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**NOTIFICATION FOR THE CHANGE OF SHAREHOLDING STRUCTURE FILED BY
CELL C IN RESPECT OF ITS RECAPITALISATION TRANSACTION**

REASONS FOR DECISION

FEBRUARY 2018

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1. INTRODUCTION

- 1.1. On 12 August 2017, the Independent Communications Authority of South Africa ("the Authority") received a Notice of Change of Information in Respect of an Individual Licence ("the notification") in accordance with regulation 2(1)(c) of Schedules 2 and 3¹ of the Standard Terms and Conditions for Individual Electronic Communications Network Services Regulations, 2010 ("Standard Terms and Conditions Regulations")² read with regulation 14(A)(2)(c) of the Licensing Processes and Procedures Regulations, 2010 ("Processes and Procedures Regulations")³ from Cell C Limited ("Cell C"). In terms of the notification, Cell C had concluded a recapitalization transaction which resulted in changes to, *inter alia*, its shareholding.
- 1.2. In the circumstances, the Authority was required to ensure that the change as outlined in terms of the notification complied with all licence terms and conditions and the Electronic Communications Act, 2005 (Act No. 36 of 2005) ("the ECA").⁴
- 1.3. The Authority considered the notification in relation to the compliance requirements mentioned in paragraph 1.2 above and on 28 November 2017 resolved to accept the notification.
- 1.4. The purpose of this document is to provide all interested parties with reasons for the Authority's decision to accept the notification.

2. PROCESSES AND PROCEDURES

- 2.1. The notification was submitted to the Authority on 12 August 2017.
- 2.2. On 23 August 2017, the Authority requested to be provided with the transaction agreements in respect of the recapitalisation of Cell C.
- 2.3. On 25 August 2017, Cell C furnished the Authority with copies of the transaction agreements and, in terms of section 4D of the Independent Communications Authority of South Africa Act, 2000 (Act No. 13 of 2000) ("the ICASA Act"), requested the Authority to treat almost all of the transaction agreements as confidential information.
- 2.4. On 27 September 2017, the Authority held a meeting with Cell C in which clarity was sought on the nature and extent of the recapitalization transaction. The purpose of the meeting was, *inter alia*, to place the Authority in a position

¹ Cell C is the holder of an individual electronic communications network service licence and an individual electronic communications service licence under licence numbers 001/IECNS/JAN/2009 and 001/IECS/JAN/2009

² Government Gazette No. 33294 of 14 June 2010, as amended by Government Gazette No. 39875 of 30 March 2016

³ Government Gazette No. 33293 of 14 June 2010, as amended by Government Gazette No. 39871 of 30 March 2016

⁴ Regulation 2(2), Schedules 2 and 3 of the Standard Terms and Conditions for Individual Electronic Communications Network Services Regulations, 2010

to properly consider whether the transaction resulted in a transfer of control of a licence as contemplated in section 13(1) of the ECA (or section 31(2A), which essentially has the same wording).

- 2.5. On 11 October 2017, Cell C delivered written submissions in which it contended that section 13(1) of the ECA was not applicable to the recapitalization transaction.
- 2.6. On 24 October 2017, the Authority invited CellSaf (Pty) Ltd (CellSaf) to make written representations in response to the submissions made by Cell C on whether the recapitalization transaction resulted in a transfer of control of Cell C's licences as contemplated in sections 13(1) of the ECA. CellSaf was afforded this opportunity because of its equity interests in Cell C and because it had lodged a complaint with the Authority contending, *inter alia*, that implementation of the recapitalisation transaction, without the Authority's approval, contravened the provisions of the ECA.⁵
- 2.7. On 17 November 2017, CellSaf submitted its written representations on the submissions made by Cell C.
- 2.8. Having considered all the submissions, the Authority was of the considered view that there were no material issues on the notification which warranted a public hearing.

3. LEGISLATIVE AND REGULATORY FRAMEWORK

- 3.1 A change in either the name, contact details including contact person, shareholding, physical address or financial year end of an individual licensee is regulated by the Standard Terms and Conditions⁶ and Processes and Procedures Regulations.⁷ In terms of both sets of regulations, a licensee must notify the Authority within 7 (seven) days of the occurrence of the change. In terms of regulation 14(A)(1) of the Processes and Procedures Regulations, a notice of the change of information in a licence must be submitted in the format as set out in Form O.
- 3.2 Any change or transfer of shares as envisaged in s 2(1)(c) of Schedules 2 and 3 of the Standard Terms and Conditions Regulations must comply with all the terms and conditions of the licence(s) and the ECA.⁸

⁵ The complaint by CellSaf is a subject of a different process and is pending.

⁶ The Standard Terms and Conditions Regulations, 2010 were subsequently amended in certain respects, as set out in the Standard Terms and Conditions Regulations, 2016 under Government Gazette No. 39875, dated 30 March 2016. The two sets of Regulations are therefore to be read together, to the extent of the 2016 amendments.

⁷ The Processes and Procedures Regulations, 2010 were also amended in certain respects, as set out in the Licensing Processes and Procedures Regulations, 2016 under Government Gazette No. 39871, dated 30 March 2016. The two sets of Regulations are therefore to be read together, to the extent of the 2016 amendments.

