COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM148Dec 21

In the matter between:

Vodacom Proprietary Limited	Primary Acquiring Firm
And	
Business Venture Investments No 2213 Proprietary Limited	Primary Target Firm

Panel:	A Wessels (Presiding Member)
	T Vilakazi (Tribunal Member)
	A Kessery (Tribunal Member)
Heard on:	20 – 24 May 2024; 27 – 28 May 2024; 30 May 2024; 13 – 14 June 2024; 18 – 19 June 2024; 15 – 16 July 2024; 18 – 19 July 2024; 29 – 31 July 2024; 1 – 2 August 2024; 7 August 2024; 28 August 2024; 9 September 2024; 26 – 27 September 2024
Last submission on:	16 October 2024
Decided on:	29 October 2024

REASONS FOR DECISION

PROHIBITION

1. On 29 October 2024, the Competition Tribunal ("**Tribunal**") prohibited the proposed transaction in terms of which Vodacom (Pty) Ltd ("**Vodacom**") intends to acquire 30%, and potentially 40%, of the issued share capital of Maziv (Pty) Ltd ("**Maziv**"), previously called Business Venture Investments No 2213 (Pty) Ltd[1] ("**the proposed transaction**"). Vodacom and Maziv collectively are referred to in these reasons as "**the merger parties**".

[1] Newco was renamed Maziv during the course of the Competition Commission's investigation.

2. The proposed transaction involves, *inter alia*, the largest Mobile Network Operator ("**MNO**") in South Africa, Vodacom, and the largest dark fibre provider in South Africa, Dark Fibre Africa (Pty) Ltd ("**DFA**"), as well as the largest fibre to the home ("**FTTH**") Fibre Network Operator ("**FNO**") in South Africa, Vumatel (Pty) Ltd ("**Vumatel**").

3. The Tribunal's reasons for prohibiting the proposed transaction follow.

4. We note that it is common cause that the proposed transaction given that it relates to access to the internet/data and its (future) pricing, is of great significance to millions of South African consumers. The Commission's case is that the proposed transaction raises both horizontal and vertical competition concerns and ultimately negatively affects South African consumers. The merger parties disagree but nevertheless tender mostly behavioural conditions mainly for the vertical concerns (not for the horizontal concerns) and tender fibre roll-out and other public interest commitments, that we assess under the public interest.

5. We shall consider the effects of the proposed transaction particularly on low-income consumers, including future access to products and services through the roll-out of fibre to support the provision of internet into lower income areas and the effects of the proposed transaction on the future costs of those products and services. Various relevant counterfactual(s) will be a key consideration in this assessment.

MERGER PARTIES

6. The primary acquiring firm is Vodacom. Vodacom is ultimately controlled by Vodacom Group Limited ("**Vodacom Group**"), a public company listed on the Johannesburg Stock Exchange. Vodacom Group is the sole shareholder of Vodacom. The issued share capital in Vodacom Group is held as follows:
   - Vodafone Investments (South Africa) (Pty) Ltd ("**Vodafone Investments**") – 52.68%;

- the public – 18.98%;
- Government Employees Pension Fund – 14.30%;
- Vodafone International Holdings B.V. ("**Vodafone International**") – 7.81%; and
- Yebo Yethu Investment Company (Pty) Ltd ("**Yebo Yethu**") – 6.23%.

7. The 52.68% shareholding held by Vodafone Investments is a controlling interest. Vodafone Investments and Vodafone International are controlled by Vodafone Group plc ("**Vodafone**"). Yebo Yethu is controlled (100%) by Yebo Yethu (RF).

8. The primary target firm is Business Venture Investments No 2213 (Pty) Ltd, renamed Maziv. Maziv is a wholly owned subsidiary of Community Investment Ventures Holdings (Pty) Ltd ("**CIVH**"). The main operating subsidiaries of CIVH are DFA and Vumatel.

9. Of relevance is that Vumatel currently has a [redacted]% shareholding in Hero Telecoms (Pty) Ltd ("**Herotel**"). Vumatel intends to increase its shareholding in Herotel from the current [redacted]% interest to a greater than 50% interest. A merger was filed with the Competition Commission ("**Commission**") on 30 June 2022 in terms of which Vumatel intends to own [redacted]% of the issued share capital of Herotel. At the time of the hearing, the Commission was still investigating this proposed transaction.

10. CIVH is jointly controlled by Industrial Electronic Investment (Pty) Ltd ("**IEI**") (57%), [redacted] ([redacted]%) and New GX Fund I ([redacted]%). IEI is controlled by VenFin (Pty) Ltd ("**VenFin**") ([redacted]%), and VenFin is in turn controlled by Remgro Limited ("**Remgro**") (100%). Remgro is not controlled by any specific firm.

11. In addition to CIVH, Remgro has an interest in various firms involved in several industries. In the telecommunications industry, Remgro has a non-controlling interest in Seacom South Africa (Pty) Ltd. Remgro has recently sold its indirect interest in fibre operators Octotel (Pty) Ltd and RSAWeb (Pty) Ltd.

PROPOSED TRANSACTION

12. In terms of the proposed transaction Vodacom will acquire a shareholding in Maziv by subscribing for shares, acquiring shares and selling assets to Maziv. Vodacom will first achieve a 30% shareholding. Vodacom will then have the option to subscribe for additional shares for cash in terms of the top-up mechanism set out in the Shareholders Agreement, which would increase its shareholding in Maziv to 40%.

13. In a prior step to the proposed transaction, and in the form of an internal restructuring transaction, the shares in, and claims against, the main operating subsidiaries of CIVH, i.e., DFA and Vumatel, together with their respective subsidiaries, will be transferred by CIVH into Maziv.[2]

14. In terms of the proposed transaction Vodacom would retain its MNO business, long-haul fibre assets and retail Internet Service Provider ("**ISP**") business.

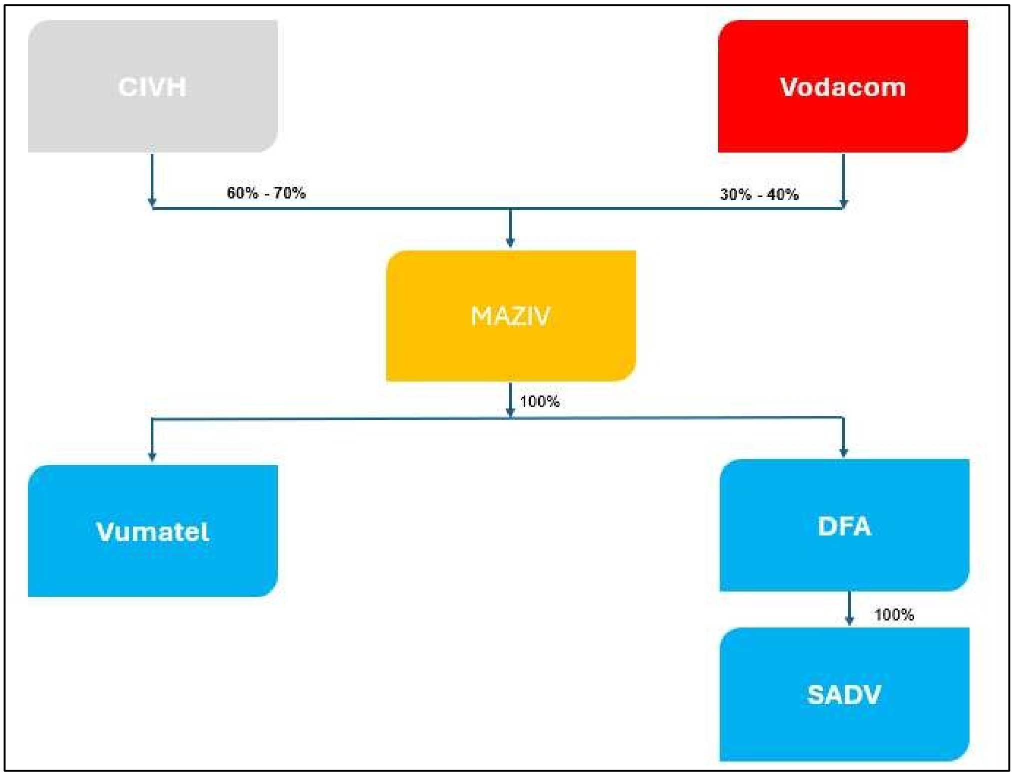
15. The following payments and transfers would take place in terms of the agreement:

    15.1. Vodacom will (i) pay approximately R6 billion in cash into Maziv; (ii) pay approximately R4.2 billion to acquire shares in Maziv from CIVH;[3] and (iii) transfer fibre to the business ("**FTTB**") and FTTH wholesale assets and metrofibre transmission links ("**Transfer Assets**")[4] valued at approximately R4.2 billion to Maziv.[5]

    15.2. If the abovementioned top-up to 40% shareholding is triggered, Vodacom will pay a further R4 billion in cash.[6]

[2] Merger Filing Part A of the Record p 42 para 2.3.
[3] Joosub Factual Witness Bundle ("**FWB**") p 322 para 8.
[4] See Sale of Transfer Asset Agreement, clause 2.1.64 (Bundle M part 1 p 712).
[5] Joosub FWB p 321 para 7.
[6] Joosub FWB p 322 para 8.

16. The proposed transaction will create the following structure:



MERGER PARTIES' ACTIVITIES

Vodacom

17. As indicated above, Vodacom is an MNO. It is active in the provision of mobile wholesale and retail voice, messaging and data services to residential and business customers.

18. We note that mobile connectivity gives millions of South Africans access to information, by providing extensive geographic and population coverage. As of 2023, South Africa enjoys more than 90 million active SIMs, and 41.6 million mobile data users, representing a 69% population penetration rate.[7]

[7] ICASA (2024) "State of the ICT Sector Report in 2024", available at: https://www.icasa.org.za/legislation-and-regulations/state-of-the-ict-sector-in-south-africa-2024-report; Stats SA (2022) "60,6 million people in South Africa", available at: https://www.statssa.gov.za/?p=15601 (accessed 25 March 2025).

19. Vodacom is the largest MNO in South Africa, followed by Mobile Telephone Networks Proprietary Limited ("**MTN**"). The other major MNOs include Cell C, Telkom, Rain Proprietary Limited ("**Rain**") and Liquid Telecom. As of 2023, Vodacom, MTN, Telkom, and Cell C have around [redacted] million, [redacted] million, [redacted] million, and [redacted] million subscribers, respectively.[8] This shows the relative size of Vodacom in comparison to the other MNOs. Other than Vodacom, only MTN has more than 20 million subscribers.

20. The Commission's investigation found that Vodacom is active at all levels of the telecommunications value chain, using various business models to build, acquire and lease infrastructure and sell services using that infrastructure. It owns national long-haul, metro backhaul and last mile fibre, including FTTH and FTTB.

21. Vodacom's FTTH business comprises its FTTH network infrastructure and related assets, including contracts, fixed assets and software. It also has an FTTB network, which is used to self-provide retail services to enterprises that are located in business parks and malls. It does not offer access to this infrastructure to third parties.

22. Vodacom leases and builds last mile fibre to connect end consumers (i.e., FTTH and FTTB) and uses this infrastructure to sell directly to consumers and enterprise customers (i.e., downstream retail services). Vodacom also has Vodacom long-haul (referred to as Vodacom Core) and a metro fibre network (referred to as Vodacom Access).

23. Vodacom is also active in the provision of fixed wholesale and retail services to residential and business customers. Vodacom's mobile and fixed services are supported by its own fibre infrastructure and are also provided over third party infrastructure. Vodacom provides limited fixed wholesale services to other telecommunications providers. These include wholesale fixed managed

[8] Nunes FWB p 165 paras 6.49 – 6.50; Smith Expert Witness Bundle ("**EWB**") p 256 para 181 Figure 7.

services, wholesale bitstream access to ISPs, wholesale fibre and microwave backhaul and managed satellite internet services. Vodacom also provides wholesale Access Point Name services, leases access to its towers and provides wholesale network management services to Rain and Liquid Telecom. Vodacom also offers retail Digital Subscriber Line ("**DSL**") broadband services to business customers, using wholesale DSL access from Telkom and business satellite internet services (particularly for customers without alternative access). Vodacom also provides more specialised services to enterprise customers, including unified communications solutions based on interlinking products and services; cloud and hosting services; connectivity services such as leased lines, microwave links, dedicated internet access, and best effort internet access; security solutions for IT systems and networks; and managed services, such as managed VoIP/telephony/video, managed VPN, and managed LAN services.

24. Vodacom holds several licences for the use of mobile and microwave spectrum. It holds licences for 14% of assigned mobile spectrum, including the following: 11 MHz FDD in the 900 MHz band; 12 MHz FDD in the 1800 MHz band; and 15 MHz FDD and 5 MHz FDD in the 2100 MHz band. It also provides wholesale national roaming services to Telkom and Cell C.

25. Vodacom's above licences, and the conditions of those licences as well as submissions that it has made to the sector regulator, ICASA, are of relevance to both the competition and public interest assessments. We shall in the reasons consider Vodacom's submissions made to ICASA, as well as its obligations in terms of its licences.

Maziv

26. As indicated above, the main operating subsidiaries of CIVH are DFA and Vumatel.

DFA

27. DFA is both a fibre infrastructure provider and an FNO.

28. DFA is a provider of wholesale, open access passive fibre infrastructure (so-called '*Layer 1*' ducts and fibre cables) and managed network connectivity ('*Layer 2*') services in both the metropolitan and long-haul telecommunications markets. DFA provides no '*Layer 3*' services (i.e., internet services). DFA's primary activity is deploying metro fibre networks and providing wholesale access to this infrastructure to fixed and mobile network operators and service providers.

29. DFA owns fibre networks in Johannesburg, Cape Town, Durban, Midrand, Centurion and Pretoria, as well as in 25 smaller metros, such as East London, Polokwane, Tlokwe, Emalahleni and George. DFA also has spectrum licences in the 26 GHz band, which is allocated for point-to-multipoint microwave services, and which cannot be used for MNO mobile services.

30. DFA was originally established as a wholesale open access provider of passive or dark fibre infrastructure, but it has expanded its activities into managed or lit services provided over its infrastructure at each level of the value chain.

31. The DFA network comprises about [redacted] km of fibre. DFA has achieved wide network coverage, reaching all of South Africa's major metropolitan areas.

32. In terms of national long-haul and metro fibre, DFA offers Titan, Peregrine and Calypte fibre products. In terms of access or last mile products, DFA offers dark fibre products in the form of Helios, Tachyon, Lumic and Arc and lit products consisting of Magellan and Business Broadband.

Vumatel

33. Vumatel is an FNO that provides open access FTTH and FTTB infrastructure at the last mile level to ISPs. Vumatel installs fibre in a suburb and also installs a fibre spur up to the home wall. After the fibre has been installed, Vumatel provides capacity on the network to ISPs who then provide retail services to end-customers over the last mile infrastructure. In other words, it provides an active network over the fibre infrastructure, allowing ISPs to connect to the network on an open access basis. Vumatel carries the costs of fibre deployment in the suburb and the ISP is responsible for providing the wi-fi router and internet access in the customer's home.[9]

34. Vumatel is active in three segments of the FTTH market, divided according to the monthly income of its customers, Core, Reach and Key:

Core

34.1. The Core segment comprises approximately 2.2 million household customers who earn above R30,000 per month.

34.2. It is common cause that almost all homes in the Core segment have been passed (but not connected). Vumatel submits that it is now focused on the Reach and Key segments.

