enterprise for business applications and to enable their employees to access a company's VPN. Public APNS are used exclusively for retail internet access and can be used to access business applications and company VPN through the public internet a less secure environment. APNs are not important and certainly not essential inputs into the VPN market. MTN faces competition from a number of APN providers such as Vodacom, Cell C and to a smaller extent iBurst and Sentech.<sup>42</sup> A foreclosure strategy in this market is highly unlikely and highly unlikely to succeed if the merged entity embarked on such strategy.

### **Customer foreclosure**

[59] According to RBB, customer foreclosure would occur where MTN would post merger provide Verizon with all its fixed links thereby foreclosing its rivals in the upstream fixed links market from having access to Verizon as a customer. This was likely to deter entry in the upstream ECNS market. The merging parties argued that foreclosure concerns in this regard are not merger specific and that MTN does not have market power in respect of fixed links. The Commission, while accepting that MTN had no market power in relation to fixed links was concerned that the merger provides MTN with a larger customer base from which to build a monopoly. The Commission nevertheless found that even if this did occur, which was highly unlikely, the extent of foreclosure would be minimal and would not lead to a substantial lessening of competition.<sup>43</sup> The maximum extent of foreclosure if it did occur at all would be less than 20% given the merged entity's market shares in both wholesale internet access and MPLS VPN.

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<sup>42</sup> See page 154 of the record.

<sup>43</sup> The Commission relied upon the Tribunal's decision in *Mandla Matla Publishing (Pty) Ltd and Independent Newspapers (Pty) Ltd* Tribunal Case NO: 48/CR/Jun04 in which it was held that a foreclosure of 26% in that case was not substantial.

[60] At the hearing Mr Brierley testified that MTN had had yet to roll out its fixed links. It was unlikely that it would in the near future be supplying Verizon with any fixed links. Mr Thompson from Verizon testified that because Verizon always sought to manage its costs downwards it obtained fixed links from more than one supplier. It also strived not to rely too heavily on one supplier for quality and security reasons. The decision to buy from MTN or another provider would always be informed by these factors. It appears that customer foreclosure in this context was unlikely to occur. Recent events in the industry suggest that entry into the upstream market seems undeterred. Both MTN and Vodacom have announced their plans to roll out fixed links, Neotel has taken a foothold in the market and a range of ECS licensees, including Altech and IS, are poised to take advantage of pending ECNS rights.<sup>44</sup> Indeed if the merger posed such a chilling effect on entry in the upstream market as theorized by RBB we would have seen more dedicated opposition from Altech and from others such as Telkom, IS and Vox.

### **Voice over Internet**

[61] In our view none of the vertical concerns raised by RBB on behalf of Altech are likely to occur as a result of the merger. This leaves us with one final issue to consider. In the application for intervention one of the concerns put forward by Altech was that MTN was acquiring Verizon in order to prevent VoIP on its network with the long term aim of increasing the price of VoIP which was a direct threat MTN's traditional voice revenues. It relied upon a letter sent by MTN to all its service providers stating that an additional fee would be charged for VoIP calls. However in its witness statements Altech limited the issue only to VoIP going through Verizon's international internet connection, a matter that was not foreshadowed in the proceedings until then.

[62] RBB argued that MTN is threatened by VoIP and VoIP/LCR services as evidenced by the letter sent to service providers, referred to in the intervention proceedings as annexure "H".<sup>45</sup> As a consequence it will seek to limit VoIP traffic on its network through blocking, disrupting or monitoring VoIP calls on Verizon's international trunk leg. Trunking involves the bulk transmission of traffic, aggregated from different parts of the network over a high capacity pipe or connection. Put another way, it involves the provision of network

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<sup>44</sup> ICASA has issued over 400 I-ECNS licenses. It remains to be seen how many of these will actually roll out their own networks.

<sup>45</sup> This was a letter addressed to service providers advising them of a tariff for Voice over Internet Protocol. Record page 238.



access to many clients by sharing a set of lines or frequencies instead of providing them individually.