⁸ Schedules 2 and 3 of the Standard Terms and Conditions Regulations, regulation 2(2)

- 3.3 In addition, section 13(1) of the ECA regulates the transfer of an individual licence and the transfer of control of licences whereas section 31(2A) regulates the transfer of a radio frequency spectrum licence and the transfer of control of a radio frequency spectrum licence. An individual or radio frequency spectrum licence as well as control of such licences may not be transferred without the prior written permission of the Authority.
- 3.4 The notification by Cell C concerns a change in its shareholding and therefore the issue under consideration was whether the recapitalization transaction complies with all the terms and conditions of the licences and the ECA.
- 3.5 The Authority's analysis is outlined below.

4. DISCUSSION AND ANALYSIS OF THE NOTIFICATION

The Notification

- 4.1. In terms of Cell C's notification, the following changes in its shareholding have occurred:

Prior Recapitalisation	After Recapitalisation
<ul style="list-style-type: none"> • Prior the recapitalization, 100% of the shares in the issued share capital of Cell C was held by 3C Telecommunications and the issued share capital in 3C was held as follows: • Oger Telecom (South Africa) (Pty) Ltd (OTSA) - 60%; • Lanun Securities S.A. (a limited liability company registered in Panama) (Lanun) — 15%; and • CellSAf (Pty) Ltd (CellSAf) -25%. 	<ul style="list-style-type: none"> • After the recapitalisation, the shareholding in Cell C is held as follows: • Cedar Cellular Investment 1 (RF) Proprietary Limited (SPV 1) — 11.8%; • Magnolia Cellular Investment 2 (RF) Proprietary Limited (SPV 2) — 16%; • Yellowwood Cellular Investment 3 (RF) Proprietary Limited (SPV 3) — 2.2%; • The Prepaid Company (Pty) Ltd (TPC) - 45%; • Net1 Applied Technologies South Africa (Pty) Ltd (Net1) - 15%; • Albanta Trading 109 Proprietary Limited (referred to as MS15) — 5%; and

	<ul style="list-style-type: none"> The individuals collectively referred to as M5, hold 5% as follows: José Guilherme Vieira, 1.875%, Robert Killigrew Sabine Pasley, 1.25%, Graham Neil Mackinnon, 1.25%, and Hilton Roy Coverly, 0.625%.
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4.2. Cell C submits further that, as a result of the change in shareholding, the effective shareholding by Historically Disadvantaged Individuals (HDIs) has increased from 25% to at least 32.48%.

5. CELL C'S SUBMISSIONS

5.1. Cell C made the following submissions to the Authority⁹:

5.1.1 Neither the Processes and Procedures Regulations nor the Radio Frequency Spectrum Regulations provide for any approval requirements for its recapitalization transaction. The approval requirements are imposed by section 13(1) and section 31(2A) of the ECA. The Regulations simply make provision for the procedures to be followed when a licensee seeks to effect a transfer or transfer of control of an individual licence or a radio frequency spectrum licence respectively. If a transaction does not constitute or provide for a transfer or transfer of control of any licences, it follows that those procedures, do not apply;

5.1.2 Even if the Recapitalisation Transaction amounted to a "change of control" of Cell C's licences, sections 13(1) and 31(2A) of the ECA do not require approval for a change of control. They require approval for transfer of control. Cell C argued that the use of the word "transfer" is important to a proper understanding of the meaning of the section and what it is intended to provide for;

5.1.3 The changes that have been made to Cell C's shareholding structure pursuant to the Recapitalisation Transaction do not mean that the Recapitalisation Transaction resulted in a transfer of control of any of Cell C's licences as contemplated in section 13(1) of the ECA (or section 31(2A), which has essentially the same wording and to which Cell C therefore do not expressly refer again). In particular, changes in shareholding, without more, do not amount to a transfer of control for the purposes of section 13(1) of the ECA;

5.1.4 Neither the word "transfer" nor the word "control" is defined in the ECA. The meanings of these words must be determined using the usual

⁹ Cell C Submission dated 31 August 2017, in response to a complaint lodged by CellSaf, paras 10.1-10.15

principles of statutory interpretation – the starting point is the ordinary meaning of the words of the provision itself. However, reference must also be had, to the context within which the words occur and the purpose of the provision itself;

- 5.1.5 The ordinary meaning of the word “transfer” is the movement of a thing from one person to another.¹⁰ Used in the context of the control of a licence then, the verb “transfer” requires that the “control” of the licence must move to a new person or entity in order to fall within the ambit of section 13(1). That this is what section 13(1) contemplates is confirmed by the inclusion of the phrase “*to another person*” in the section. Although the phrase is, strictly speaking, redundant, it confirms that the ordinary meaning of the word “transfer” applies;
- 5.1.6 As to what “control” of a licence means in the context of section 13(1), is unclear. Under the common law the concept of control features prominently in the law of property and is a defining feature of ownership. Applying this definition in relation to a licence, “control” would mean the ability to use the licence in whichever way one pleases, and a transfer of control would accordingly be the transfer of this ability from the owner of the licence to a third party;
- 5.1.7 It is apparent from the text of section 13(1), that, this form of transfer of control is already dealt with in the first part of the section, through the prohibition on lease, sub-lease, assignment and cession of the licence. These are all methods of disposal of control without disposing of ownership of the licence itself. The reference to transfer of control in the second part of the section must therefore have an alternate meaning, so that the provision is not redundant;
- 5.1.8 That alternate meaning becomes clear when regard is had to the fact that licence holders, such as Cell C, are inevitably juristic persons. Juristic persons are generally controlled by their shareholders. The intention to include the second part of section 13(1), in the ECA by the Electronic Communications Amendment Act 1 of 2014 with effect from 21 May 2014, was to prevent any attempt to circumvent the indirect transfer of the licence, without regulatory approval as further dealt with in the first part of the section. In essence, the prohibition was extended to include the transfer of control of the licence holder. Therefore, the prohibition is clearly intended to ensure that effective control of a licence is not transferred through a transfer of control of the licence holder (without the necessary consent);