Reach

34.3. The Reach segment comprises approximately 4.8 million customers and is aimed at suburbs where the average monthly household income is between R5,000 and R30,000 a month.[10]

34.4. Vumatel launched Vumatel Reach in 2019 and states that it developed the roll-out model which made the Reach segment accessible. With Vuma Reach it installs the customer premises equipment into the resident's house, providing a Wi-Fi connection that can be shared by everyone in

[9] Mare FWB p 439 para 38.
[10] Mare FWB p 440 para 41.

the house. Vuma Reach prepaid internet products are made available on a wholesale open-access basis to ISPs.[11]

34.5. Mr Mare indicates that this is the "*more formal previously disadvantaged areas, like your Mitchells Plain, Soweto, Vosloorus, Soshanguve, places like that, Phoenix, Chatsworth …*".[12]

34.6. Competitors are currently also rolling-out fibre in the Reach segment.

34.7. According to Mr Mare's witness statement, the total capex spent by Vumatel on Vuma Reach to date is approximately R[redacted].[13]

Key

34.8. Vumatel launched the Key product in 2021. The Key segment refers to customers who earn under R5 000 per month, comprising between 9 and 11 million customers.[14]

34.9. Mr Mare explains that these are people living in informal dwellings and include places essentially like Khayelitsha, Alexandra, and Kayamandi.[15]

34.10. Vumatel has rolled-out fibre to Kayamandi and, as of February 2024, had passed approximately [redacted] Key segment homes and the number of subscribers connected amounted to [redacted].[16] This shows a relatively low uptake by customers, also referred to in the industry as the penetration rate.

34.11. Mr Mare indicates that Key requires aerial deployment with GPS on the poles to manage uncertainty around addresses. Since Reach is aimed at the low-income 'cash' customers, it requires a different payment mechanism,[17] an efficient distribution model, consistent customer service, and maintenance so that there is no disruption of service at a cost that is affordable to consumers in this segment.[18]

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[11] Mare FWB p 440 para 43.
[12] Mare FWB p 440 para 42.
[13] Mare FWB p 443 para 51.
[14] *Inter alia* Mare FWB p 441 – 442 para 48.
[15] Transcript p 2577 lines 5 – 17.
[16] Mare FWB p 441 para 48.
[17] Transcript p 2580 line 15 to p 2582 line 22.
[18] Transcript p 2580 line 15 to p 2582 line 22.

34.12. According to Mr Mare's witness statement, the total capex spent on Vuma Key to date is approximately R[redacted].[19]

35. We note that in terms of conditions imposed by the Tribunal in the merger involving CIVH and Vumatel, the parties to that transaction had to execute pilot projects in Alexandra and Mitchells Plain with a certain total anticipated capital cost.[20]

36. Vumatel offers FTTB Best Effort to connect enterprises that it passes incidentally. These services are provided more to Small Medium and Micro Enterprises ("**SMMEs**") in homes and not into, for example, malls like DFA.

BACKGROUND

Commission's investigation and concerns raised

37. On 4 August 2023, the Commission recommended to the Tribunal that the proposed transaction should be prohibited.

38. During its investigation, the Commission received submissions, data and other information and documents from *inter alia* the merger parties, customers of the merger parties, competitors, the Department of Trade, Industry and Competition ("**dtic**"), employee representatives and trade unions.

39. Concerns were raised by various third parties about the proposed transaction. For brevity we do not repeat those concerns here; the Commission deals with them in its Report from paragraphs 389 to 456. The concerns raised by these parties include concerns about vertical input and customer foreclosure, market consolidation, horizontal concerns, tying and bundling, durable first mover advantage concerns, 5G based concerns, removal of a competitor, information

[19] Mare FWB p 442 and 443 para 51.
[20] *Community Investment Ventures Holdings Proprietary Limited* and *Vumatel Proprietary Limited* (CT Case no.: LM109Jul18 ("***CIVH/Vumatel***") CT Case no.: LM109Jul18; see Condition 7.1. of the Tribunal's imposed conditions.

exchange concerns, suitability of open access conditions, and AEX driven concerns. The Commission notes in its Report that most third parties are of the view that the proposed transaction should be prohibited and that no remedies would suffice to address those concerns. However, certain third parties made remedy suggestions.

40. After the hearing of evidence before the Tribunal, the Commission persists with its view that the proposed transaction ought to be prohibited. It submitted that the merger parties' proposed (mostly behavioural) conditions, in their different iterations, do not address the competition concerns that in the Commission's view outweigh the merger parties' public interest commitments.

Dtic and union participation

41. The dtic[21] and the Communication Workers Union ("**CWU**") participated in the hearing.

42. In terms of section 18(1) of the Competition Act, 89 of 1998, as amended ("**the Act**") in order to make representations on any public interest ground referred to in section 12A(3), the *Minister* may participate as a party in any merger proceedings before the Commission, Tribunal or the Competition Appeal Court ("**CAC**"), in the prescribed manner.

43. The dtic representing the Minister participated in this matter in relation to the public interest in terms of the abovementioned section. Its legal representatives questioned both the factual witnesses and the economic experts on public interest issues and made closing arguments in relation to the public interest. We note that the dtic did not apply to intervene in relation to the competition issues and therefore did not participate in the proceedings in relation to any of the competition issues. It submits that it will abide by the Tribunal's findings in regard to the latter.

[21] Bundle N p 1103: Minister's Notice of Intention to participate dated 21 December 2021.

44. During the course of 2022 and 2023, the dtic and the merger parties engaged with each other regarding the public interest effects of the proposed merger. This resulted in a draft framework agreement between them circulated in June 2023, which recorded a number of commitments made by the merger parties.[22]

45. The dtic proposes that should the Tribunal be minded to approve the proposed merger, it should do so subject to the merger parties' ultimate set of proposed public interest conditions.

46. The CWU participated in relation to the effects of the proposed transaction on employment and ownership. It made written and oral submissions seeking the imposition of certain conditions it proposed in relation to employment and ownership if the Tribunal were minded to approve the proposed transaction.[23]

Intervenors

47. The Tribunal gave intervention rights to two third parties (i) Rain; and (ii) MTN, both are customers and competitors of the merger parties. The Tribunal did not provide reasons at the time for allowing these interventions. The level of participation of these parties in the proceedings is self-evident from these reasons.

Rain

48. On 16 November 2023, the Tribunal granted Rain, an MNO, leave to intervene in the merger proceedings on a limited basis. It is a customer of DFA and both a competitor and a supplier of Vodacom.

49. In 2023 Rain launched RainOne which is a bundled product that offers 5G fixed wireless access ("**FWA**") and two 4G SIMs for mobile services.

[22] These commitments are contained in the set of tendered conditions which was marked Exhibit CB during the hearing.
[23] See Transcript *inter alia* p 42 line 12 to p 46 line 9.

50. As a customer of DFA, Rain leases the following from DFA: (i) dark-fibre circuits for transmission from Rain's individual radio sites to aggregation nodes; (ii) space to host Rain's equipment at DFA aggregation nodes where DFA's fibre circuits aggregate; and (iii) backhaul dark-fibre circuits from these aggregation nodes to Rain's core network. Rain submits that it is heavily dependent on DFA for these transmission services and that it has a strong preference to use dark fibre only (as supplied by DFA).[24]

51. As a competitor to Vodacom, Rain competes as a provider of retail mobile and FWA products.[25] FWA is a home broadband product supplied by MNOs using their licensed spectrum via a router device located at the customer's home. The FWA router is nomadic insofar as it can be moved to another location where the service is supplied. LTE/4G FWA was the first generation of FWA provided over licenced spectrum in South Africa initially led by Telkom and Rain, with Rain as the first to introduce 5G FWA.

52. Rain offers (i) retail 4G mobile products i.e., through the sale of data and airtime on Rain simcards for use in mobile phones;[26] and (ii) retail 5G FWA products for home broadband and small businesses (through the provision to the client of a router that receives data over 5G signals and which re-transmits that data over a Wi-Fi signal in the user's home; and the provision of unlimited data over this device).[27]

53. Rain is a supplier of Vodacom in that it provides roaming services to Vodacom on the 4G layer of its network.[28]

54. Rain submits that its customers are predominantly people in the middle- to lower-income brackets who, without Rain's products, would not be able to afford the

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[24] Schoeman FWB p 521 para 8.6; Conrad Leigh, Rain Intervention Application Founding Affidavit, intervention bundle p 19 to 20 paras 35 to 39; Schoeman Transcript p 941 line 17 to p 942 line 10.
[25] Schoeman FWB p 521 para 8.7.
[26] See https://www.rain.co.za/mobile (accessed 25 March 2025).
[27] Schoeman FWB p 519 – 520 para 8.1; Schoeman Transcript p 929 line 22 to p 930 line 5.
[28] Founding affidavit intervention bundle p 19 para 33. This does not mean, however, that Vodacom owns Rain's spectrum or that Vodacom's total spectrum holdings include Rain's spectrum. Transcript p 2189 line 20 to p 2190 line 6, p 2264 line 10 to p 2266 line 8, p 2266 line 9 to p 2267 line 18.

same access to data. Many of Rain's customers are in outlying areas or townships.

55. Before the hearing started, Rain cited satisfaction with the merger parties' tendered version of the (mostly behavioural) conditions filed on 14 March 2024,[29] and on 28 March 2024 withdrew its objection to the proposed transaction.[30] It thus would no longer intervene in the proceedings.

56. Given the above, the Tribunal requested Rain to explain its position and address the Tribunal on the following issues at the hearing: (i) its theories of harm/concerns regarding the proposed transaction; (ii) why and how the merger parties' remedies address its competition concerns; and (iii) comments on/any proposed changes to the merger parties' tendered remedies. Following the Tribunal's request, Rain filed a factual witness statement.

57. Rain's position after hearing the evidence is that it is not in favour of approving the proposed transaction without conditions. It submits that without appropriate conditions the proposed transaction is likely to substantially lessen competition in the affected markets and Rain would oppose the merger, given that the competitive concerns associated with the merger would outweigh its likely benefits. This is because:

57.1. the merged entity would have an incentive to foreclose competitors of Vodacom, including Rain, which would be paired with an existing ability on the part of DFA to foreclose primarily through the provision of services to Vodacom on preferential terms; and

57.2. the merger would generate the risk that Rain's sensitive commercial information would leak from DFA to Vodacom as a competitor. Rain submits that this would be to its competitive detriment. It is heavily dependent on DFA for the provision of backhaul dark-fibre circuits.

[29] The merger parties' tendered conditions filed on 14 March 2024.

[30] Rain communicated in its letter to the Tribunal dated 28 March 2024 that it was satisfied that the revised version of the proposed conditions filed on 14 March 2024 addressed the concerns Rain had raised in its intervention application. Also see Transcript p 936 lines 1 – 7.

MTN

58. On 16 November 2023, the Tribunal granted MTN leave to intervene in the hearing proceedings in terms of a defined scope. MTN is both a customer and a competitor of the merger parties.

59. Unlike Rain, MTN was not satisfied with merger parties' tendered version of behavioural conditions filed on 14 March 2024. MTN submits that, absent effective conditions, the proposed merger would give rise to concerns of substantial anti-competitive harm. It however does not propose a prohibition of the proposed transaction.

60. During the hearing of the factual evidence, MTN on 19 July 2024 informed the Tribunal that it negotiated an agreement with the merger parties on behavioural conditions and therefore would no longer actively participate in the hearing other than closing argument.[31] The above development had certain practical implications since certain factual witnesses, including Mr Van Zyl Botha ("**Mr Botha**"), of Herotel, were yet to testify and would have been crossed-examined by MTN's counsel.[32]

61. Recall that CIVH through Vumatel currently has a shareholding in Herotel (see paragraph 9 above). We note that in relation to Herotel, MTN on 02 June 2024 requested the Tribunal to issue a subpoena *duces tecum* requiring the CEO of Herotel to testify within the period allocated for the testimony of the factual witnesses nominated by the parties to these proceedings. The Tribunal on 11 June 2024 issued a subpoena requiring Mr Botha, the CEO of Herotel, to appear and testify under oath before the Tribunal on certain issues falling within his personal knowledge. He was further required to provide certain documents to the registrar of the Tribunal for inspection by the independent legal and

[31] Transcript p 2683 line 14 to p 2685 line 19.
[32] Transcript p 2686 line 3 to p 2694 line 4.

economic advisors of all the parties to the proceedings against the provision of appropriate confidentiality undertakings.[33]

62. MTN during the hearing placed its focus on improving the merger parties' tendered behavioural conditions aimed at dealing with vertical concerns. As it articulates already in its opening statement, it is not a proponent of the prohibition of the proposed Maziv/Vodacom deal because "*Investment in South Africa's fibre network infrastructure is presumptively positive; and* <u>*consolidation of the industry is an inevitable and even desirable feature of the national*</u> *and international* <u>*landscape*</u>*…".*[34] (Own emphasis) The reason why MTN does not favour that the deal be prohibited becomes clear during the hearing – it itself wants to make acquisitions to acquire a fibre footprint and grow fibre assets in order to effectively compete after this proposed merger. Its strategic documents reveal that it wants to "*target Openserve as a possible acquisition or JV partner to acquire a fibre footprint & wholesale business that can effectively compete with Vodacom CIVH*" and in parallel to this, "*Multiple ISP/FNO acquisition & consolidation to grow fibre assets and customer base*".[35] The need for this to occur in parallel is "*to mitigate the risk of Openserve acquisition not being approved by regulators*".[36] Mr James Hodge ("**Mr Hodge**") makes the point that "*certainly, if you want to pursue other deals, then if this was prohibited pursuing those over the deals depending on the structure, is likely to not be feasible.*"[37] We shall deal with this further under the public interest analysis, i.e., the effects on the particular sector.

[33] These documents were: (i) Herotel's memorandum of incorporation; (ii) any shareholders' agreement and/or similar document regulating the rights and obligations of Herotel's shareholders *inter se* and in respect of Herotel; (iii) any document(s) reflecting the terms and conditions on which CIVH extended and/or facilitated funding to Vumatel, whether directly or indirectly, to enable it (or an associated entity) to acquire a shareholding in Herotel; (iv) any document(s) reflecting the terms and conditions on which CIVH extended and/or facilitated funding to the Trust, whether directly or indirectly, to enable it (or an associated entity) to acquire a shareholding in Herotel; (v) the four most recent annual budgets and/or business plans of Herotel; and (vi) the four most recent audited annual financial statements of Herotel.
[34] Transcript p 27 line 16 to p 28 line 4.
[35] See MTN document of December 2021 with the title "*MTN SA – FTTX Way Forward*: *Role of Fibre and Options to Consider*", Bundle O page 253 and following.
[36] Bundle O p 254.
[37] Transcript p 3926 lines 13 – 20.

Witnesses

63. The following factual witnesses testified at the hearing on behalf of the Commission:

- Mr Abraham Van der Merwe ("**Mr Van der Merwe**"), a Director at Frogfoot Networks (Pty) Ltd ("**Frogfoot**"). Frogfoot is an FNO that provides services (FTTH, FTTB and FTTT/S) on an open access, wholesale-only basis. It does not provide any services to retail customers;[38]
- Mr Lebogang Masalesa ("**Mr Masalesa**"), the Managing Executive of Telkom Consumer and Small Business; and
- Mr Hasnain Motlekar ("**Mr Motlekar**"), the Chief Financial Officer of Telkom Consumer and Small Business.

64. The Commission called Mr Graham Johnson ("**Mr Johnson**"), an associate partner at Aetha Consulting Limited ("**Aetha**") who testified on issues relating to the merger parties' claimed efficiencies and proposed behavioural remedies.

65. MTN called Mr Richard Nunes ("**Mr Nunes**"), the General Manager, Network Implementation at MTN, as a factual witness.

66. Mr Botha, the CEO of Herotel, testified following the Tribunal's subpoena of Mr Botha (see paragraph 61 above).

67. The merger parties called the following factual witnesses:

- Mr Pieter Uys ("**Mr Uys**"), the Head of Strategic Investments at Remgro Ltd and the Chairperson of the board of directors of CIVH;
- Mr Mohamed Shameel Aziz Joosub ("**Mr Joosub**"), the CEO of the Vodacom Group Limited;
- Mr John Otty ("**Mr Otty**"), the financial controller at Vodafone Group Plc and a non-executive director on the Vodacom Group Limited board;

[38] Van der Merwe FWB p 36 para 24.

- Dr Ryan Van den Bergh ("**Dr Van den Bergh**"), the Managing Executive for Group Technology Strategy, Architecture, Spectrum and Assurance at Vodacom; and
- Mr Dietlof Ziegfried Mare ("**Mr Mare**"), the CEO of Maziv; and
- Dr Marten Scheffer ("**Dr Scheffer**"), a managing executive at Vodacom.