[63] The argument went as follows. Verizon has international internet connectivity which is only one of four possible routes for international VoIP traffic. One of these routes is through Telkom which does not have the incentive to promote VoIP, and the other is Vox Telecom, which has capacity constraints. Hence this leaves IS as a residual monopolist that will push up prices for VoIP traffic.

[64] The merging parties through a supplementary report by Mr Hodge argued that the theory had both factual and analytical flaws. We discuss these concerns both in relation to incoming and outbound VoIP.

[65] As far as outgoing VoIP traffic is concerned, VoIP originated calls will pass over MTN's data network and it is at this point that MTN would theoretically be able to disrupt such traffic. This is not aggregated traffic. It is difficult to see how the merger would enhance MTN's ability and incentive to engage in any kind of disruption on its own network, which it can already do. Calling card type applications advertise their number publicly and the call is made over the MTN circuit-switched network to that number. MTN could already, pre-merger identify and block that number.

[66] Inbound traffic that comes through Verizon's international connection is usually trunked for all of Verizon's customers and consists of packets which may or may not be VoIP. Some of this traffic in fact would be for MTN's own large corporate customers. Any disruption of this traffic at the international connection would necessarily disrupt both data calls and VoIP calls which would reduce the quality of data services for all Verizon's customers. Mr Thompson explained that if MTN engaged in such disruption it would cause reputational damage for the service and may result in Verizon being in breach of its SLAs, an outcome that could attract serious financial penalties, if not cancellation, which it could least afford. This is because VoIP could not be separately identified from other data packets unless the packet was opened. But even once it was opened, which could not occur in real time, it would generally be in encrypted form which would require decryption. Such technology was extremely expensive and the cost would not be justified.

[67] Technology that could monitor IP packets was available and Verizon had installed such technology on its network as required by the RICO Act.<sup>46</sup> However, this was utilised under warrant and was not done by the operator. The technology was designed to monitor

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<sup>46</sup> Regulation of Interception of Communications Act 70 of 2002.

and not intercept information and was a probe placed (like a T) into the network. The process involved transmitting a copy of that packet (“T off”) to the National Interception Centre which was legally authorised to open it. Likewise MTN is unable, unless at great cost which is not justified by the level of VoIP on its network, to distinguish between VoIP and other data traffic on its network. It too is required to monitor packets on its network in accordance with the RICO Act and could only “T-off” packets to the National Interception Centre. Operators could not themselves open data packets as this would be in contravention of the Electronic Communications Transactions Act (number 25 of 2002) and patently illegal.<sup>47</sup> On this basis alone it appears that the likelihood of disruption as theorised by RBB seems relatively low. Even if we were to assume that this was a likely strategy, it could hardly succeed given the context. There are not only four international routes for VoIP in South Africa. International internet connection is provided by Verizon, Telkom, IS, Vox, MTN NS, Neotel, Vodacom Business, Verizon Business, Sentech and can also be trunked on the public internet. Barriers to entry are relatively low, no regulatory approval is required and expansion can be achieved by the purchase of additional IPLCs.

[68] It may well be that traditional voice operators such as Telkom and the mobile operators view VoIP as a direct threat to their traditional voice revenues. However at the same time all of them are already utilising IP technology in various ways and seeking to expand their footprints in data and VoIP markets. This also seems to be the trend in other countries.<sup>48</sup> Mr Brierley explained that MTN seeks to expand its footprint in the VPN market through this acquisition and that it also sought to gain a share of the VoIP market. At the time of the VANs de-regulation VoIP was seen as a significant threat to traditional voice. As a response to VoIP possibly being used on its networks, MTN required subscribers to pay an additional tariff as mentioned in annexure “H”. This tariff had been approved by ICASA. However, MTN did not enforce it, because it could not discriminate between VoIP and other data services and has since then taken the view that such a strategy was futile.<sup>49</sup> In any event, he alleged, the uptake of VoIP in the market was slower than initially anticipated, due mainly to quality issues and MTN did not consider it as significant a threat on its network. It remains to be seen whether VoIP does indeed pose a significant threat to traditional voice in the near future, and to mobile voice in the future converged space in the long term. This particular merger however is unlikely to increase MTN’s ability or incentive to disrupt VoIP on its network.