¹⁰ Collins English Dictionary, “*to move from one place to another*”; “*to move to another group, occupation or service*”; “*to copy from one service to another*”; “*to make over the possession of a right or property to someone else*”.

- 5.1.9 The notion of "control" of a juristic person is expressly dealt with in a number of statutes. Of most direct relevance, the concept is defined in both the Companies Act 71 of 2008 (the **Companies Act**), in sections 2(2) and 3,¹¹ and the Competition Act 89 of 1998 (the **Competition Act**), in section 12(2)¹²;
- 5.1.10 While the definitions adopted in the said statutes do not assist to determine the meaning of the word "control" as used in section 13(1) of the ECA, they reflect a settled understanding on the part of the legislature as to the meaning of the word "control" in the context of a juristic person, which, in light of the purpose of section 13(1) and absent any indications to the contrary, should apply equally to section 13(1);
- 5.1.11 Therefore, the meaning of "control" can be put as follows: A person is in "control" of a juristic person if that person is in a position, directly or indirectly, to determine its direction and fate, its overall destiny. Control generally arises when a person holds more than half of the issued share capital of a company and therefore controls the majority of the voting rights. However, it may also arise where a person has majority voting rights even though a person does not hold more than half of the shares, or where a person through its shareholding, controls the composition of the board of directors or otherwise has the ability to materially influence the policy of the company, as if a person holds the majority of the voting rights or has the power to appoint the board. Further, control in its most extended sense might even arise where a minority shareholder has the ability to veto corporate conduct on strategic matters (referred to as negative control);
- 5.1.12 Even adopting, purely for the sake of argument, the most extensive definition of the word "control", the Recapitalisation Transaction does not result in a transfer of control because, as the explanation goes above, none of the shareholders after the Recapitalisation Transaction has the power to determine Cell C's destiny in any of the ways as set out earlier. Nor does any shareholder enjoy negative control in the sense described above. Similarly, none of the shareholders has agreed

¹¹ Section 2(2) of the Companies Act, defines control as being (a) control of the majority of the voting rights or (b) control of the composition of the board of directors or (c) the ability to materially influence the policy of the company in a manner comparable to a person who in ordinary commercial practice would be able to exercise an element of control of the type referred to above. In similar vein, section 3 provides that a company is a subsidiary of another juristic person if that company is subject to the exercise of control by that other person (alone or with others), where control has the characteristics referred to in (a) and (b) above.

¹² Section 12(2) of the Competition Act incorporates the notion of "real control" contained in the Companies Act, but also includes the holding of more than half of the issued share capital of a company in and of itself as constituting "control" (even where the relevant shareholder does not have voting control or the ability to control the board) and the concept of "negative control" (i.e. the ability of a minority to veto corporate conduct beyond the rights afforded by the Companies Act).

to act with any other shareholder in concert, in a manner that would give any of them the ability to jointly determine Cell C's destiny or to exercise negative control in the manner as described already;

- 5.1.13 The fact that the Recapitalisation Transaction has resulted in significant changes to the shareholding structure of Cell C does not in and of itself result in a transfer of control that triggers the approval requirement in section 13(1) of the ECA;
- 5.1.14 Simply put, it is incorrect and misleading to characterise the Recapitalisation Transaction as the "acquisition ... of 70% of the issued share capital of Cell C". No one shareholder or shareholders acting together has acquired 70% of the shares in Cell C and no one shareholder or shareholders acting in concert has acquired control of Cell C by acquiring more than half the shares in the issued share capital or by any other means. This means that section 13(1) does not apply;
- 5.1.15 Therefore, Recapitalisation Transaction has resulted in separate acquisitions by the various shareholders of shareholding interests at a level that does not allow any of the shareholders to exercise control of Cell C. In addition, as stated above, none of the shareholders has agreed to act in concert with any other shareholder so that they can exercise joint control of the licensee. It is clear that if each new shareholder which has been introduced into the shareholding structure had acquired its shareholding in Cell C by way of a separate transaction and at different times, there would be absolutely no basis on which to claim that there had been any transfer of control of Cell C. The fact that the various shareholders have acquired their shareholding interests at the same time, does not change this position in any way. It remains the case that none of the shareholders has acquired control of Cell C and control has not been transferred;
- 5.1.16 Interpreting the word "control" to mean any change in shareholding would make section 13(1) so broad as to be unworkable. Such a reading of section 13(1) would require words or meaning to be imported that do not appear from the text of the section. It would also be inconsistent with the distinction drawn in the Processes and Procedures Regulations in which the Authority itself has recognised the distinction between transfers of licences and transfers of control of licences, on the one hand, and changes in shareholding on the other. In the context of shareholding changes, as provided for in article 2(c) of Schedules 2 and 3 to the Processes and Procedures Regulations, only a notification to the Authority, as opposed to prior approval, is required.¹³ Cell C has duly complied with this notification obligation;

¹³ See regulation 14A of the Processes and Procedures Regulations. See also article 2(c) of Schedules 2 and 3 to the Standard Terms and Conditions Regulations.