68. Factual witness statements were filed by the merger parties for the following individuals; however, they were not called to testify at the hearing:
    - Mr Sitho Mdlalose ("**Mr Mdlalose**"), the CEO at Vodacom; and
    - Mr Robin Maduray ("**Mr Maduray**"), a managing executive for transmission engineering at Vodacom.

69. Rain put up Mr Gustav Schoeman ("**Mr Schoeman**"), the Chief Engineer of Rain as factual witness following the Tribunal's request as noted above (see paragraph 56).

70. The following economic experts gave evidence in so-called "hot tub" format:
    - for the Commission, Mr Hodge, the Chief Economist at the Commission;
    - for MTN, Mr Patrick Smith ("**Mr Smith**"), a partner at RBB Economics; and
    - for the merger parties, Prof Nicola Theron ("**Prof Theron**"), an affiliate in the Economic and Financial Consulting practice at FTI Consulting; and Mr Paul Reynolds ("**Mr Reynolds**"), Senior Vice President of Compass Lexecon, a trading name of FTI Consulting LL.

Hearing and ultimate conclusion

71. The hearing took place over 26 days in the period 20 May 2024 to 27 September 2024, with the last written submission received on 16 October 2024.

72. We note that both the customers and competitors of the merger parties have raised competition concerns with the proposed transaction and do not support the outright approval of the proposed transaction. Other than the firms

associated with the above factual witnesses, several other third parties raised concerns with the proposed transaction during the Commission's investigation.

73. Although the merger parties tendered several iterations of behavioural remedies in an attempt to deal with the vertical concerns, the proposed remedies do not, other than a divestiture remedy in relation to FTTH infrastructure, address the horizontal competition concerns. Furthermore, the tendered behavioural remedies for the vertical competition concerns, as raised by customers and competitors alike, are technical in nature, cumbersome, and will not be effective and furthermore cannot be adequately monitored and enforced by the competition authorities. In addition, the tendered behavioural remedies, which are extremely complex and technical in nature, and affect many customers/competitors of the merger parties, will place a huge regulatory burden on the Commission and Tribunal and both institutions cannot take on this (sector) regulatory burden of indefinite duration.

74. Having considered the factual and economic evidence, numerous strategic and other documents and argument, the Tribunal on 29 October 2024 issued its order prohibiting the proposed transaction.

CONTEXT

Sector background and terminology used

75. To provide context to the assessment that will follow, we explain certain general features of the sector and the terminology used, including the different fibre infrastructure layers, our history of high mobile data costs in South Africa, and alleged past cartel behaviour involving Vodacom and MTN.

Layers of fibre infrastructure

76. There is broad consensus between the parties on the general features of the four layers that make up the fibre infrastructure industry. These layers comprise the

(i) international; (ii) national long distance; (iii) metropolitan (including backhaul); and (iv) last mile levels.[39] We explain each layer below.

International and national long distance layer

77. We note that the international layer and the national long distance ("**NLD**") infrastructure layer are not particularly relevant to the assessment of the competition issues in this merger. For completeness, we note that at the international layer, connectivity occurs through high-capacity undersea fibre cables which connect different countries and continents through multiple landing sites.[40] This infrastructure has high capacity given that it carries country aggregated traffic.[41] Consortia typically built these connections given the high cost to lay this infrastructure.

78. The NLD fibre/infrastructure connects major cities and towns across South Africa, transporting traffic between them and connecting them to the international connectivity infrastructure.[42]

Metropolitan

79. The metropolitan layer is relevant to the competition issues raised in this merger.

80. At the metropolitan layer, metropolitan fibre rings and backhaul (or metro fibre) aggregate traffic from last mile access networks (both fixed and mobile) or aggregation nodes (including major datacentres), and transport aggregated traffic between these networks and nodes, and connect them to the infrastructure NLD layer.[43] Backhaul may also be provided by microwave links, but typically only where fibre is not in place or is too expensive to lay, and is

[39] Van der Merwe FWB p 33 – 34 para 16; Nunes FWB p 129 – 131 para 2.4; Van den Bergh FWB p 188 – 189 para 5; Hodge EWB p 49 and 50; Smith EWB p 211 to 213; Reynolds EWB p 437 and 438.
[40] Transcript *inter alia* p 74 line 3 to p 75 line 6.
[41] Transcript p 74 lines 9 – 18.
[42] Transcript p 75 line 11 to p 78 line 8.
[43] Transcript p 78 lines 11 – 22; p 79 line 13 to p 80 line 12.

typically self-provided rather than wholesaled. There are also some legacy copper connections, but these are currently being replaced by fibre.

Last mile

81. Relevant to the competition issues raised in this merger, is the final layer known as the last mile fibre infrastructure. This infrastructure provides the connection between the metropolitan backhaul network and the final customer premises.[44]

FTTB and FTTH

82. It is common cause that a distinction can be drawn between the markets for (i) residential customers using FTTH infrastructure; and (ii) commercial customers or enterprises using FTTB infrastructure. This distinction is due to the difference in service levels required by residential consumers and businesses. We note however that many SMMEs in South Africa also make use of FTTH infrastructure.

83. Both the FTTH and FTTB networks are built by FNOs and are typically offered on a wholesale basis to ISPs. The ISPs provide internet connectivity services and package the completed product to final consumers or businesses. However, there are some operators that offer the ISP and retail service for FTTB themselves and do offer their FTTB networks on a wholesale basis.

Mobile and fixed retail services to consumers, SMMEs and businesses

84. MNOs use the fibre backbone infrastructure as the building blocks to form their core mobile networks and connect their core network to their last mile radio access network ("**RAN**") infrastructure. The RAN makes use of base stations (or towers) and antennas to provide a wireless last mile connection to the end user devices using privately held spectrum. It connects directly to the metropolitan network through fibre to the site ("**FTTS**") infrastructure.

[44] Transcript p 81 line 14 to p 82 line 15.

Technologies

85. Another view of the market is to segment it across different technologies. The market is segmented across the following technologies in South Africa:

85.1. FTTx which includes FTTH, FTTB, and others such as fibre to the site or tower ("**FTTT/S**"). Examples of service providers include DFA, Vodacom, Liquid Telecom, Openserve, Frogfoot, Octotel, Metrofibre, WIOCC, and Seacom.

85.2. Mobile Wireless Access which includes the 3G, 4G/LTE and 5G technologies (mobile) and some of this also is delivered as FWA products (e.g. Rain, and Fixed LTE). Examples of service providers here include Vodacom, MTN, Telkom, Rain, and Cell C.

85.3. Point-to-point FWA would usually use unlicensed or licensed spectrum (not 4G/5G). Examples of service providers include Comsol, Herotel, Sentech, MTN, and Liquid Telecom.

85.4. Satellite refers to technologies such as Very Small Aperture Terminal, and Low Earth Orbit. Examples of service providers include Yahsat, Eutelsat OneWeb, Vodacom, Liquid, Vox, Paratus, CMC, and Q-KON.[45]

Data costs in South Africa

86. As context, we note that South Africa has a history of high data pricing that over recent years have reduced following intervention *inter alia* by the Commission. Mobile broadband ("**MBB**") has long been flagged as a costly alternative source of internet access for consumers, which resulted in the initiation in 2017 by the Commission of its Data Services Market Inquiry ("**DSMI**") and the ICASA Market Inquiry into Mobile Broadband Services ("**MBSI**").

[45] Van der Merwe FWB p 35 – 36 para 18.

87. The Commission during its market inquiry received a number of submissions arguing that access to data has become akin to a human right or an essential utility on the level of electricity and water. Affordable data was seen as critical for social and economic inclusion. Mr Hodge testifies that there is still a constant gripe about data prices in South Africa and that organisations like amandla.mobi's consumer surveys show data prices amongst one of their top three concerns, every month.[46]

88. The DSMI found *inter alia* the structure of data pricing in South Africa to be anti-poor, meaning the poor who typically purchase small pre-paid data bundles, pay more for data than richer consumers who purchase larger bundles and on a contract basis.[47] Whilst the DSMI did reach agreement for short-term price reductions, it recognised that the mobile market remained uncompetitive which required regulatory interventions in the medium-term. The DSMI also included recommendations to extend fibre alternatives, including public Wi-Fi and FTTH, precisely to bring competitive pressure on persistent high mobile data prices.

89. Mr Hodge notes that there were two settlement agreements involving Vodacom and MTN after the Commission's finding of a *prima facie* case of excessive pricing.[48] MNOs now offer a range of MBB packages with higher usage levels at lower prices.

90. Mr Reynolds provides a useful analysis of the significant decrease in the price per gigabyte for mobile services for MNOs in South Africa over the period 2018 and 2022, as illustrated by his Figure 13 as replicated below. [49]

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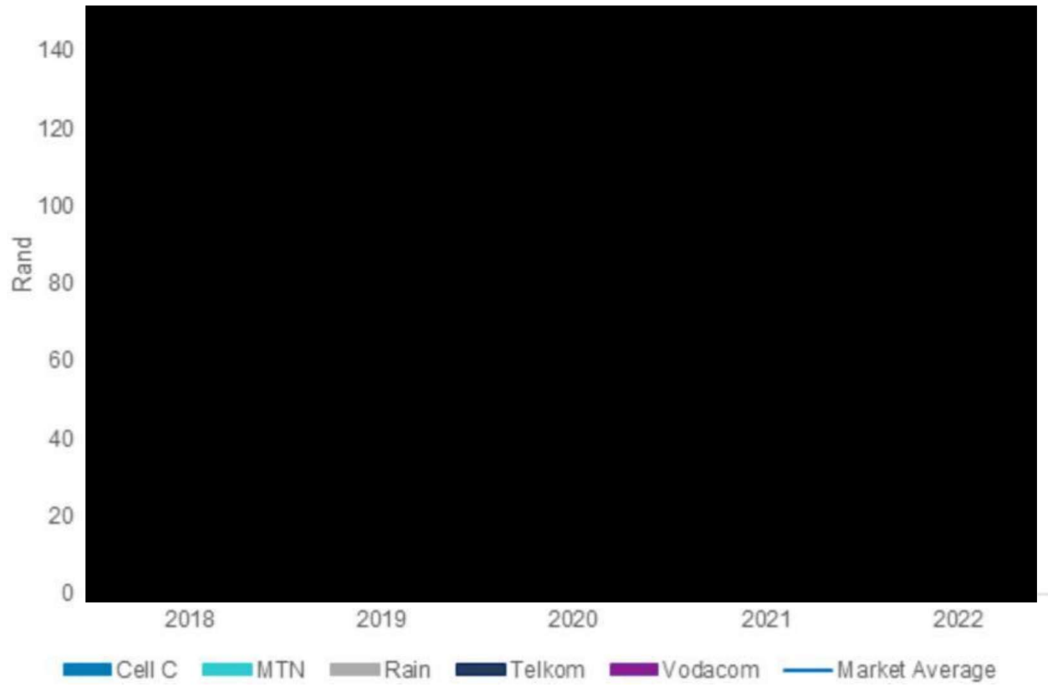
[46] Transcript p 3663.
[47] DSMI Final Report 2019.
[48] Transcript p 3635.
[49] Reynolds EWB p 546 para 7.34, Figure 13.

Figure 13: Average effective mobile price per gigabyte by MNO, 2018-2022



Notes: Prices are exclusive of VAT.

Source: Compass Lexecon analysis based on Africa Analysis data, PR0005 Effective mobile prices.

91. The above graph illustrates the historic high average mobile price per gigabyte per MNO in South Africa and the significant drop in the five-year period considered.

92. Mr Smith also notes significant changes in the price of mobile connectivity over time in South Africa. His Figure 8[50] shows that the effective price paid by MTN's customers for mobile data connectivity fell dramatically in the eight years from 2011 to 2019. This dramatic fall again highlights the historic high mobile data connectivity prices of MTN.

[50] Which was submitted by MTN to ICASA during the MBSI.

Economies of scale at MNO level

93. The history of the South African telecommunications sector has other implications. Mr Hodge notes that Vodacom and MTN's national coverage gives them a larger customer base and a higher share of customer revenue. This along with wholesale revenues make both players highly profitable and able to make vast investments in their network from retained earnings. The ability to invest at the level that Vodacom and MTN can ensures that they have a network quality advantage, including network speeds as they rollout new generation faster than rivals to more areas.[51]

94. National network coverage as an MNO is important to benefit from economies of scale. Vodacom and MTN's national coverage provide them with significant economies of scale, as the largest cost components of an MNO are rental of space on towers/high sites for radios, backhauls, as well as equipment. Each of Vodacom and MTN have an advantage in that they can share tower space with their GSM radios and reduce a significant cost component and can also negotiate with tower companies to get lower rates due to scale.[52] In contrast, other (smaller) MNOs wanting to advertise national presence are forced to roam on one of the two networks at a much higher variable cost.[53]

Alleged history of collusion between Vodacom and MTN

95. According to a 1996 Financial Mail report, Vodacom and MTN executives met in London in 1994 to discuss pricing. The result of the meeting became known as the "*London Agreement*" - a memorandum where cellular tariffs for South Africa allegedly were set. The memorandum allegedly outlined agreements on tariff structures, airtime discounts, and connection bonuses. At the time, Vodacom and MTN said that the agreement reached in London was "*legal and not anti-competitive*." The erstwhile Competition Board referred the London Agreement

[51] Hodge EWB p 93 para 128.3.
[52] Hodge EWB p 92 para 128.1 referring to Liquid Telecom's letter dated 25 March 2022, Bundle M 6857.
[53] Hodge EWB p 92 para 128.2.

to the criminal authorities, but not much progress was made. *My Broadband* reports that according to Gordon Institute of Business Science Professor and former Tribunal Chairperson, Mr David Lewis, Vodacom and MTN "*concocted legal stratagems designed to keep the issue out of court*".[54]

Issues in dispute between the parties in this matter

96. We note that many issues are in dispute between the parties in this case which in very broad terms include:

    96.1. the (true) rationale of the proposed transaction (including the issue of so-called co-control) and the merger parties' post-merger incentives;

    96.2. the competitive dynamics and effects of the proposed transaction relating to the following markets:

        96.2.1. whether or not dark vs lit fibre are in separate relevant markets and the market position of DFA; and

        96.2.2. market delineation in regard to home broadband and (the degree of) competitive interaction between FWA and FTTH;

    96.3. relevant counterfactuals including a competition, investment and fibre roll-out counterfactual;

    96.4. the horizontal effects of the proposed transaction relating to the following markets:

        96.4.1. metro fibre and FTTB actual and potential future competition; and

        96.4.2. competitive interaction between FWA and FTTH, including in the future;

    96.5. portfolio effects, specifically post-merger bundling concerns;

    96.6. vertical foreclosure in relation to:

        96.6.1. metro/FTTS used by MNOs;

        96.6.2. wholesale metro and FTTB used by FNOs; and

        96.6.3. wholesale FTTH/FTTB used by ISPs;

[54] See *My Broadband* article of 26 November 2014 titled *Secret Vodacom, MTN Pricing Agreement Warning* available at: https://mybroadband.co.za/news/cellular/114623-secret-vodacom-mtn-pricing-agreement-warning.html (accessed 25 March 2025).

96.7. the adequacy and effectiveness of the merger parties' proposed mostly behavioural (and one structural divestiture) conditions; and

96.8. the public interest effects of the proposed transaction including the merger-specificity of the effects.

Legal framework

97. In terms of section 12A(1) of the Act, whenever required to consider a merger, the Tribunal must initially determine whether or not the merger is likely to substantially prevent or lessen competition, by assessing the factors set out in subsection (2), and if it appears that the merger is likely to substantially prevent or lessen competition, then determine—

(a) whether or not the merger is likely to result in any technological, efficiency or other pro-competitive gain which will be greater than, and offset, the effects of any prevention or lessening of competition, that may result or is likely to result from the merger, and would not likely be obtained if the merger is prevented; and

(b) whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3).