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<sup>47</sup> FN See section 86(2) of the Electronic Communications Transactions Act 25 of 2002

<sup>48</sup> The Commission referred us to an ITU discussion paper entitled: “*The Status of Voice Over Internet Protocol (VoIP) Worldwide, 2006*” Document: FoV/04 12 January 2007 in which it is reported that traditional voice operators who had been expected to resist VoIP are observed to move into these markets.

<sup>49</sup> See Brierley evidence on page 76 of the transcript

## **Conclusion**

[69] In conclusion we find that the transaction is unlikely to lead to a substantial lessening of competition in any of the relevant markets or lead to any input or customer foreclosure. While historically barriers to entry have been high in the South African telecommunications sector these have been significantly lowered as a result of recent regulatory reform. The merged entity faces competition from much stronger players in all the relevant markets and faces the prospect of increased competition in the upstream infrastructure and the downstream services markets. There are no public interest concerns and the merger is approved unconditionally.

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**Y Carrim**

Tribunal Member

**06 March 2009**

**Date**

**U Bhoola and N Manoim concurring**

**Tribunal Researcher : Jabulani Ngobeni**

For the merging parties : Adv Mike Van Der Nest SC and Adv Anthony Gotz instructed  
by Edward Nathan Sonnenburgs and Webber Wentzel

For the Commission : Rizia Buckas (Legal Services Division)

## GLOSSARY OF TERMS

## ANNEXURE “A”

1. ADSL- *Asymmetric Digital Subscriber Line*:
2. APN-*Access Point Access*
3. ATM- *Asynchronous Transfer Mode*:
4. BCX-Business Connexion
5. BMI-T- *BMI-TechKnowledge Group (Pty) Ltd*:
6. DFA-*Dark Fibre Africa*
7. DIDATA-*Dimension Data Plc*:
8. ECA-Electronic Communications Act
9. ECNS-Electronic Communications Network Services-
10. ECS-Electronic Communications Service
11. EC-European Commission
12. GIJIMA- *GijimaAst Group Limited*
13. HHI- *Herfindahl-Hirschman Index*
14. ICASA-Independent Communications Authority of South Africa
15. ICT-Information and Communications Technology
16. i-ECNS- *Individual Electronic Communications Network Services*
17. IP- *Internet Protocol*
18. ISO-Information Systems Outsourcing
19. ISP-Internet Service Provider
20. ISPA- *Internet Service Provider Association*
21. IS-Internet Solutions
22. IT-Information Technology
23. ITS- *Information Technology Services*
24. LAN-*Local Area Network*
25. MNS- *Managed Network Services*
26. MPLS-*Multi-protocol layer switching*
27. MTNS-MTN Network Service
28. NDOS-*Network and Desktop Outsourcing Services*
29. NEOTEL- *Neotel (Pty) Ltd*
30. NGN-*Next Generation Network*
31. Packet switching

32. PABX- *Private Branch Exchange*
33. PLMN-Public Land Mobile Network-
34. PSTN-*Public Switched Telecommunications Network*
35. PSTS- *Public Switched Telecommunications Services:*
36. POP-*Points of Presence*
37. SLA-Service Level Agreement
38. SNO-Second Network Operator
39. SoHo- Small Office and Home Office
40. Telkom-Telkom SA Ltd
41. The 1996 Act-Telecommunications Act 103 1996
42. The 2005 Act-Electronic Communications Act 36 of 2005
43. VANs-Value Added Network Services
44. VPN- *Virtual Private Network*
45. VoIP- *Voice over Internet Protocol*
46. WAN-*Wide Area Network*
47. WBS- Wireless Broadcast Services
48. WiMax- *Worldwide Interoperability for Microwave Access:*