5.1.17 In addition to considering the position under sections 13(1) and 31(2A) of the ECA, Cell C has also taken into account the Regulations on Limitation of Ownership and Control of Telecommunications Services, 2003¹⁴ (the **2003 Regulations**) and specifically the definition of "control interest" therein. In this regard Cell C is of the view that the 2003 Regulations have been superseded by either the ECA itself or the regulations promulgated subsequently under the ECA dealing with the processes and procedures for approval of transfers of control. Even if the 2003 Regulations notionally continued to apply, they are thoroughly unworkable within the current legislative framework and cannot permissibly be used to interpret the meaning of the word "control" as used in sections 13(1) and 31(2A) of the ECA. Furthermore, even on the basis of the terms of the Regulations themselves, the 2003 Regulations would not apply to Cell C and the Recapitalisation Transaction; and

5.1.18 In a similar vein to the analysis above, the fact that certain shares in Cell C may be encumbered also self-evidently does not, without more than 50%, have the effect of a transfer of control.

6 CELLSAF'S SUBMISSIONS

6.1 CellSAf recorded that it made its written representations under the following constraints¹⁵ –

6.1.1 ICASA provided CellSAf with a redacted version of Cell C's written representations. None of the transaction documents referred to therein were provided to CellSAf on account of confidentiality claimed by Cell C;

6.1.2 CellSAf is aware that the Recapitalisation Transaction comprises, *inter alia*, a series of not less than fifty-four (54) agreements; and

6.1.3 CellSAf has made various attempts to obtain copies of such transaction documents for itself and its advisors. Apart from the opportunity offered to CellSAf to review some of the agreements at the offices of Cell C's attorneys, and under their supervision, CellSAf's efforts to access and to obtain copies of all the relevant documents have all been in vain.

6.2 CellSAf noted that in the circumstances, it was impractical for CellSAf to fully examine and understand with sufficient particularity the true nature and full extent of the hallmarks of the Recapitalisation Transaction, including the relationships between the parties thereto and the commercial and/or other arrangements amongst such parties, which may inform the enquiry into whether or not implementation of the Recapitalisation Transaction directly or

¹⁴ Published under GN R105 in *Government Gazette* 24288 of 16 January 2003.

¹⁵ Page 2 of CellSAf Submission to ICASA, dated 17 November 2017

indirectly results in the transfer of control of Cell C's licences to such parties or any of them.

6.3 Despite the constraints mentioned above, and stating that it is reserving its rights to seek access to the relevant documents and supplement its representations, CellSAf submitted as follows:

6.3.1 While CellSAf agrees with most of the general propositions asserted by Cell C, CellSAf contests the veracity of the conclusions drawn by Cell C with regard to the correct interpretation of "control" within the context of sections 13(1) and 31(2A) of the ECA;

6.3.2 the rules of interpretation direct that regard be had to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production¹⁶;

6.3.3 it is noteworthy that the words "in any way transferred" are a recent inclusion to the provisions of sections 13 of the ECA; the same applies to regulation of transfer of control of individual licences, while section 31(2A) is a new inclusion altogether. The ECA was amended during May 2014 to include these new provisions;

6.3.4 CellSAf is of the view that the inclusion of the words "in any way" in relation to transfers, be it transfer of individual licences or the control thereof, evinces a clear intention on the part of the legislature to not only regulate direct transfers of ownership or control of licences, but also indirect transfers of such licences. Previously, there were instances where certain licensees applied or filed for indirect licence transfer as a stratagem to avoid regulatory scrutiny¹⁷;

6.3.5 Therefore, the 2014 amendment sought to include regulation of "transfer of control" as a trigger for regulatory scrutiny and regulatory approval in respect thereof. It is plain that the introduction of the amended wording by the promulgation of the 2014 amendment was meant to regulate situations in which the licence itself was not assigned, ceded or transferred, while there was transfer of control of the licensee, thus resulting in transfer of control of the licence itself;

6.3.6 In the current context, CellSAf is of the view that Cell C's narrow interpretation of control (more especially with reference to negative control) as used in both sections 13(1) and 31(2A) is misplaced and

¹⁶ *Natal Joint Pension Fund v Endumeni Municipality* judgment.

¹⁷ Prior to the Electronic Communications Amendment Act, 2014, section 13(1) read as follows: "**Transfer of individual licences or change of ownership.**—(1) An individual licence may not be assigned, ceded or transferred to any other person without the prior written permission of the Authority."

inconsistent with the objects of the ECA and the purport of sections 13(1) and 31(2A). It appears Cell C's interpretation is imported wholly from competition law jurisprudence and is sought to be applied in the context of the ECA context without due regard to the context of and the objectives the ECA, with reference to the mischief that the legislature sought to regulate with the promulgation of sections 13(1) and 31(2A);

6.3.7 CellSAf is of the view that the meaning of "control" in the context of the ECA is distinct from and much broader than, that in the Competition Act, 1998 ("the Competition Act"). Further, CellSAf is of the view that an interpretation that is consistent with and serves to realise the objects of the ECA must be preferred over any interpretation that is inconsistent therewith. To do otherwise would frustrate the achievement of the objects of the ECA; and

6.3.8 Furthermore, even if CellSAf were to adopt Cell C's narrow interpretation of control (which limits negative control only to the ability to veto strategic decisions), CellSAf is of the view that Blue Label is, as a matter of fact, able to veto decisions of a strategic nature in Cell C pursuant to the provisions of Cell C's MOI. There is no closed list of what constitutes strategic decisions; strategic decisions cannot be narrowly confined to business plans, budgets and appointment of senior executives, as Cell C seeks to suggest.