98. The assessment of a substantial prevention or lessening of competition under section 12A is determined on a case-by-case basis. The word "*substantially*" in this context means "*materially or considerably in amount or duration*."[55]

99. In *Imerys* the CAC in relation to likely effects held: "*[t]here is thus much to be said for the view that 'likely' in s 12A(1) means reasonably probable rather than more probable than not. <u>One is concerned with a predictive exercise where future outcomes cannot be measured with fine callipers</u>*."[56] (Own emphasis) Indeed, this is a case where reasonably probable future outcomes are important

[55] *Medicross Healthcare Group (Pty) Ltd and Another v Competition Commission* [2006] 1 CPLR 1 (CAC) ("***Medicross***") at para 19.

[56] *Imerys South Africa (Pty) Ltd and Another v Competition Commission* (147/CAC/Oct16, IM013May15) [2017] ZACAC 1; [2017] 1 CPLR 33 (CAC) (2 March 2017) ("***Imerys***") at para 53.

for the assessment of the competitive effects of the proposed transaction, with due regard to the merge parties' strategic documents.

100. When determining this the Tribunal must assess the strength of competition in the relevant market(s), and the probability that the firms in the market after the merger will behave competitively or co-operatively, taking into account any factor that is relevant to competition in the relevant market(s), which may include issues such as an increase in price,[57] a reduction in quantity, quality, consumer choice or a loss of innovation. Concerning the substantiality of any likely price increase, we note that the Tribunal in *Draslovska* found that "*any negative price effect as a result of a merger arguably represents a substantial effect for purposes of section 12(1) of the Act*."[58]

101. Regarding onus and Tribunal's inquisitorial powers, the CAC in *Imerys* explains: "*Given the Tribunal's inquisitorial powers, it may not strictly be accurate to say that the Commission bears the burden of proving likely SLC. It is nevertheless so that, if on all the evidence before the Tribunal, a likely SLC cannot be found, the Tribunal must approve the merger unless the public interest override is operative*."[59]

102. In relation to remedies, as we have (mostly behavioural) remedies put up in this case, the CAC in *Imerys* held: "*I think it is permissible for the Tribunal to reason thus: 'The merger will likely give rise to an SLC. Although the proposed conditions are more likely than not to remedy the likely SLC, <u>there is a reasonable possibility that they will fail to do so. Therefore we prohibit the merger</u>.*'"[60] (Own emphasis)

103. The Act furthermore in terms of section 12A(1A) requires us to, despite our determination in subsection (1), also determine whether the merger can or

[57] *Competition Commission of South Africa v Mediclinic Southern Africa (Pty) Ltd and another* 2022 (4) SA 323 (Constitutional Court) ("***Mediclinic***") at para 54.
[58] *Draslovska Holdings A.S v Competition Commission of South Africa and others* IM139Dec21 (11 October 2023) ("***Draslovska***") at para 194.
[59] *Imerys* (CAC) para 38.
[60] *Imerys* (CAC) para 40.

cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3). These factors are the effect that the merger will have on-

(a) a particular industrial sector or region;

(b) employment;

(c) the ability of small and medium businesses, or firms controlled or owned by historically disadvantaged persons, to effectively enter into, participate in or expand within the market;

(d) the ability of national industries to compete in international markets; and

(e) the promotion of a greater spread of ownership, in particular to increase the levels of ownership by historically disadvantaged persons and workers in firms in the market.

104. In these reasons we first assess the competition effects, including efficiencies, and then assess the public interest factors. We then perform a balancing exercise of the anti-competitive effects and the merger-specific public interest benefits.

TRANSACTION RATIONALE

105. We next consider the evidence regarding the rationale for the proposed transaction. Determining the true rationale of the proposed transaction is essential since it gives context and informs the competition and public interest analyses that will follow.

Merger parties' submissions

106. The merger parties submit that Vodacom wishes to invest in Maziv because Maziv has the unique capability, know-how and expertise to roll out fibre at scale and with speed.[61] It accordingly gives effect to Vodacom's core purpose of connecting people. Vodacom's business case for the proposed transaction is

[61] Joosub FWB p 329 – 330 para 24.

that it is off-balance sheet, could generate returns from Maziv's existing businesses from the outset and is likely to realise a future return derived from expanding Maziv's fibre coverage and increasing take-up of fibre.[62]

107. The merger parties explain Maziv's rationale as follows: currently Maziv is required to focus on connecting homes that are already passed, rather than passing new homes, because of its capital constraints.[63] Mr Uys submits that "*the proposed transaction will provide Maziv with the necessary capital to continue with the roll-out of fibre, supporting the provision of internet into lower income areas*".[64] In this way, the proposed transaction will contribute significantly to narrowing the "*digital divide*".[65] Maziv also sees an opportunity through the proposed transaction to expand its fibre footprint through the acquisition of the Transfer Assets, thereby improving the value of Maziv's open access offering to customers.[66]

108. The merger parties rely on Mr Uys's oral evidence during the hearing that until Maziv reduces its [redacted] ratio it cannot invest further in expanding its network.[67] The capital injection from Vodacom will improve its [redacted] ratio.

109. They also argue that Vodacom (alone or in a FibreCo JV) will not build fibre in competition with Vumatel and DFA.

Commission's submissions

110. The Commission submits that both Vodacom and Maziv have defensive reasons for concluding the transaction.

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[62] Joosub FWB p 330 – 331 para 26 – 27.
[63] Uys Supplementary Witness Statement FWB p 551 para 23.
[64] Uys FWB p 486 para 58.
[65] Uys FWB p 486 para 58.
[66] Transcript p 1116 lines 14 – 22.
[67] Transcript p 1125 lines 3 – 4.
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111. It submits that CIVH initially rejected the transaction before later agreeing to it, based on 'the costs of not doing the transaction' following threats by Vodacom to pursue 'other options.'

112. Vodacom is DFA's [redacted] customer, and the proposed transaction presents an opportunity for Maziv to reduce the revenue risk of losing DFA's [redacted] customer. The Commission further submits that pre-merger DFA must price aggressively in order to retain its [redacted] customer and, post-merger, this pricing constraint is lessened or lost as the risk of losing Vodacom is eliminated by this proposed merger.

113. According to the Commission, Vodacom has sought a fibre deal given the risk posed to its mobile revenues as a result of mobile consumers embracing fibre.

Our assessment

114. Throughout our assessment we give weight to the merger parties' own internal, strategic and other documents since these documents, unlike the merger parties' factual witness statements, were created in the normal course of business and not prepared specifically for this merger hearing. This weight is consistent with international practice. The USA 2023 Merger Guidelines explain this weight as follows: "*The Agencies often obtain substantial information from the merging parties, including documents, testimony, and data. <u>Across all of these categories, evidence created in the normal course of business is more probative than evidence created after the company began anticipating a merger review. Similarly, the Agencies give less weight to predictions by the parties or their employees, whether in the ordinary course of business or in anticipation of litigation, offered to allay competition concerns. Where the testimony of outcome-interested merging party employees contradicts ordinary course business records, the Agencies typically give greater weight to the business records</u>*"; and "*Similarly, other suppliers, indirect customers, distributors, consultants, and industry analysts can also provide information helpful to a merger inquiry. As with other interested parties, the Agencies <u>give less weight</u>*

to evidence created in anticipation of a merger investigation and more weight to evidence developed in the ordinary course of business."[68] (Own emphasis)

115. In our view the merger parties' own internal documents prepared when considering the deal reveal the true rationale for the proposed transaction rather than what is submitted later to the competition authorities. These documents clearly reflect that from CIVH's perspective the rationale was the very real threat of substantial competition from Vodacom at both the DFA and Vumatel levels, as shown below.

116. We first consider the factual evidence that Vodacom had 'other options*'* than concluding the current deal with CIVH as made clear during the negotiations to Mr Uys and reflected in the board minutes.

117. CIVH's internal documents reveal that CIVH was anxious to conclude a deal with Vodacom to avoid it pursuing 'other options' in the market. Mr Uys confirms these facts when presented with CIVH's Board meeting minutes which reflect: "*[Pieter Uys] advised that 'Project LINDT'[69] was not concluded in December 2020 and a shareholder subcommittee was formed to continue discussions with Vodacom. The subcommittee has been engaging with Vodacom to see if there's an opportunity for them to invest in CIVH. Vodacom is still interested in investing in CIVH, however, there is limited time to conclude the transaction as Vodacom is considering other options. It was noted that should the parties fail to reach an agreement on the transaction by the end of March 2021 Vodacom would consider other options.*" (Own emphasis) Mr Uys confirms that these are his words as contained in the signed minutes.[70]

118. Mr Uys further indicates that Mr Joosub, the Chief Executive Officer and Executive Director of Vodacom Group Limited, had reached the end of his tether at that point and was applying pressure for Maziv to confirm the conclusion of

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[68] Merger Guidelines of the U.S. Department of Justice and the Federal Trade Commission, 2023 Section 4.1 page 35.
[69] '*Project Lindt'* is the internal nomenclature used by CIVH denoting the proposed transaction.
[70] Minutes of the meeting of the CIVH Board on 17 March 2021.Bundle M p 1174 para 2.1.1.10; Transcript p 1194 lines 6 – 21.

the deal by March 2021 since, as indicated above, Vodacom would "*do other things*".[71] He quotes Mr Joosub as having said at the time "*I'm going to do other things*".[72]

119. He further confirms that CIVH delayed the transaction for a considerable time: "*We then asked Mr Joosub, Mr Joosub, we are sorry that CIVH did not approve the transaction in December. Mr Joosub, I cannot use the words he used to us, but they were not friendly and he said, you guys have messed me around for the whole of 2020 and then at the end you did not approve the deal*."[73]

120. CIVH's internal documents further reveal what it sees as the threats to its businesses and specifically what Vodacom would do absent this proposed transaction. These documents show that among the threats to its businesses are "… *aggressive land-grab and overbuild[74] strategies of competitor metro and backbone networks in secondary cities*"; "*price erosion due to large ISPs and network operators looking to self provide*"; "*rapidly reducing ARPUs[75] and overbuild*"; and "*competition from other technologies such as satellite broadband, tapping into rural and other low return areas*".[76] (Own emphasis)

121. The documents furthermore identify certain high probability scenarios which presented a threat to CIVH. Mr Uys under cross examination sought to downplay the detailed information in these internal documents as mere "*hypothetical scenarios that we discussed*".[77] He attempted to claim that "*thinking back*" the identified scenarios were not a real credible outcome.[78] We do not find this attempt by Mr Uys to downplay the strategic documents credible. The internal documents clearly express CIVH's held view that Vodacom posed a threat to CIVH's businesses. Mr Uys did not recall this ex-ante view when questioned

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[71] Transcript p 1195 lines 12 – 22; p 1196 line 12 to p 1197 line 6; p 1202 lines 20 – 21.
[72] Transcript page 1197 lines 1 – 6.
[73] Transcript page 1195 lines 12 – 17.
[74] Overbuild refers to the duplication of fibre infrastructure by two or more fibre infrastructure providers that have laid their own fibre optic cables in the same area or even in the same roadside trench.
[75] Average Revenue Per User.
[76] Bundle M p 1221; Transcript p 1209 lines 2 – 20.
[77] Transcript p 1226 lines 6 – 7.
[78] Transcript p 1217 line 22 to p 1218 line 1.

about any document before the Tribunal. Furthermore, the scenarios were prepared by management and advisors,[79] considered and discussed by the CIVH board and, importantly, informed the decision to do the deal with Vodacom.[80] Notably, no other scenarios were presented to the CIVH board.

122. When the strategic documents are put before Mr Uys by the Commission's counsel, he acknowledges that they were put together by management and advisors, but despite being "*the Chairman of the Board*" and "*we debated each and every of these*" he had no idea where the information came from: "*ADV BERGER SC: So, you don't know where they got this information from? MR UYS: No idea*".[81] We do not find this credible.

123. We consider the threats identified in the CIVH internal documents in relation to DFA and Vumatel respectively.

Threats to DFA

124. In relation to DFA the identified threats relate *inter alia* to Vodacom establishing (i) a FibreCo; and (ii) a TowerCo. We deal with these in turn indicating what the anticipated effect will be on the competition that CIVH will face absent the proposed deal, the fear being significant increased competition for DFA.

The FibreCo threat

125. The documentary evidence indicates that Vodacom "*has identified*" the establishment of a FibreCo by pursuing deals with other FNOs, making a significant investment, and expanding as a rival to DFA:[82] "*Vodacom <u>**has identified**</u> <u>the establishment of a Fibre Co as a key strategic priority (with or without Lindt)</u>. <u>Without Lindt, to deliver its strategic ambitions, Vodacom **will** partner with another FNO</u> (e.g; [redacted]) or MNO (e.g; [redacted]) <u>to</u>*

[79] Transcript p 1213 line 22 to p 1214 line 1.
[80] Transcript p 1225 lines 21 – 22.
[81] Transcript p 1214 lines 1 – 12.
[82] Bundle M p 1223.

<u>establish a Fibre Co which will now be a rival to DFA</u> and in which it <u>will have invested R6 billion cash which can be used as CAPEX to fund its expansion</u>." (Own emphasis) We stress the use of the words "*Vodacom has identified*" in the strategic document.

126. The implications of this FibreCo threat are recorded in the internal documents and will play out at three levels of effects on DFA:

126.1. a significant risk of losing DFA's [redacted] tenant and the largest MNO in South Africa, Vodacom - together with major revenue churn in a competitor FibreCo in which Vodacom would have a shareholding;

126.2. the risk of losing R[redacted] in revenue per annum with average contract tenure of [redacted] years; and

126.3. in addition to the above, all future new business from Vodacom which would shift to its own FibreCo (new links for existing base stations and new 5G densification).[83]

127. The above concern is exacerbated by the fact that Vodacom's Transfer Assets would move to the FibreCo - being a rival to DFA. The implications of that are that DFA would be unable to expand its network footprint as planned to match that rivalry and would be unable to quickly and efficiently capture new FTTB market share whilst mitigating downward pressures on pricing.[84]

128. A further issue identified in this CIVH strategic document, is that Vodacom's new rival FibreCo could expand its existing routes to rooftop and indoor mobile sites in buildings, to also include [redacted], as well as the expansion of the FibreCo model to footprint in [redacted] other markets on the continent. The implication of this is that the FibreCo [redacted] FTTB offers, resulting in further downward pressure on DFA's pricing and DFA losing the opportunity to partner with

[83] Bundle M p 1223; Transcript p 1215 line 3 to p 1216 line 3.
[84] Bundle M p 1223.

Vodacom on expansion opportunities to enter new markets outside of South Africa.[85]

129. The further scenario contained in this strategic document is of competitors concluding similar deals to establish FibreCos with [redacted] with the implication that [redacted]."[86]

The TowerCo threat

130. The further threat identified in the CIVH internal document relates to Vodacom establishing a TowerCo. The document notes "*Vodacom has also identified* *the establishment of* *a separate TowerCo as an additional key strategic priority* *(with or without Lindt)*." (Own emphasis) It goes on to state "*Vodacom is looking to partner with* [redacted]*, to establish the TowerCo with* [redacted]."[87]

131. From a DFA perspective, the implications of this scenario were *inter alia* that[88] "*Vodacom will also not* [redacted] *DFA products and services resulting in* [redacted] *for DFA. DFA will not only* [redacted] *previously mentioned, but also stands to lose* [redacted]." (Own emphasis)

132. A further negative consequence of the above highlighted in the strategic document is that CIVH would lose [redacted] due to having no visibility of Vodacom's requirements.[89]

[85] Bundle M p 1223.
[86] Bundle M p 1223.
[87] Bundle M p 1223.
[88] Bundle M p 1223.
[89] Bundle M p 1223.

Vumatel

133. In relation to Vumatel, the threats identified by CIVH include "*Vodacom* [redacted] *to increase market share" that can "result in* [redacted][90] We note that this clearly suggests that Vodacom has lower Average Revenue Per User ("**ARPUs**"). The impact would be [redacted] at the difference between Vumatel's [redacted] ARPUs and Vodacom's [redacted] ARPUs.[91] This confirms that Vodacom has [redacted] ARPUs than Vumatel.

134. A further clear indication of the level of CIVH's concerns regarding the competitive threat from Vodacom, is that it is willing to purchase Vodacom's assets at a [redacted] in the present transaction to commercially [redacted] its core business to future competition. The CIVH Board pack explains this as follows: "*Although CIVH is acquiring the assets at a* [redacted]*, the overall transaction is set to commercially* [redacted] *the core business of CIVH significantly into the future. The strategic* [redacted] *benefits in a rapidly evolving and uncertain market and economic environment potentially outweigh the short-*[redacted]"[92] (Own emphasis)

135. The CIVH Board pack further records one of the main strategic benefits of the investment as "[redacted]."[93]

136. Mr Uys in his oral evidence concedes that the proposed transaction is a means by which Maziv de-risks itself from losing Vodacom as a client and gaining it as a formidable competitor.[94]

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[90] Bundle M p 1223 and 1224.
[91] Bundle M p 1224.
[92] Bundle M p 1231 and 1236.
[93] Bundle M p 1236.
[94] Transcript p 1229 lines 6 – 13.

137. As regards Vodacom, the transaction allows it to have a stake in fibre revenues given that fibre roll-out reduces FNO revenue. Vodacom's rationale is the 'Value at Risk' to its mobile business (also see paragraph 285 below). The Value at Risk that Vodacom sees for its mobile business, is estimated at half of R11.8 billion in Mr Joosub's version.[95] Mr Joosub confirms a loss of up to 30% of mobile data spend within a house as they move to fibre, although he sought to claim it was less than the stated "*Consumer VaR estimated to be R11.8bn (Euro570mn) for the total period up to FY24*".[96] He explains the Value at Risk as "… *essentially … when a customer moves onto fibre, what happens is you lose the spend, the data spend within the household and you could lose as much as 30% of the spend. So, essentially you're losing 30% of the spend within the house* …".[97]

138. The merger parties concede that a segment of mobile revenues has moved to fibre, but argue that the demand for mobile data outside the home continues to grow rapidly.[98] This however is not responsive to the fact that fibre is taking away revenue from the FNOs and Vodacom's internal documents both identify it as a concern and quantify this. As Mr Van der Merwe of Frogfoot testifies, "*As fibre roll-outs into new low-income areas continue and new products are developed to target consumers at a lower price points than what has traditionally been targeted by FTTH providers, the MNOs will lose customers and revenue. The MNOs will need to respond by rolling out better technologies (like 5G) on a more widespread basis and/or dropping prices for their mobile and FWA products*".[99] Dr Van den Bergh similarly confirms that "… *the installation of fibre in these areas will likely affect Vodacom's revenue generated from data use in the areas, …".*[100]

139. In conclusion, CIVH's true rationale for the proposed transaction is its defensive reasons for the proposed transaction in relation to both DFA and Vumatel, as

[95] The figure of R11.8 billion was presented to the Vodacom Board. See, for example, Transcript p 2003 lines 2 – 12.
[96] Bundle M p 3498.
[97] Joosub Transcript p 1639 lines 6 – 14.
[98] Transcript p 1953 line 14 to p 1954 line 5.
[99] Van der Merwe FWB p 40 – 41 para 34.
[100] Van den Bergh FWB p 215 para 80.

explained above. From Vodacom's side it wants to have a significant stake in the future fibre revenues of the largest dark fibre and FTTH provider in South Africa, given its Value at Risk, as explained above.

VODACOM'S RIGHTS IN TERMS OF THE TRANSACTION, INFLUENCE AND INCENTIVES

140. In order to contextualise the competition assessment, one must have regard to the rights that Vodacom will enjoy in terms of the proposed transaction post-merger, and how the proposed transaction changes the merger parties' incentives.

141. The Commission submits that after the merger there are shared incentives between Vodacom and Maziv which cannot be separated from the co-control ownership structure of the proposed deal. *Inter alia* Vodacom's and Maziv's economic interests will be mutually aligned, and various incentives give Vodacom reason to limit the degree to which it competes against Vumatel post-merger, thereby substantially lessening competition in the relevant markets.

142. The merger parties submit that the acquisition of negative control rights by Vodacom simply means that Vodacom's incentives must be taken into account in assessing the effects of the limited number of veto rights it will be granted. It does not mean that Maziv's (or CIVH's) interests will become aligned with those of Vodacom. They say that Maziv will not acquire any interest in Vodacom's remaining MNO and retail operations. Therefore, the only aligned incentive between Vodacom and CIVH that the merger will create is the incentive to maximise the profitability of Maziv. The merger will not give either Vodacom or CIVH an incentive to promote the interests of Vodacom over the profit maximising interests of Maziv itself.

143. We first consider Vodacom's post-merger rights as 30%-40% shareholder in Maziv.

Merger parties' submissions

144. When the merger parties on 10 December 2021 notified the proposed merger to the Commission, they disclosed: "*The Proposed Transaction will result, inter alia, in Vodacom acquiring at least 30% of the issued share capital of Newco [Maziv]. This will, in turn, result in Vodacom qualifying for various rights in terms of the Newco Memorandum of Incorporation ... that will give Vodacom joint control of Newco. The Proposed Transaction will accordingly result in Vodacom acquiring control over Newco in terms of section 12(2)(g) of the Competition Act 89 of 1998*".[101] (Own emphasis)

145. During the hearing, the merger parties alleged that the term "*joint control*" is simply a useful label to describe the nature of the rights exercised by Vodacom – rights that will enable Vodacom to prevent a '*limited set'* of decisions being made unilaterally by CIVH. The merger parties adopt the position that, post-merger, Vodacom would not have an unfettered ability to control Maziv, and to require it to engage in conduct that is not in Maziv's independent interests.

146. The merger parties also submit that Vodacom would have no influence over the operations of subsidiaries such as DFA and Vumatel.[102] Mr Joosub testifies that as far as he knows, the Reserved Matters (explained below) relate only at the level of Maziv itself.[103]

147. In his first witness statement Mr Uys, the chair of the boards of directors of CIVH, Maziv, DFA and Vumatel,[104] contends that post-merger Vodacom would have (only) a minority shareholding in Maziv, by virtue of which "*Vodacom will qualify for certain shareholder reserved matter veto rights that will provide it with joint control of Maziv, without compromising the operational independence of Maziv*"[142] or without "*provid[ing] for [Vodacom's] involvement in the day-to-day management*

[101] DLA Piper letter to Commission dated 10 December 2021 para 2.3, Bundle M p 35; Bundle M p 160 – 170, specifically p 161 par 1.1.4; Transcript p 1860 line 5 to p 1862 line 20.
[102] Joosub FWB p 320 – 321 para 6; p 322 – 324 paras 10 – 14; Uys FWB p 483 – 486 paras 50, 53 – 57.
[103] Transcript p 1869 line 20 to p 1870 line 4.
[104] Transcript p 1399 lines 4 – 9.

of Maziv's subsidiaries".[105] In substantiation of this assertion, Mr Uys mentions only certain of Vodacom's post-merger rights and confirms this at the start of his evidence in chief without qualifying the evidence.

148. Mr Joosub, the CEO of Vodacom Group Limited and a director of Vodacom, in his witness statement states that post-merger "*Maziv remains a business controlled by CIVH as a majority shareholder, completely separate from the Vodacom business*", albeit that Vodacom had negotiated rights to "*protect Vodacom's interests, as minority shareholder, against CIVH exercising its majority to make material changes to the business of Maziv*".[106]

149. Relying on the evidence of Messrs Joosub and Uys, the merger parties contend that the package of rights are "*normal minority protection rights*" - given to a shareholder, i.e., Vodacom investing R14 to R18 billion to acquire a minority interest in a company. i.e., Maziv.[107] Mr Uys submits that the veto rights are not unusual for an investment of this nature. He states that these minority protections are "*less than what current CIVH shareholders get at a 30% shareholder level*" and that they "*are good rights for a R15 billion investment*."[108]

Commission's and MTN's submissions

150. The Commission contends that Vodacom's acquisition will result in Vodacom obtaining substantial rights in terms of the Memorandum of Incorporation of Business Venture Investments No 2213 (Pty) Ltd, renamed Maziv ("**MOI**").[109]

151. MTN submits that post-merger, Vodacom would have joint control of Maziv and material influence over the operations of its subsidiaries and even of its controlled investee companies. It alleges that the merged entity could use the business operations of group companies (at least partially) to foreclose MNOs, FNOs and ISPs in the industry.

[105] Uys FWB p 483 para 50.
[106] Joosub FWB p 320 – 322 para 6 and 10.
[107] Transcript p 1675 line 20 to p 1676 line 8.
[108] Transcript p 1236 lines 9 – 13.
[109] Bundle M p 801 – 855.

Our assessment

152. Section 12(2)(g) of the Act provides that a person controls a firm if it "*has the ability to materially influence the policy of the firm in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to in paragraphs (a) to (f)*."

153. In *Caxton and CTP* the CAC held that "… *the concept policy of a firm should be viewed in a wide sense and within the context of each case.*"[110] Indeed, context is important in this case when one considers both the ability to influence policy and post-merger incentives.

154. The CAC went on to say that "*While it should be accepted that influence on one aspect of a firm may not be sufficient to constitute material influence over the policy of that firm, context is very important. There may be matters whose nature is so material to the strategic direction of the firm (even if numerically few) such that influence on them may be reasonably extensive in a manner that qualifies to control contemplated by paras 12 (2) (a) to (d) of the Act. That qualification, we would suggest, was made in the Novus judgment by reference to 'depending on the nature of those matters' (at para 48)*".[111] As we shall show below, Vodacom will post-merger have the ability to influence numerous aspects of Maziv.

155. It is common cause that Vodacom, as a 30%-40% shareholder, will be able, through the veto rights it will acquire, to limit CIVH's ability to exercise positive control on specific elements of the Maziv business, requiring consensus on those aspects before they are implemented. The veto rights relate to a number of matters as set out in Schedule 2 of the MOI. The parties describe this as Vodacom exerting "*negative control*" over Maziv on these matters.

[110] *Caxton and CTP Publishers and Printers Limited and Others v MultiChoice Proprietary Limited and Others* (140/CAC/MAR16) [2016] ZACAC 3 (24 June 2016) ("***Caxton and CTP***") at para 79.
[111] *Caxton and CTP* at para 79.

156. The merger parties concede that the proposed transaction was notified as a merger because certain of the veto rights granted to Vodacom relating *inter alia* to Maziv's budget, business plan and the appointment of the CEO and CFO[112] are typically regarded in competition law as a form of *de facto* (or negative) control in terms of section 12(2)(g) of the Act.

157. The first to note is that Mr Joosub indicates that Vodafone, in order to approve this acquisition as one of three conditions, required that Vodacom secure that it could "*obtain co-control*".[113] Mr Otty of Vodafone confirms that Vodafone made the transaction conditional upon co-control.[114] Mr Uys also confirms during his testimony that Vodacom wanted joint control with CIVH when negotiating the proposed transaction.[115]

158. The factual evidence further confirms that Vodacom will be an active strategic investor in Maziv rather than a passive financial investor. As we shall show below, the rights granted to Vodacom go well beyond the rights ordinarily granted in terms of the Companies Act for the protection of minority shareholders.[116] As Mr Joosub testifies, "*we [Vodacom] want a seat around the table*"[117] and "*given the size of the cheque, it needs to be a strategic investment as opposed to a financial investment*."[118]

159. We further note that Maziv does not have any assets beyond its investments.[119] Maziv also does not have any operations beyond those of its subsidiaries.[120] Indeed the basis for seeking approval of the merger was that Vodacom would gain the ability to influence the policy of subsidiaries such as DFA and Vumatel or operations beyond those of such subsidiaries.[121] A driver for such influence

[112] Schedule 2: Reserved Matters, Bundle M p 853.
[113] Transcript p 1793 lines 4 – 17.
[114] Transcript p 2022 lines 3 – 10.
[115] Transcript p 1205 lines 6 – 16.
[116] Companies Act 71 of 2008: sections 26; 31(1); 39(2); 61(3); 61(4); 61(5); 62; 66(4); 65; 163; 165.
[117] Transcript p 1776 lines 13 – 15.
[118] Transcript p 1777 lines 11 – 12.
[119] Transcript p 1865 lines 5 – 9.
[120] Transcript p 1865 lines 12 – 18.
[121] Transcript p 1864 line 20 to p 1866 line 5.

was Vodacom's need to safeguard its interests arising out of both its multi-billion rand investment in Maziv and its transfer of valuable fibre assets to Maziv.[122]

160. Regarding decision-making at shareholder level, the MOI provides that the Company [Maziv] shall not perform, permit, conclude or implement any 'Reserved Matters' in respect of any Group Member [including DFA and Vumatel[123]] (or in respect of any investee company, to the extent within its control[124]) unless every Controlling Shareholder [CIVH and Vodacom[125]] has confirmed its support for the relevant Reserved Matter in writing.[126] This means that Maziv requires the written consent of Vodacom to engage in any conduct specified in Schedule 2 of the MOI.[127]

161. Schedule 2 lists 23 Reserved Matters in respect of which any valid decision would require the concurrence of Vodacom. We note that contrary to the evidence of Messrs Uys and Joosub, most of such matters relate to decisions not only of Maziv but also of subsidiaries such as DFA and Vumatel and controlled investee companies (potentially including Herotel).

162. The Reserved Matters[128] include that Vodacom has the ability to veto the appointment or dismissal of Maziv's CEO and CFO, the issuing of shares, the financing of debt and the adoption or amendment of the dividend policy.[129] For completeness, we list certain of the Reserved Matters:

162.1. the approval of the annual budget and business plan of Maziv and its subsidiaries and/or any deviation therefrom. Mr Joosub clarifies that DFA and Vumatel fit within the Maziv business plan and that in terms of the merger parties' tendered behavioural remedies Vodacom would not by virtue of this reserved matter claim an entitlement to veto the underlying

[122] Transcript p 1866 line 6 to p 1867 line 14.
[123] Transcript p 1872 line 14 to p 1873 line 15.
[124] This potentially includes Herotel.
[125] Transcript p 1871 line 16 to p 1872 line 13.
[126] Bundle M p 837 MOI clause 5.5.
[127] Bundle M p 806 MOI clause 1.1.
[128] Bundle M p 853 – 855.
[129] Transcript p 1805 line 18 to p 1807 line 19; p 1808 lines 11 – 17.

companies' budgets or business plans unless they fed through into an impairment at the Maziv level;[130]

162.2. the appointment or dismissal of the (group) CEO and CFO.[131] This means that the approval of both Vodacom and CIVH is required for the appointment or dismissal of the CEO and CFO.[132] Vodacom would have the ability to remove Maziv's CEO and CFO prior to, or during, the proposed transaction.[133] The CEO and CFO of Maziv are ex officio directors and in the event of a vacancy, Maziv's Nominations Committee ("**NomCom**") will suggest a preferred candidate in respect of which the Board will vote and that vote will be subject to approval by the Controlling Shareholders, CIVH and Vodacom;[134]

162.3. the cessation or discontinuation of any material business of the Maziv Group, where the business shall be regarded as material if: (i) it contributes more than [redacted]% of the annual revenue of the Group: or (ii) it is reasonably anticipated that it will start to contribute more than [redacted]% of the annual revenue of the Maziv Group within the next [redacted] financial years;[135]

162.4. any material changes to the nature of the business and/or strategic direction of any Maziv subsidiaries or of the Maziv Group as a whole (unless already approved as part of the budget and business plan) that is not in the ordinary course of business;[136]

162.5. the acquisition and disposal of assets if the aggregate purchase price payable in respect of the transaction, or the aggregate value of the assets disposed of, exceeds R500 million;[137]

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[130] Bundle M p 853 MOI Schedule 2 clause 1 - 2; Transcript p 1875 line 8 to p 1876 line 22.
[131] Bundle M p 854 MOI Schedule 2 clause 14; see also Exhibit AA; Transcript p 1884 line 8 to p 1885 line 10.
[132] Clause 6.2.4.2 at Bundle M p 838 and clause 14 of Schedule 2 at Bundle M p 854.
[133] Transcript p 1886 line 19 to p 1889 line 2.
[134] Transcript p 1897 line 12 to p 1898 line 12; clause 6.2.4 at Bundle M p 838.
[135] Bundle M p 853 MOI Schedule 2 clause 11; Transcript p 1883 lines 18 – 21.
[136] Bundle M p 853 MOI Schedule 2 clause 3; Transcript p 1877 line 1 to p 1879 line 7.
[137] Bundle M p 853 MOI Schedule 2 clause 6; Transcript p 1881 lines 16 – 22.