7 ANALYSIS

7.1 In the Authority's view, the crux of Cell C's submission is that:

7.1.1 No one shareholder or shareholders acting together has acquired 70% of the shares in Cell C;

7.1.2 No one shareholder or shareholders acting in concert has acquired control of Cell C by acquiring more than half of the shares in the issued share capital or by any other means; and

7.1.3 The Recapitalisation Transaction has resulted in separate acquisitions by the various shareholders at a level that do not allow any of the shareholders to exercise control of Cell C.¹⁸

7.2 According to Cell C, this means that sections 13(1) and 31(2A) of the ECA do not apply. It argues that the Recapitalisation Transaction has merely resulted in separate acquisitions by the various shareholders at a level that do not allow any of the shareholders to exercise control of Cell C.¹⁹

¹⁸ Cell C Submission, dated 31 August 2017, paragraph 10.13.

¹⁹ Ibid, paragraph 10.13.

- 7.3 Regarding the 2003 Regulations and the definition of "control interest" therein, Cell C is of the view that the 2003 Regulations have been superseded by either the ECA itself or the regulations promulgated subsequently under the ECA dealing with the processes and procedures for approval of transfers of control. They also argue that even if the 2003 Regulations notionally continued to apply, they are unworkable within the current legislative framework and cannot permissibly be used to interpret the meaning of the word "control" as used in sections 13(1) and 31(2A) of the ECA. Finally, even on the basis of the terms of the Regulations themselves, the 2003 Regulations would not apply to Cell C and the Recapitalisation Transaction.²⁰
- 7.4 Cell C further argues that the fact that some shares in Cell C may be encumbered also self-evidently does not, without more, have the effect of a transfer of control.²¹ Cell C argues that the ECA prohibits only a transfer of control of such licences without approval. Where licences are encumbered, this does not in and of itself result in a transfer of control of those licences. It is only if the security holder (i.e. the person in favour of whom the licences are encumbered) exercises that security that there would potentially be a transfer of control of the licences.
- 7.5 On the basis of what is stated above, Cell C concludes that it has not contravened section 13(1) of the ECA.
- 7.6 On the other hand, Cellsaf is of the view that the implementation of the Recapitalization Transaction has resulted in the transfer of control in Cell C to BLT as BLT exercises negative control over Cell C.
- 7.7 The focus for the Authority regarding Cell C's notification was on whether the significant changes in shareholding that Cell C has undergone has resulted in a transfer of control as contemplated in sections 13(1) and 31(2A) of the ECA.

Issues for Consideration

- 7.8 The Authority considered whether the recapitalization transaction complies with the terms and conditions of the licences and the ECA.²²
- 7.9 In considering whether the recapitalization transaction complies with the ECA, the Authority considered, *inter alia*, whether the transaction resulted in the transfer of control of a licence as contemplated in sections 13(1) and 31(2A) of the ECA. More specifically, the following were considered:
- The meaning of 'control'; and
 - Whether any shareholder has a material influence over Cell C.

²⁰ Ibid, paragraph 10.15.

²¹ Ibid, paragraph 10.16.

²² Schedules 2 and 3 of the Standard Terms and Conditions Regulations, regulation 2(2)

The Meaning of 'Control'

- 7.10 Whether the provisions of sections 13(1) and 31(2A) are triggered by the recapitalization transaction is dependent on what is meant by phrase 'transfer of control of a licence'. Cell C acknowledges that approval would be required where there is transfer of control but asserts that a change in shareholding does not require approval where control is not transferred. The question that arises is what control is.
- 7.11 As does Cell C, the Authority notes that the term 'control' has no general definition in the ECA. However, the 2003 Regulations define "control interest"²³. These regulations were made under the now repealed Telecommunications Act. If the 2003 Regulations are still applicable, a person would be considered to have a control interest if they beneficially own more than twenty-five percent of the issued share-capital of the licensee; then there would be little argument that the acquisition by BLT of 45% of Cell C would constitute a transfer of control of a licence.
- 7.12 However, as stated above, Cell C has taken the view that the 2003 Regulations have been superseded and are, in any event, inapplicable.
- 7.13 By virtue of section 95(2) of the ECA, the 2003 Regulations continue to have effect under the ECA.²⁴ Section 95(2) of the ECA gives legal force to regulations which, thanks to the repeal of the Telecommunications Act, would lack such force. But section 95(2) tells one nothing about the applicability of the 2003 Regulations to any given situation. In order to determine what regulations, if any, are applicable to the Cell C recapitalization, one looks to the specific provisions dealing with the transfer of control of licences in such regulations.