162.6. any transaction that is not in the ordinary course of business and which: (a) exceeds R[redacted] or which (b) binds the relevant Group member to obligations for longer than [redacted];[138]

162.7. the incurral of debt finance above a certain amount;[139]

162.8. the provision of security above a certain amount;[140]

162.9. the establishment or implementation of an employee profit or share incentive scheme and/or B-BBEE participation scheme;[141]

162.10. any Group Member making any loan or otherwise extending any credit to a third party in excess of a certain amount;[142]

162.11. the commencement of a litigation or arbitration process;[143]

162.12. a related party transaction in excess of R[redacted] or which binds the Group for more than [redacted] years;[144] and

162.13. the conclusion of a profit- or revenue-sharing agreement with a person that is not a member of the Maziv group above a certain amount in any financial year.[145]

163. Mr Joosub concedes that all these rights remain, except for any specific carve-outs in the merger parties' proposed conditions.[146]

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[138] Bundle M p 854 MOI Schedule 2 clause 15; Transcript p 1891 line 18 to p 1893 line 6.
[139] Bundle M p 853 MOI Schedule 2 clause 4; Transcript p 1880 lines 2 – 16.
[140] Bundle M p 853 MOI Schedule 2 clause 5; Transcript p 1880 line 17 to p 1881 line 15.
[141] Bundle M p 853 MOI Schedule 2 clause 7; Transcript p 1882 lines 1 – 15.
[142] Bundle M p 853 MOI Schedule 2 clause 9; Transcript p 1882 line 16 to p 1883 line 17.
[143] Bundle M p 853 MOI Schedule 2 clause 10; Transcript p 1883 lines 18 – 21.
[144] Bundle M p 854 MOI Schedule 2 clause 16; Transcript p 1891 line 18 to p 1893 line 6.
[145] Bundle M p 854 MOI Schedule 2 clause 17; Transcript p 1891 line 18 to p 1893 line 6.
[146] Transcript p 1806 lines 5 – 10.

164. The Maziv board, whose decisions are made by majority vote, shall consist of the following tree types of director: (i) two ex officio board members; (ii) up to three independent board members; and (iii) up to 14 directors appointed by CIVH and Vodacom.[147]

165. Despite Vodacom only acquiring up to 40% of Maziv shares, CIVH and Vodacom will have equal representation on the Maziv board and the same voting rights.[148] CIVH can nominate up to seven directors (as a 70% shareholder) and Vodacom can match this number of directors.[149] We note that CIVH and Vodacom need not nominate their full quotient of directors and if either of them elects to nominate less directors than provided in the MOI, the nominated directors would vote as if the full quotient were elected.[150]

166. Vodacom SA would appoint two directors from the Mergers and Acquisition and Business Development Teams in Vodacom Group Limited and two further appointees from Vodacom International. The four Vodacom appointees together with CIVH's four appointees would carry 61% of the votes on the Maziv Board, and would be able to overrule the other directors; alternatively, if Vodacom is able to persuade three independent directors to vote with it on a particular issue, it would have more than 50% of the Board votes.[151]

167. As indicated above, the Maziv group CEO and CFO would be the ex officio directors of Maziv, subject to certain veto rights. Any successor CEO or CFO would be recommended by NomCom and appointed by the board, subject to the approval of each of CIVH and Vodacom.[152] NomCom would comprise five members, two of whom would be appointed by each of CIVH and Vodacom. NomCom would make recommendations in respect not only of members of the board but also of "*all members of senior executive management in the Group,*

[147] Clause 6.2.2 Bundle M p 838; Transcript p 1896 line 8 to p 1897 line 11.
[148] Clause 6.3.14 Bundle M p 845.
[149] Clause 6.2.6.1(a) Bundle M p 840.
[150] Clause 6.2.6.8 Bundle M p 842.
[151] Bundle M p 1082; Transcript p 1802 line 5 to p 1803 line 6.
[152] Clause 6.2.4 Bundle M p 838; Transcript p 1897 line 12 to p 1898 line 12.

as well as independent non-executive Directors and candidates to serve as the chairperson of the Board."[153]

168. The approval of both Vodacom and CIVH is required for the appointment of independent non-executive directors of the board.[154] The chairperson of the Board must be an independent non-executive director.[155]

169. The shareholder representatives nominated by CIVH and Vodacom must always exceed in number the aggregate number of the ex officio and independent directors.[156]

170. If an independent director is to be removed or replaced, the approval of both CIVH and Vodacom is required.[157]

Corporate dynamics and incentives

171. As indicated above, the merger parties argue that the above rights were negotiated by Vodacom as part of its investment in Maziv to protect Vodacom's minority interests against CIVH exercising its majority shareholding to make material changes to the business of Maziv which would undermine the substance of Vodacom's investment in Maziv.[158] The merger parties further argue that these rights do not provide for Vodacom's involvement in the day-to-day management of Maziv's subsidiaries nor will Vodacom be able to create any preference for its own businesses or have any insight into the business of any other DFA or Vumatel customer or any planned DFA or Vumatel roll out.[159]

172. The Commission submits that the merger parties' claims are divorced from the realities of corporate power dynamics and economic incentives. It relies *inter alia*

[153] Clause 6.3.17 Bundle M p 846; Transcript p 1893 line 18 to p 1896 line 7.
[154] Clause 6.2.5 Bundle M p 838 - 840; Transcript p 1898 line 22 to p 1899 line 16.
[155] Clause 6.2.9.2 Bundle M p 842 and 843.
[156] Clause 6.2.5.5 Bundle M p 839.Transcript p 1899 line 17 to p 1900 line 14.
[157] Clause 6.2.5.6 Bundle M p 840; Transcript p 1900 line 15 to p 1901 line 5.
[158] Transcript p 52 lines 6 – 13.
[159] Transcript p 52 lines 13 – 18.

on the evidence of Mr Van der Merwe of Frogfoot who submits that "*… they [Vodacom] can veto just about anything. They have to approve the annual budget and the business plan. They have to agree to the CEO and CFO that ever gets appointed. Any sort of funding they can really kind of decline or so forth …. even if they acquire 30% of the – you know, there's a promise of another 10% potentially being invested … I mean I do believe that's a real level of control … even absence of control there's a real economic interest from both sides to engage in harmful behaviour. So, I think that just doesn't disappear whether they have control or not. I think there is economic incentives to engage in harmful behaviour and I'm concerned about that. And then I think as well, I mean the letter of the law means one thing, but what happens in practice is different … if they're [Vodacom] unhappy I'm not going to do it*."[160]

173. MTN, through its legal representative, observes:[161] "*We pause to dispel a point that, with respect, is divorced from the reality of corporate life. The merger parties' witnesses suggest to this Tribunal, that post-merger, Vodacom would have no influence over the operations of DFA and Vumatel. That it is a kind of benevolent investor seeking to release a promising business from the strictures of its debt burden. MTN is unconvinced. A corporate colossus of Vodacom standing would not entrust the arteries of its lifeblood to or invest up to 14 billion in targets at liberty to act as they see fit, including by granting all comers open access to Vodacom's Metro and Last Mile fibre assets in the hope that the targets would do a decent job with these resources. In the real world, in every matter of strategic significance, Vodacom would materially influence the decision of Maziv, which would materially influence the related decision of DFA or Vumatel*."

174. We consider the extent to which Vodacom's and Maziv's economic interests would align post-merger from a competition perspective.

[160] Transcript p 129 line 8 to p 131 line 5.
[161] Transcript p 29 lines 3 – 16.

175. First, one can accept that the merger parties' incentives post-merger would be different to their incentives pre-merger given Vodacom's significant investment and post-merger significant shareholding in Maziv.

176. Second, the shareholders agreement prohibits any shareholder (whether through its representatives on the Board or on any committee of the Board, or through its representatives on any subsidiary boards or committees, or directly in its capacity as a shareholder) from requiring or having regular meetings, reviews or reports from any operational members of the Group without the Board's approval and without all shareholders having been "*allowed the same opportunity to participate in such process at operating subsidiary level*".[162]

177. Third, both CIVH and Vodacom as shareholders may have representatives on Maziv's board and committees, and also on the boards and committees of Maziv's underlying subsidiaries, including DFA and Vumatel. Vodacom (as shareholder) could require regular meetings, reviews or reports from any operational member of the group.[163]

178. Fourth, an important issue to bear in mind is that Vodacom is DFA's largest customer. Given that Vodacom will have a 30%-40% economic interest in Maziv, any strategies that benefit Maziv financially align with Vodacom's interests. Moreover, since Vodacom is Maziv's largest customer, if Vodacom grows, Maziv will have a larger anchor customer in Vodacom, in the context where there is a Right of First Refusal ("**ROFR**") between the parties. This ROFR ensures that Vodacom always gives Maziv the right to match to supply Vodacom, which serves to solidify Vodacom and Maziv's common commercial interests. Maziv thus has an economic incentive to give Vodacom preference and to grow Vodacom's business.

179. Mr Van der Merwe of Frogfoot submits that in terms of market dynamics Vodacom's and Maziv's incentives would be aligned post-merger and that

[162] Clause 11.4 Bundle M p 783.
[163] Transcript p 1889 line 6 to p 1890 line 21.

Vodacom as DFA's largest customer could substitute any business lost by Maziv with more business from itself.[164] Furthermore, Maziv would have a real incentive to appease its largest customer, and to adhere to Vodacom's requirements at board level.[165]

180. The abovementioned incentives could give Vodacom reason to limit the degree to which it competes against Maziv in a number of ways:

180.1. the more aggressively Vodacom competes with Maziv, the lower Maziv's revenues and the lower the return on Vodacom's interest in Maziv. As a result, Vodacom will be incentivised to, where possible, not compete or compete less aggressively with Maziv. This would be of particular concern in the low-income areas where both firms are set to roll out absent the proposed merger;

180.2. the incentive to lessen competition could be observed in rollout decisions where the quality (for example the density of towers) or extent of rollout may be affected;

180.3. Vodacom would have less incentive to develop, promote, and competitively price products in ways that would compete more directly against any Maziv product or service.

181. Further opportunities for partnership to the benefit of Maziv that emerged during the hearing include a potential FWA bundle for FTTB services[166] and the potential to use their very strong retail presence in the form of Vodashops for the distribution of prepaid vouchers for FTTH products.[167]

182. Combined post-merger strategies may include that the merger parties could use Vodacom's very significant subscriber base and data as a springboard off which

[164] Transcript p 127 lines 1 – 9.
[165] Transcript p 127 lines 7 – 9; p 130 line 19 to p 131 line 5.
[166] Transcript p 2493 lines 2 – 8.
[167] Transcript p 2424 lines 7 – 12; p 2718 lines 2 – 21; p 3307 lines 4 – 10.

to offer customers a bundled combination of immediate FWA access at a discount to be followed in due course by fibre access which rivals may not be able to replicate.[168] Mr Masalesa of Telkom CSB echoes this concern.[169]

183. Although the merger parties tender behavioural conditions in an attempt to deal with strategic roll-out decisions and information sharing concerns, MTN, Rain and others point out that if the transaction is implemented, competitors' strategic information on issues such as the future rollout of fibre could permeate corporate walls before finding its way onto websites.[170] Mr Van der Merwe of Frogfoot echoes this: "*So, I think first thing is, I mean, how do you even monitor that there is <u>no whispers in the corridors, which you know I think is very real probability</u>*".[171] (Own emphasis)

184. Furthermore, as per Mr Joosub's evidence: "*also if there's additional capital investment and so on that's required to be able to achieve the plan that those discussions are being had*",[172] Maziv may in future if the transaction is implemented require additional capital investment from Vodacom. This means that Vodacom's investment in Maziv should not be viewed as a one-off event, aligning the merger parties' future interests.

185. Prof Theron argues that even if Vodacom has the incentive to benefit its own interests, it has no control over Maziv and therefore "*cannot instruct*" or influence Maziv into conduct that does not benefit Maziv.[173] We disagree with this characterisation in the full context of the documentary and factual evidence. Vodacom has the ability, as co-controlling shareholder with a significant shareholding, to influence CIVH to vote with it on issues in Vodacom's or CIVH's broader interests because of their joint commercial and economic incentives. Mr Otty confirms that Vodafone's approach is to maximise its subsidiaries' EBITDA-

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168 Transcript p 34 lines 17 – 22; Mr Nunes p 632 line 5 to p 633 line 10.
169 Transcript p 329 line 13 to p 332 line 12.
170 Transcript p 34 lines 16 – 17. Transcript p 935 lines 13 – 16. Rain Intervention Application Founding Affidavit p 27 – 28 paras 77 – 82.
171 Transcript p 130 lines 11 – 13.
172 Transcript p 1674 line 14 to p 1675 line 14.
173 Transcript p 3896.

AL,[174] operating profit and cash flow, and that it would seek to extract as much short- and medium-term profit as possible.[175]

186. One must further consider the merger parties' strategic documents. A CIVH Board presentation clearly identifies areas of strategic rationale/benefits from the partnership opportunities with Vodacom to the benefit of Maziv and its operating entities, DFA and Vumatel and a number of 'Key Transaction Considerations'. These include access to Vodacom '[redacted]; [redacted] etc); [redacted] i.e., Vodacom.[176]

187. Furthermore, the post-merger joint incentives between Vodacom and Maziv would not be restricted to their activities in South Africa. The factual evidence that we shall deal with later in these reasons indicates that Vodacom has a fibre strategy absent the proposed transaction, including through pursuing off-balance sheet fibre joint ventures ("**JVs**").

188. Mr Joosub confirms Vodacom's strategy contained in its internal document titled *Infrastructure Sharing – FibreCo and Rural Coverage*.[177] Mr Otty testifies that "*It's possible that this was presented to a strategy meeting of Vodacom. We have an annual strategy meeting in* [redacted] *every year. It looks like the sort of document that will be presented there*".[178] The document sets out Vodacom's

[174] EBITDA refers to earnings before interest, tax, depreciation and amortisation. 'AL' means 'after leases'.
[175] Transcript p 2008 line 9 to p 2009 line 17.
[176] Bundle M p 1269 and 1397.
[177] The author is indicated as Mr Sean Bennett; the document was created "*within the last two years*" according to Mr Joosub.
[178] Transcript p 1987 lines 5 – 11.

strategy on how it intends to approach [redacted] for the setting up of a [redacted] in different markets.[179] The document records: "*Investment structures – We are developing partnerships for off-balance sheet 3rd party funded investments*". It includes [redacted] and has the bullet points: (i) [redacted] (ii) [redacted]; (iii) Up to [redacted] will be held by Vodacom [redacted]; and (iv) [redacted]. Mr Joosub confirms that this is still the strategy.[180]

189. Mr Joosub also confirms "*… you would've seen in our strategy documents that talk about* [redacted] *while we* [redacted] *and the context of that is that you can off* [redacted] *the investment*"[181] and "… *so that's the attraction of why we wanted to do it with CIVH and that's also the reason why we're talking to them about doing it with us in Africa* …"[182] On the Maziv side, Mr Uys testifies that "*Ja, we would like to partner with MTN and Vodacom, and whoever, in Africa. We can't do it alone. It is too risky. In fact, we will never go into Africa on our own*."[183]

190. In relation to Vodacom's strategic partners in Tanzania, Mr Joosub confirms that Vodacom wants to do a three-way deal including CIVH, with CIVH bringing their capacity, strength and know-how.[184] Vodacom's Vision 2030 states that Vodacom's "*Strategic Intention*" is that it "*has committed to expanding its fibre footprint via FibreCo JVs in several markets*".[185] This document also reflects in relation to Tanzania that integrated teams have been formed with [redacted] and in relation to the Democratic Republic of Congo and Mozambique that there is preliminary interest from [redacted].[186]

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[179] Bundle M p 12455: Infrastructure Sharing – FibreCo and Rural coverage.
[180] Transcript p 1720 line 16 to p 1723 line 5.
[181] Transcript p 1649 lines 4 – 7.
[182] Transcript p 1657 lines 1 – 7.
[183] Transcript p 1276 lines 3 – 5.
[184] Transcript p 1717 lines 10 – 20.
[185] Vodacom's Vision 2030 document dated August 2023 Bundle M p 12851 and p 12879.
[186] Bundle M p 12879.

191. Notably CIVH, in setting out the reasons for doing this transaction to the board, highlights the "*unique potential to explore international opportunities*"; as well as the "*Growing demand across the continent: Meet the growing demand for connectivity infrastructure into the rest of the Africa continent … focussed partnerships to* [redacted] *market entry in* [redacted] *where partners have a* [redacted] *market presence*".[187]

192. Given the above it is conceivable that CIVH's support of Vodacom's strategies in South Africa, even if at a cost to Maziv, may result in more investment by Vodacom with CIVH in JVs in other countries, creating additional income for Maziv.

193. The above serves to align Maziv's and Vodacom's incentives as Maziv will realise other benefits from the partnership. Realising these benefits may require preferencing Vodacom as a customer and partner over others, and may offset any loss, assuming there is, from any preferencing.

194. In light of the above strategic and other evidence, including Vodacom's investment of up to R14 billion in the targets, the merger parties' witnesses' version rings hollow that post-merger Vodacom would have no influence over the operations of DFA and Vumatel; that it is an investor seeking to release a promising business from the strictures of its debt burden.[15]

Conclusion

195. The evidence shows that Vodacom will have extensive decision-making rights and powers at shareholder, director and even committee levels in relation to Maziv as well as its subsidiaries and controlled investee companies.

196. We conclude that Vodacom's 30%-40% shareholding in Maziv would give Vodacom joint control of and extensive influence in, as well as strategic alignment with, the Maziv business by virtue of *inter alia* the suite of contractual

[187] Bundle M p 1222.

rights to direct the strategic affairs of the Maziv group. Vodacom would materially influence the decisions of Maziv, which would materially influence the related decisions of DFA or Vumatel and potentially even Herotel (discussed below).

197. Vodacom's extensive rights are however just one aspect that demonstrates Vodacom's ability to materially influence Maziv post-merger. One further has to consider that the merger parties' incentives are aligned post-merger through Vodacom's economic stake, the ROFR granted to Maziv on all Vodacom (future) fibre purchases, and the ability of Vodacom to offer side-payments through other JVs across Vodacom's operations elsewhere in Africa, as well as potential future capital provided by Vodacom.

198. Given the above, we have to reject the merger parties' claim that Maziv would continue doing business as if it were unaware of Vodacom's presence. MTN in our view correctly characterises as "*artificial*" the merger parties' arguments that Vodacom's and Maziv's "*perspectives would remain discrete rather than intertwined*."[188]

Herotel

199. As indicated above, Vumatel currently has a [redacted]% shareholding in Herotel and intends to increase this to a greater than 50% interest (see paragraph 9 above). As further indicated above, the Tribunal issued a subpoena *duces tecum* requiring the CEO of Herotel, Mr Botha, to testify at the hearing and provide certain documents. After MTN negotiated behavioural remedies with the merger parties, it fell on the Commission to cross-examine Mr Botha on *inter alia* the current control structure of Herotel, the Herotel confidential, strategic information that Vumatel has access to and alleged existing co-ordination of roll-out activities between Herotel and Vumatel. One of the issues that arose during the hearing is if Herotel's (closed access) network has been used – or is budgeted to be used – to deliver Vumatel's FTTH products and/or services in secondary areas in South Africa.

[188] Transcript p 33 lines 5 – 7.

200. Herotel is of relevance in this matter *inter alia* for the determination of concentration (market shares), the assessment of Vumatel's and Herotel's more recent roll-out decisions, and how Herotel affects any potential remedies, as will become apparent below.

201. The merger parties argue that given that Vumatel in their view does not currently control Herotel – and will not do so unless and until it obtains approval from the competition authorities for the recently notified transaction – Maziv is not in a position to use Herotel in the manner suggested by the Commission. The Commission and MTN however, after considering the factual and documentary evidence, specifically the cross-examination of Mr Botha, argue that Vumatel already controls Herotel.

202. In terms of the merger parties' tendered conditions and how they are affected by Herotel, the tendered conditions are aimed at preventing preferencing prior to any acquisition of control of Herotel.[189] Further, if Maziv obtains approval to acquire control of Herotel in due course, the merger parties' proposed conditions require Maziv to fully integrate Herotel to the Maziv business model and make the Herotel network open access.[190]

203. The Commission, based on the subpoenaed Herotel documents and Mr Botha's evidence, submits that the circumstances surrounding the acquisition by Vumatel of its [redacted]% shareholding in Herotel appears to be tantamount to the acquisition of control of Herotel, as well as prior implementation of the proposed merger with Community SPV. The issue of alleged prior implementation is, however, the subject of a separate investigation by the Commission and it has made no finding in regard to that. Likewise, we do not deal with the issue of alleged prior implementation in these reasons.

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[189] Clauses 3.2 to 3.5, 5.1 and 5.3 of the merger parties' conditions submitted on 30 September 2024 ("**Conditions**").
[190] Clauses 1.41 read with 4 and 5 of the Conditions.

204. MTN after considering the evidence submits that since at least 2022, CIVH and/or Vumatel has enjoyed sole control of Herotel. Of importance to the competition assessment, is MTN's view that the merger parties could use the business operations of Herotel effectively to circumvent the tendered conditions and (at least partially) to foreclose MNOs, FNOs and ISPs.

Our assessment

205. Relevant to our assessment is *inter alia* the extent of any economic interest and influence that Vumatel already has over Herotel (regardless of whether it amounts to control or not). Furthermore, the strategic documents of Herotel and CIVH/Vumatel shed light on if Herotel and CIVH/Vumatel have coordinated or potentially could coordinate their activities in the market(s) that they are active in, and the extent of that (potential) coordination.

206. Mr Botha confirms that Herotel and Vumatel compete in the same industry in terms of building, owning and operating fibre networks. Herotel's services are provided on a closed access basis.[191] Although Mr Botha alleges in his witness statement that Herotel and Vumatel are not close competitors, when questioned about it by the panel he concedes that "*Look, at the end of the day the product is connecting home to the internet*".[192]

207. In terms of who has control over Herotel, Mr Botha confirms in his witness statement that Herotel's shares (and shareholder voting rights) are currently held as follows:

- Vumatel – [redacted]% (since 24 August 2023 according to Mr Mare);[193]
- Herotel Communities (RF) Proprietary Limited ("Herotel SPV") – 49.93%. According to Mr Botha, Herotel SPV was established to facilitate the funding for the acquisition of shares in Herotel, by Herotel SPV, on behalf of Community NPC;[194] and

[191] Transcript p 1590 lines 18 – 19.
[192] Botha Transcript p 3031 lines 9 – 20.
[193] Mare Transcript p 2787 lines 9 – 11.
[194] FWB p 561 para 17.

- Non-management minorities – 0.11%.[195]

208. Despite the large shareholdings in Herotel by the abovementioned two parties, Mr Botha contends that Herotel is not currently controlled, jointly or otherwise, by any person or firm.[196] Mr Uys also denies that Vumatel currently has any control over Herotel[197] referring to it as "*an associate investment*".[198]

209. As background, we note that Vumatel acquired its shareholding in Herotel in a series of transactions wherein it bought out numerous minority shareholders and [redacted] the Herotel management to establish the Community SPV. CIVH [redacted] the establishment of Herotel SPV and Community NPC. Mr Botha confirms that he is aware of the [redacted] arrangement.[199] The Commission contends that SPV may be a sham vehicle used by CIVH to acquire control of Herotel, without having to notify a merger with the competition authorities.

210. The evidence heard confirms that the Community SPV: (i) does not have any powers in terms of its MOI other than to acquire shares from Herotel, hold the shares, and sell them to CIVH; and (ii) has ceded all its rights to CIVH, including its bank accounts, its claims and shares.[200] Mr Botha testifies that "*SPV is restricted by its MOI to the functions that is described, because that's the only purpose for setting it up is to have a limited function*."[201] Furthermore, the directors of the Community SPV are all former and present executives of Herotel, Vumatel, and DFA.[202] Interestingly, none of them is from any group or community whose interests the Community SPV is purported to advance.[203]

211. Mr Uys concedes that there has been no benefit to date to any community in which Herotel rolls out fibre.[204]

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[195] FWB p 559 para 10.
[196] FWB p 559 para 7. Transcript p 3034 line 10 to p 3036 line 6.
[197] Transcript p 1324 line 20.
[198] Transcript p 1589 lines 17 – 19.
[199] Transcript p 2956 lines 10 – 16.
[200] Transcript p 2959 lines 5 – 15.
[201] Transcript p 2966 lines 5 – 14.
[202] Exhibit S; Transcript p 2948 line 21 to p 2955 line 20.
[203] Transcript p 2957 lines 6 – 10.
[204] Transcript p 455 lines 10 – 15.

212. Mr Uys could during his testimony not explain a number of issues relating to Herotel:

212.1. First, both Mr Mare and Mr Uys could not explain why CIVH in strategic documents maintains that "*CIVH retains* [redacted]*% economies of secondary cities*" if the notified merger with Community SPV were ultimately prohibited by the competition authorities:[205]

"*ADV BERGER SC: No, but why will CIVH get* [redacted]*%?*

MR MARE: Oh, I don't know.

ADV BERGER SC: When its shareholding is at [redacted]*%.*

MR MARE: Ja. So, it's CIVH Group Companies maybe.

ADV BERGER SC: Mr Mare?

MR MARE: I don't know."[206]

212.2. Second, the inclusion of unredacted, detailed Herotel budgets in CIVH's board documents. Mr Uys could not explain this repeated "*mistake*".[207]

212.3. Third, why CIVH's board minutes reflect discussions about Herotel's performance, approval of matters concerning Herotel, a board pack including Herotel's budgets and recorded approvals of those board packs.[208]

212.4. Mr Botha also testifies that Vumatel has access to Herotel's monthly management accounts as a shareholder holding more than 10% of the shares.[209] He in response to questions from the panel indicates that these

[205] Bundle R p 55 – Overview of Project Legend decision points and outcomes; Mare Transcript p 2835 line 12 to p 2838 line 9; Uys Transcript p 1346 lines 3 – 6.
[206] Transcript p 2836 lines 14 – 19.
[207] Transcript p 1255 lines 4 – 14; p 1259 lines 1 – 21; Bundle M p 11432 to 11440.
[208] Transcript p 1553 lines 8 – 15; p 1553 line 19 to p 1555 line 19; See also Exhibit Z – Minutes of meeting of Maziv, Dark Fibre and Vumatel Board of 16 March 2023 paras 4.1.5, 4.2.1.5, 5.1.1, 5.1.12, 6.1.1.1, 6.1.2.1 and 6.1.2.3.
[209] Botha Transcript p 2995 line 16 to p 2996 line 2.

management accounts contain details of Herotel's number of stands it builds, referred to as 'Tier 1' and 'Tier 2' stands.[210]

213. The documents relevant to Herotel in this matter include an internal CIVH management presentation dated July 2021 regarding *Project Legend*[211] relating to the approval of CIVH's investment committee to submit a binding offer to Herotel's board of directors to acquire up to [redacted]% of the shares in Herotel. This is defined in the presentation as 'the Proposed Transaction'.[212] Vumatel's strategic rationale for this transaction as set out in the presentation includes:

213.1. in the third part:[213] "*Herotel as* [redacted], and indicates that "*Herotel has a* [redacted]" in [redacted] across South Africa, through its wireless and fibre networks rolled out to date, "*which provides an attractive* [redacted] *by other FNO's*".[214]

213.2. that Herotel's existing FWA customer base in [redacted]" in that it could be used to establish a presence in such an area in anticipation of fibre rollout and "[redacted]".[215]

213.3. the presentation further sets out the "*[a]ncillary benefits of the Proposed Transaction*" including: (i) leveraging Herotel's existing footprint in '[redacted]";[216] and thus (ii) investing in Herotel would provide an opportunity for Vumatel "[redacted] and could also provide an opportunity for DFA "*to*

[210] Botha Transcript p 3028 line 17 to p 3031 line 8.
[211] Bundle R p 12 – 38 CIVH presentation of July 2021 regarding *Project Legend* ("CIVH 1").
[212] Bundle R p 13 CIVH 1 Slide 2 bullet 1, 5; p 31 Slide 20 block 1.
[213] Vumatel's strategic rationale for the Proposed Transaction is set out in four parts.
[214] Bundle R p 18 CIVH 1 Slide 7 block 3 bullet 1; Uys Transcript p 1465 line 4 to p 1466 line 7.
[215] Bundle R p 18 CIVH 1 Slide 7 block 3 bullet 3; Uys Transcript p 1466 line 8 to p 1467 line 1.
[216] Bundle R p 18 CIVH 1 Slide 7 block 4 bullet 1; Uys Transcript p 1467 line 2 to p 1468 line 7.

[redacted].[217]

214. Vumatel's strategy for Herotel post the Proposed Transaction is similarly set out in four steps:

214.1. first, a key focus post the Proposed Transaction would be "[redacted] *in* [redacted] *in which Herotel already has a presence*" to ensure that "[redacted] *which can* [redacted]".[218]

214.2. second, as regards the stated strategy [redacted], [redacted] *competitor behaviour*"": in each secondary area where competitor activity and risk of overbuild is limited, "*Vumatel would seek to maintain Herotel's* [redacted] *offering, rather than convert the existing footprint to a* [redacted] *model*" to enjoy [redacted] "*until such time as* [redacted] *offering is required due to other FNO activity in the area*";[219] while in parallel, "[redacted][220]

214.3. third, as regards the stated strategy involving "[redacted]":

214.3.1. the intention was that "*a 'Reach' model/product offering* *__be rolled out in areas where Herotel__* [redacted] *and would seek to* [redacted]";[221] (Own emphasis) and

[217] Bundle R p 18 CIVH 1 Slide 7 block 4 bullets 3 and 4.
[218] Bundle R p 19 CIVH 1 Slide 8 block 1 bullets 1 and 2.
[219] Bundle R p 19 CIVH 1 Slide 8 block 2 bullet 1.
[220] Bundle R p 19 CIVH 1 Slide 8 block 2 bullet 2.
[221] Bundle R p 19 CIVH 1 Slide 8 block 3 bullet 1.

214.3.2. having regard to Herotel's direct access model, this strategy would seek to ensure that "*Herotel is able to effectively* [redacted]."[222] (Own emphasis)

214.4. fourth, a key priority post-transaction would be "*to* [redacted] *of Herotel's [fibre] network so as to ensure that as much of the existing* [redacted] *customer base can be* [redacted] *Herotel's own network to* [redacted]".[223] (Own emphasis)

215. As indicated above, we need not ultimately decide which firm(s) control(s) Herotel for competition law purposes, but note that the presentation records a legal due diligence finding that "*CIVH [would] gain control of Herotel pursuant to the Proposed Transaction (>35% shareholding)*".[224]

216. Further Herotel-related documentary evidence includes a business plan presentation that formed part of Maziv's budget for FY2024,[225] which reflects an aggregated budget per operating business within the Maziv group, including Herotel;[226] as well as an individualised budget per entity within the Maziv group, including Herotel.[227] Significantly, in addressing Maziv's FTTH strategy, the document contains forecasts of revenue and other metrics associated with the strategy of "*driv[ing] penetration on FTTH network – specifically Core, Reach and Key*" both by Vumatel (denoted by 'V') and by Herotel (denoted by 'H').[228]

217. Mr Uys accepts that the presentation reflects "*numbers* [redacted] *products*" but was unable to explain why it envisages [redacted] Vumatel products on [redacted].[229]

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[222] Bundle R p 19 CIVH 1 Slide 8 block 3 bullet 2.
[223] Bundle R p 19 CIVH 1 Slide 8 block 4 bullet 2.
[224] Bundle R p 35 CIVH 1 Slide 24 bullet 4.
[225] Bundle M p 12323 – 12396; Transcript p 1255 line 15 to p 1256 line 16.
[226] Bundle M p 12332.
[227] Bundle M p 12389 – 12396; Transcript p 1483 line 5 to p 1485 line 14.
[228] Bundle M p 12330.
[229] Transcript p 1479 line 7 to p 1483 line 4.