²³ The 2003 Regulations define a "control interest" as follows:

"a person has a control interest if, in the absence of proof to the contrary, that person directly or indirectly:

(a) beneficially owns more than twenty-five percent of the issued share capital of the licensee;

(b) is entitled to vote a majority of the votes that may be cast at a general meeting of the licensee or has the ability to control, either directly, indirectly or through an affiliate the casting of a majority of those votes of the licensee;

(c) is able to appoint or veto the appointment of a majority of the directors of the licensee;

(d) is a holding company and the licensee is a subsidiary of that company as contemplated in section 1(3)(a) of the Companies Act, 1973 (Act No. 61 of 1973);

(e) in the case where the licensee is a trust, has the ability to control a majority of the votes of the trustees, to appoint the majority of the trustees, to appoint or change the majority of the beneficiaries of the trust;

(f) in the case where the licensee is a close corporation, owns more than twenty-five percent of the members' interest, or controls or has the right to control the member's votes in the close corporation; or

(g) has the ability to direct or cause the direction of the management or policies of the licensee in a manner similar to any of paragraphs (a) to (f), whether through the direct or indirect ownership of issued share capital, by contract, by other securities, or otherwise."

²⁴ Section 95(2) of the ECA provides that "the regulations referred to in subsection (1) remain in force until they are amended or repealed in terms of this Act."

- 7.14 Section 13(3) of the ECA contemplates specific or special regulations that deal with the limitation on ownership and control. The Processes and Procedures Regulations deal with issues pertaining to transfer of control of a licence in the amended Regulation 11 but do not deal specifically with restrictions on control or ownership. In the absence of other specific regulations dealing with restrictions on ownership and control, the question becomes whether the 2003 Regulations effectively apply to fill the gap.
- 7.15 On the one hand, it appears that there is nothing in the wording of the 2003 Regulations and the definition of control interest that makes the definition patently inapplicable to section 13 of the ECA. However, on the other hand, it is clear that the Regulations contemplated in section 13(3) of the ECA are intended to come into effect only after ICASA has conducted an inquiry in terms of section 4B of the ICASA Act, which may include, but is not limited to, a market study, and must give due regard to the objectives of the ECA.²⁵ The specific Regulations could not, in light of this, have preceded the coming into effect of the ECA. It was therefore necessary for the Authority to look beyond the 2003 Regulations and determine whether there is, in any event, a transfer of control on another basis other than on the basis of the 2003 Regulations.
- 7.16 Licence holders are often juristic persons. Though juristic persons have separate legal personality, it is also recognised that juristic persons may be controlled by their shareholders. The Supreme Court of Appeal in *MV Heavy Metal*²⁶ held that:
- "The ultimate control over a company's affairs is exercised by its members in general meeting, although immediate and direct control may vest in its directors, but they are answerable to the company's members in general meeting who may, of course, determine who the directors are to be."*²⁷
- 7.17 The amendment to section 13(1) of the ECA was intended to ensure that there was no transfer of control of a licence holder without the requisite consent from ICASA. This took into account the fact that while the entity that held the licence might in fact remain the same, those controlling the licence holder might change, resulting in the transfer of control of a licence holder.
- 7.18 The Authority is of the view that Cell C correctly makes the distinction between shareholder ownership and shareholder control. Shareholder ownership does not necessarily imply control. Shareholder ownership can occur without the shareholder acquiring the power to have effective say over the running of the company. Whereas shareholder control relates to who has a decisive say over the running of the company and strategic decisions.
- 7.19 As the term "control" has no general definition in the ECA, Cell C contends that guidance can be sought from the Companies Act and the Competition Act on

²⁵ Section 13(5)(b).

²⁶ *MV Heavy Metal: Belfry Marine Ltd v Palm Base Maritime* 1999 (3) SA 1083 (SCA)

²⁷ *Ibid*, at para 33.

the meaning of "control". While the Authority agrees that guidance can be sought from the Companies Act and the Competition Act, it must be remembered that each of these Acts seeks to regulate the issue of control for separate and distinct legislative purposes.

- 7.20 For example, in the Companies Act, "control" is dealt with in section 2 of the Act which defines related and inter-related persons. Understanding how and when persons are "related" to one another under the Companies Act is fundamental to an assessment of whether certain provisions of the Companies Act apply to, and regulate, a transaction to which a company is a party. The term "related" is common in the Companies Act and where applicable it triggers, for instance, the rules relating to issues of shares to related persons²⁸ and financial assistance for the acquisition of shares or to related persons.²⁹
- 7.21 In respect of the Competition Act, the term "control" is not defined. However, in section 12(2) of the Competition Act there is a list of instances given where a person is said to have acquired control for the purposes of determining whether they should notify a merger. The Competition Act defines control from the perspective of a regulator concerned with dealing with competitiveness in the economy.
- 7.22 Thus, while some guidance can be sought from these Acts, it should be recalled that "control" in the ECA is also regulated for a separate and distinct legislative purpose. In particular, section 13(2) discusses the regulation of control in order to promote the ownership and control of electronic communications services by historically disadvantaged persons as well as promoting competitiveness in the ICT sector.
- 7.23 Control exists both as direct (*de jure*) and indirect (*de facto*) control.³⁰ This is briefly discussed both below.

De jure control

- 7.24 *De jure* control refers to instances where there is direct power and direct authority over the company by the persons who, according to the register of the company are entitled to control its destiny.³¹ There are certain 'bright line' tests for determining such control, for example if much of the voting rights of shareholder or board level are controlled by one person that would indicate *de jure* control.
- 7.25 Cell C's principal argument is that following the Recapitalisation Transaction no one shareholder holds over 50% of the shares or can exercise a majority of the voting rights at shareholder and Board level. In addition, there is no agreement between shareholders acting in concert to vote together. Cell C,

²⁸ Section 41(1) of the Companies Act.

²⁹ Sections 44 and 45 of the Companies Act.

³⁰ MV Heavy Metal:Belfry Marine Ltd, at para 10.

³¹ *Ibid*

therefore, focuses on the fact that no one of its shareholders can be said to have acquired *de jure* control.

De facto control and material influence

7.26 Both the Companies Act and the Competition Act however recognise a “catch-all” form of control in terms of which a person controls a juristic person if *“that first person has the ability to materially influence the policy of the juristic person in a manner comparable to a person who, in ordinary commercial practice, would be able to exercise an element of control...”*³²

7.27 Section 2(2)(d) of the Companies Act is identical to section 12(2)(g) of the Competition Act. Both sections take “control” beyond the ordinary corporate law principles of voting control as determined by the High Court in *De Klerk v Ferreira and Others*:³³

*“The provision takes “control” beyond the ordinary corporate law principles of voting control. The purpose of the provision is to provide inter alia for a circumstance where the controlling person does not have majority voting power but has an element of control comparable to a person who would. Whether a person has control will depend on the circumstances. The question is unavoidably a factual one. It can include the situation where the controlling person, a minority or equal shareholder, has de facto control to materially influence the policy of the company, akin to a person who has de jure majority control. Thus, it is possible for a person to control a juristic person despite not having de jure control or the majority of controlling votes in the company.”*³⁴ (Own emphasis)

7.28 Having regard to the dicta in *De Klerk v Ferreira*, a minority shareholder can be said to have control where they can materially influence the policy of the company. This is, however, a factual question.

7.29 The Competition Appeal Court also discussed material influence in the context of section 12(2)(g) of the Competition Act when determining whether a firm has control. In *Caxton and CTP Publishers and Printers v Media 24 Proprietary Limited and Others (“Novus”)*³⁵ the Competition Appeal Court held that:

“Section 12(2)(g) permits for a filling-in of potential lacunae in the manifestations of control as provided for in (a) to (f) with the touchstone being material influence. Expressed differently, it may not be required by the section that a person must have a right strictu sensu to steer a firm or to appoint persons to do the necessary steering to constitute control in terms of (g) but the person must have

³² Section 2(2)(d) of the Companies Act.

³³ 2017 (3) SA 502 (GP).

³⁴ Ibid, at para 80.

³⁵ [2015] ZACAC 5 (25 November 2015).

a power to either steer or appoint those who can do the necessary steering. . .

In the case of (g) the term 'ability' can, in my opinion, be viewed as a power sourced in an agreement or similar legal instrument, just as the powers in (a) to (d) are sourced in legal instruments such as the company's founding documents, shareholder agreements and the like. The influence which can be exercised pursuant to such a power under (g) must, in terms of the wording of the section, be an influence over the 'policy' of the firm. Matters of 'policy' would be important or strategic decisions of the company such as are typically decided by shareholders in general meeting or at board level (as reflected by (b) and (c)).

The most obvious way of exercising influence, for purposes of s 12(2)(g), would be by way of a direct decision-making power on matters of policy, in the same way as the majority shareholder can usually exercise a direct decision-making power on such matters. The present case does not require us to decide whether, and if so how, indirect influence akin to that exercised by the person having the power to appoint many directors (para (c)) could arise in the context of para (g).

The word 'materially' in para (g) refers, in my opinion, not to the decisiveness of the power but to the range of matters over which it extends. The word 'ability' in para (g), viewed in the context of the preceding paragraphs of the subsection, points to the power to do something (which may be the positive power to determine an outcome or the negative power to prevent an outcome). However, if the power applies only to one or two matters, depending on the nature of those matters, it may not be sufficiently extensive to meet the threshold of materiality. The range of influence need not be as extensive as that exercised directly by shareholders through the general meeting or indirectly through the board by the person with the power to appoint the directors but it must, as in both those cases, be reasonably extensive since otherwise it will not be comparable to the influence exercised by a person with control contemplated in paras (a) to (d)."³⁶

7.30 In summary, the principles that can be deduced from the Competition Appeal Court's approach to section 12(2)(g) of the Competition Act and meaning of material influence is as follows:

7.30.1 the term 'ability' can be viewed as a power derived from an agreement in the same way that powers are sourced from instruments such as a shareholder's agreement;

7.30.2 'Policy of the firm' typically relates to strategic or important decisions of a firm such as budgets, business plans, major investments and/or appointment of senior management. These are matters which

³⁶ Caxton, at paras 43 – 48.

regulators have traditionally considered to be matters to be looked at when determining the existence of control of a firm³⁷; and

7.30.3 The term '*materiality*' refers to a range of matters over which the power extends. The range of influence, so required, however, need not be as extensive as that which is exercised directly by shareholders in general meetings or indirectly through the board by the person with power to appoint directors. It must though, as in both instances be '*reasonably extensive since otherwise it will not be comparable to the influence exercised by a person with control contemplated in paras (a) to (d)*'.³⁸ Lastly, power can either determine or prevent an outcome.

7.31 It is the Authority's view that properly interpreted, these provisions in the Companies Act and the Competition Act require that a controller be able to significantly but not necessarily decisively influence a company's policy in a manner similar to that typically enjoyed by companies or persons in control. The question is, does the controller have such a bearing on strategic decisions without necessarily being able to determine or procure their outcomes.

7.32 While these provisions that deal with control where a person has material influence in the Companies Act and the Competition Act provide guidance they are in no way binding.

7.33 However, it appears to be commonly accepted that a party can obtain control in other ways than by having a majority of voting rights. This can be done through the ability to exert material influence over the policy of the company. The question that arises in this case is whether any of Cell C's new shareholders can be said to fall within that category.

Does Any Shareholder Have Material Influence Over Cell C?

7.34 In determining whether any shareholder has material influence over Cell C, the Authority has considered what rights the shareholders have in terms of the Board and governance of Cell C as set out in the agreements and constitutive documents submitted by Cell C. The Authority did not find any express provision or undertaking for shareholders in Cell C to vote in concert. The agreements do not provide any bright lines indicating that the influence any shareholder has is sufficient to show *de facto* control. As stated in *De Klerk v Ferreira*, determining whether there is *de facto* control 'will depend on the circumstances. The question is unavoidably a factual one.'³⁹

7.35 The Authority's reading of CellSAf's representations is that it does not make out a case for *de jure* transfer of control of the Cell C licences. It rather

³⁷ *Caxton and CTP Publishers and Printers Limited and Others v Multichoice Proprietary Limited and Others* (140/CAC/MAR16, 08/36380) [2016] ZACAC 2 (24 June 2016), at para 74.

³⁸ *Novus*, at para 48.

³⁹ *De Klerk*, at para 80

suggests that BLT as a fact controls or will control Cell C. In the Authority's understanding, this would relate to *de facto* control.

7.36 We summarise some of the conclusions reached in CellSAf's representations as follows:

7.36.1 "[A]s a matter of fact", Blue Label is able to veto decisions of a strategic nature in Cell C pursuant to the provisions of Cell C's MOI Blue Label "will" be able to veto decisions of a strategic nature in terms of Cell C's MOI;

7.36.2 Blue Label is "in a position to veto and influence key decisions of Cell C";

7.36.3 With 45% shareholding, Blue Label will be able to veto decisions on all reserved matters under clauses 5.5.1 and 5.5.2 of Cell C's MOI; and

7.36.4 Control by Blue Label is also evident from special and preferential rights in relation to the governance of Cell C."⁴⁰

7.37 CellSAf records in its representations that the determination of control is fact-based.⁴¹ The Authority was not provided with information upon which it could conclude that in the absence of *de jure* control, BLT or any other shareholder in Cell C has *de facto* control of Cell C.

7.38 On the basis of the information and the agreements submitted to the Authority by Cell C and CellSAf, the Authority was not able to conclude, as CellSAf does, that BLT controls Cell C. There is no information submitted by CellSAf to the Authority to support its assertions made in its representation upon which it relies for the conclusion.

7.39 The Authority has noted that CellSAf claims that the recapitalization transaction comprises of a series of not less than 54 agreements. The Authority requested all the agreements underlying the recapitalization transaction and was furnished by Cell C with 36 agreements.

7.40 It is the Authority's considered view that:

7.40.1 The Cell C Recapitalisation Transaction is structured in a manner that no one shareholder has acquired *de jure* control; and

7.40.2 While there may in future be a basis to argue that any one shareholder/s have *de facto control* or have material influence over Cell C or in fact act in concert to materially influence and control Cell C, such a determination is based on a factual enquiry and the circumstances prevailing at the time. It

⁴⁰ CellSAf Submission to ICASA, dated 17 November 2017, at paragraphs 6.2.6, 6.2.7, 6.3.16, 6.4.8

⁴¹ *Ibid* at paragraph 6.4.3.

is probably not possible to make such a determination at this stage taking into account that the new shareholding structure only came into effect on 2 August 2017.

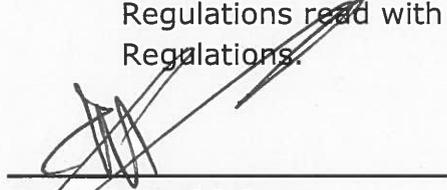
8 CONCLUSION

Having considered all the information at its disposal, the Authority reached the conclusion that the change in Cell C's shareholding structure pursuant to its recapitalization transaction complies with the terms and conditions of the licences and the ECA.

9 THE AUTHORITY'S DECISION

On 28 November 2017, after considering the notification, representations by Cell C and CellSAf, the Authority decided to accept the notification for the following reasons:

- 9.1 The change of shareholding structure in Cell C pursuant to the conclusion of the recapitalisation transaction did not amount to or result in a transfer of control of Cell C's licences as contemplated in sections 13(1) and 31(2A) of the ECA and therefore the change of shares complies with the terms and conditions of the licences and the ECA; and
- 9.2 Cell C has duly complied with the notification obligations contemplated in regulations 2(1)(c) of Schedules 2 and 3 of the Standard Terms and Conditions Regulations read with regulation 14(A)(2)(c) of the Processes and Procedures Regulations.



Rubben Mohlaloga
Chairperson

Date: 22 /02 /2018