218. This suggests that, as CIVH had strategised in July 2021, Maziv budgeted in FY2024 to use [redacted] as well as [redacted] products and/or services in [redacted].

219. A budget presentation that forms part of Maziv's budget for FY2025,[230] again reflects an aggregated budget per operating business within the Maziv group, including Herotel;[231] as well as an individualised budget per entity within the Maziv group, including Herotel.[232] Significantly, in addressing Maziv's FTTH strategy, the presentation reflects nett new '[redacted] and '[redacted] subscriber growth for each of Vumatel and Herotel[233] and forecasts revenue figures and other metrics associated with the strategy of [redacted]" of Vumatel's [redacted] products and/or services.[234] Mr Uys accepts that the presentation depicts "*Herotel rolling out those* [redacted] *products or at least* [redacted] and could offer no explanation why Herotel's projected [redacted] includes figures in respect of Vumatel's products and/or services.[235]

220. The above evidence suggests that, as CIVH had strategised in July 2021, Maziv budgets in FY2025 to use Vumatel's (open access) network as well as Herotel's (closed access) network to deliver Vumatel's FTTH products and/or services in secondary areas.

221. Mr Uys concedes that Vumatel [redacted] Herotel.[236] Mr Mare confirms that Maziv (through Vumatel) is [redacted][237] and concedes that there is little overlap in the footprint of Herotel and Vumatel with only [redacted] homes

[230] Bundle M p 11354 – 11442.
[231] Bundle M p 11359.
[232] Bundle M p 11432 – 11440; Transcript p 1487 line 16 to p 1488 line 20.
[233] Bundle M p 11357; Transcript p 1486 line 1 to p 1487 line 15.
[234] Bundle M p 11434 – 11435.
[235] Transcript p 1489 line 22 to p 1495 line 11.
[236] Transcript p 1323 lines 3 – 22.
[237] Transcript p 2821 line 15 to p 2825 line 3; Bundle R p 13 and 17 to 19.

overbuilt. This evidence would be consistent with the two firms coordinating on a complementary rollout strategy.[238]

222. Dr Scheffer of Vodacom also confirms Herotel's ambitions of rolling out network infrastructure in unserved secondary areas where competition for the market still remains in terms of the 'land grab' (discussed below). He agrees that post-transaction, Herotel, being an associate company of Maziv, could approach an unserved secondary area and offer a discounted bundle of FWA, FTTH and ISP services.[239]

223. We conclude, based on the documentary and oral evidence before us, that Vumatel has been expanding through Herotel and is pursuing some of its strategies through Herotel.

224. Given the above, and that Vumatel has [80-90]% of the economics of Herotel as recorded in the strategic documents, for the purposes of market structure analysis we shall combine part of Herotel's market share (an approximate [10-20]% share with [redacted] homes passed) with that of Vumatel.

MARKET FEATURES AND CHARACTERISTICS

225. It is important that we first set out certain key characteristics of the South African fibre sector, specifically in relation to the FTTH market. FTTB and metro fibre shall be dealt with in a latter section.

226. These characteristics of FTTH are highly relevant to the assessment of the relevant counterfactuals, relevant markets and competitive effects. They are furthermore also highly relevant to assessing the roll-out commitments under the public interest analysis.

227. The key characteristics of the fibre sector in South Africa, specifically FTTH, include: (i) the so-called 'land grab' phenomenon; (ii) the first mover advantages

[238] Transcript p 2896 line 15 to p 2897 line 6.
[239] Transcript p 2505 line 9 to p 2506 line 13.

enjoyed by the first FNO to provide fibre to a specific area; (iii) relatively low average rates of 'overbuild'; (iv) relatively low uptake of or penetration rates for FTTH; and (v) the growing demand for fibre/data in South Africa and South African consumers' disposable income used for the internet. We consider each characteristic in turn.

The land grab phenomenon

228. From the factual evidence it is clear that FTTH rollout in South Africa is characterised by the so-called land grab phenomenon, which has moved to the second phase, the 'second land grab', given that the Core market segment in South Africa (relating to the higher income areas) is saturated.

229. Mr Van der Merwe of Frogfoot confirms the land grab characteristic in fibre and that the market segment has shifted to the 'second land grab'. He explains that having covered almost all remaining homes in the Living Standard Measure ("**LSM**") 8-10 categories (i.e., the wealthiest households) in South Africa, FNOs such as Vumatel, Frogfoot and Herotel have been expanding into the next category of areas – low-income areas, secondary towns and rural areas. FNOs and ISPs use different business models, products and payment plans to drive penetration and make these investments ultimately profitable. This is referred to as the second phase of the "land grab".[240]

230. Dr Scheffer confirms that (i) the first land grab in South Africa related to the high value customers in the big metros;[241] (ii) all the FNOs focused their rollout in the first land grab on the higher income areas;[242] (iii) Vodacom has accepted that most of the metro areas in South Africa have been covered by fibre;[243] and (iv) "*in effect the first land-grab has come and gone*".[244] He confirms that (i) Vodacom is now targeting high value customers in secondary cities and towns and that is

[240] Van der Merwe FWB p 32 para 14.
[241] Transcript p 2430 lines 12 – 16.
[242] Transcript p 2441 lines 1 – 4.
[243] Transcript p 2 440 lines 1 – 5.
[244] Transcript p 2491 lines 3 – 8.

part of what is called the 'second land grab';[245] and (ii) "*the second land grab is still very much up for grabs*".[246]

231. He also confirms that in the unserved secondary areas there is land to be gabbed, after it being put to him that the primary areas are saturated.[247] Mr Mare similarly indicates that the Core (higher LSM) homes are penetrated.[248]

232. Mr Nunes of MTN also confirms the second land grab and that it relates to the lower LSM areas – the so-called Vuma Reach area(s).[249]

233. Mr Mare similarly confirms that the Core market segment in South Africa is saturated: "*we moved away from the Core because the <u>Core was penetrated</u> … So, the Core, <u>the 2.2 million homes in South Africa effectively covered</u>. So, we're <u>moving to Reach</u>*".[250] (Own emphasis) Mr Mare states that "*Reach … we believe it's 2.2 or 2.4 million of the 4.8 million has been passed*".[251]

234. Mr Joosub also confirms that fibre has been installed in most high-income areas in South Africa, where the majority of profits can be extracted. Vodacom sees no benefit in overbuilding the FTTH networks in these areas as the economic returns to be generated will not justify such overbuild.[252]

235. Mr Mare describes the second land grab as "*the Reach in secondary cities. So, it's going into a lower LSM area in the secondary cities. That's the second land grab, yes*";[253] and in relation to Herotel that "*on the second land grab for Herotel it would be going into the Reach markets, meaning they go into the lower LSM areas between 30 and over R5 000.00 a month household income*."[254]

[245] Transcript p 2440 lines 6 – 11.
[246] Transcript p 2475 lines 13 – 16.
[247] Transcript p 2505 line 21 to p 2506 line 7.
[248] Transcript p 2648 lines 19 – 21.
[249] Transcript p 788 lines 15 – 18.
[250] Mare Transcript p 2882 line 21 to p 2883 line 4.
[251] Mare Transcript p 2928 lines 12 – 14.
[252] Joosub FWB p 333 – 334 para 31.2.
[253] Transcript p 2900 lines 13 – 16.
[254] Transcript p 2900 lines 1 – 5.

236. When taken to Vumatel's budget for FY2023, Mr Mare confirms that the actions contemplated include "*<u>Continue [redacted] in [redacted] areas to [redacted]</u>*.[255] (Own emphasis)

237. Mr Uys agrees that aggressive land grab and overbuild strategies of competitor metro and backbone networks in secondary cities is still a threat today and it has always been a threat.[256]

First mover advantages

238. A further market characteristic confirmed by the factual evidence is the so-called 'first mover advantages' that the first FNO that provides fibre in a specific geographic area will enjoy.

239. Mr Van der Merwe states that there are benefits to being the first FNO to invest in an area and clear disadvantages to being the second or third FNO to invest in a network. Where there is more than one fibre network in an area, the network or area is referred to as being 'overbuilt'.[257]

240. He notes that what drives the speed and breadth of the land grab is competition. More competition means more investment, and a faster deployment of fibre to these areas than what would happen with less competition - this is because of the first mover advantage.[258]

241. Mr Van der Merwe further explains that the significant advantage to being the first to roll out fibre to an area is because it is less likely that another FNO will roll out fibre to the same area, at least in the short term and penetration rates will be higher for the first FNO. As markets mature and demand continues to grow, the investment in rolling out fibre infrastructure pays off. The FNO competes with the MNOs offering services in the area, but the lack of another

255 Transcript p 2857 line 4 to p 2858 line 5.
256 Transcript p 1209 lines 5 – 9.
257 Van der Merwe FWB p 38 para 27.
258 Van der Merwe FWB p 38 para 27.

FNO ensures the investment is more likely to be successful. Given the long-term benefits of being the first FNO to invest infrastructure in an area, and the difficulty in making a profitable investment as a second FNO in the same area, there are strong incentives to deploy more quickly, hence the 'land grab' terminology.[259]

242. Mr Otty also explains why one wants to be the first fibre operator in a specific area and how that affects both uptake/penetration rates and returns: "*And you really need to get to something like a 40% penetration of your households passed. That means, houses connected over households passed in order to generate a return on your investment. Also, if you are the second, even if you are the second player in the market, the first player tends to get first player advantage and take up the customers that really want fibre first. So, as a second player the returns are less. You still have to make the 40% penetration level to get a decent level of return, but it's much harder and it takes longer to do it*".[260] (Own emphasis)

243. Mr Nunes states that it is accepted that there is a competitive advantage to the provider that is the first to deploy fibre infrastructure in an area.[261]

244. Dr Scheffer states that Vodacom was loath to overbuild and "*it never made sense to Vodacom, frankly, to the entire market, to overbuild*" which is why being the first mover into an area is absolutely important.[262]

245. Mr Schoeman testifies that "*we want to go to maybe it's a new outlying area or a town where we identified an opportunity. If it gets published to all our competitors, you know, if we identified it, we'd like the opportunity to be the first mover there to get the opportunity to get some business*";[263] and "*So, for us it gives us a competitive advantage if we're there first and we're the – maybe it's an underserved area, you know, we get a bit of a head start above our*

[259] Van der Merwe FWB p 39 para 30.
[260] Otty Transcript p 1951 lines 12 – 20.
[261] Nunes FWB p 156 para 6.14.
[262] Scheffer Transcript p 2441 lines 5 – 11.
[263] Schoeman Transcript p 933 line 20 to p 934 line 2.

customers. You know, it's more difficult to churn a customer away from someone than to acquire them".[264] (Own emphasis)

246. Mr Mare testifies that "… *Vuma was always good to go* [redacted] *in the market, we* [redacted] *we go in with the* [redacted]*, we cover that town super quick and* [redacted] …"[265] (Own emphasis)

247. In cross-examination Mr Mare makes it clear that Vumatel's strategy is to be the [redacted] in an area and [redacted]. Thus, there is a contest to be first mover to achieve the associated benefits:

"*ADV BERGER SC: But the reason why you are so insistent on* [redacted] *as* [redacted] *as possible is because* [redacted] *and then you* [redacted]. *That's the real reason why time is of the essence for you. Isn't that so?*

MR MARE: Listen, you want – [redacted]*. That's definitely, because we don't overbuild. Okay, so that's why –* [redacted]*. You want* [redacted]".[266] (Own emphasis)

Relatively low average FTTH penetration rates actually achieved in South Africa

248. The factual evidence confirms relatively low average rates of FTTH penetration in South Africa. In other words, in the areas where FTTH has been made available to consumers through homes being passed, relatively low numbers of South African consumers actually take up the fibre alternative, although it differs per area/type of residence.

249. Mr Otty explains that fibre businesses incur significant capital costs upfront and take a long time, 7+ years, to generate returns because of the time required to achieve high enough penetration levels.[267]

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[264] Schoeman Transcript p 934 lines 14 – 17.
[265] Mare Transcript p 2590 lines 3 – 5.
[266] Mare Transcript p 2929 lines 12 – 20.
[267] Otty FWB p 358 para 15.

250. Mr Van Der Merwe submits that most fibre operators, including Frogfoot, rely on terminal penetration of at least 50% to make their business cases work. The business case for a second or third FNO to invest in fibre infrastructure in a specific geographical area is therefore less likely to be compelling as it will be harder to achieve the necessary penetration levels. This is particularly true where the first operator is well established, with significant market penetration, as the second or third FNO will find it harder to achieve the necessary market penetration to justify the investment.[268]

251. Where an FNO has access to existing infrastructure, and demand is particularly strong, the investment for a second or third FNO can potentially be possible. One example of this is Openserve which already has duct and pole infrastructure for its legacy copper network and thus rolling out fibre infrastructure by replacing its copper infrastructure is far less costly.[269]

252. The above is consistent with the evidence of Mr Otty who says when you are building a fibre network, homes passed is the first metric, but you have got to achieve approximately 40% penetration fairly quickly otherwise you will make a loss, because of the high capital costs and consequent interest bill.[270]

253. Dr Scheffer states that as a rule of thumb, an FNO requires more than 40% uptake (homes connected) of homes passed in an area to achieve a return on the investment involved in rolling out in the area (and potentially higher outside the higher income areas where Vodacom deployed to if customers take cheaper, lower speed products). If a second FNO with a similar cost structure also rolls out in the same area, this means that more than 80% of the households in the area need to be connected for both FNOs to break even. This is far less likely to happen as uptake rates of 80% are seldom achieved.[271]

[268] Van der Merwe FWB p 38 para 28. Transcript p 85 lines 8 – 15.
[269] Van der Merwe FWB p 39 para 29.
[270] Otty FWB p 359 para 17.
[271] Scheffer FWB p 240 para 41.

254. Dr Sheffer indicates that the average connection rate for Vodacom is [redacted]%.[272]

255. Importantly, he also accepts that 50% of South African homes passed by fibre are accessing the internet through means other than fibre.[273]

256. Mr Mare explains that the initial first uptake of fibre will be relatively high but then it trickles out: "… *when I spoke about the uptake, what you normally see is your first mover, your uptake goes quick … there's an uptake question to say, listen, you get your first uptake up to* [redacted]*% you get in the first* [redacted]*, and then it trickles out*".[274]

257. Mr Mare indicates that Vumatel considers that it would generally need to achieve FTTH take-up rates of [redacted]% in Vuma Core and Reach areas and [redacted]% in Vuma Key areas for the business model to be successful.[275]

258. Mr Nunes explains that penetration levels depend on the area/type of residence where fibre is installed. He uses housing estates as an example: "*depends on the estate, but you're seeing it in the 70+, 80+ figures in an estate depending on their HOA*[276]".[277] He then indicates that the situation is different in the suburbs where the marketing is "*door-to-door … normally with the ISP*".[278] Penetration in the suburbs for MTN is significantly lower: "*We normally see that in and around the – between the* [redacted] *and little bit higher,* [redacted]*% depending on the suburb and the amounts of communications*";[279] and concedes that in the suburbs only 50% of the homes passed are actually connected: "… *I agree with you, at face value it would look like that if you've got a suburb that's 50% [of homes passed are connected] and 50% not. Okay*".[280]

[272] Scheffer Transcript p 2443 line 21 to p 2444 line 5.
[273] Scheffer Transcript p 2454 lines 1 – 3.
[274] Mare Transcript p 2928 lines 8 – 12.
[275] Mare FWB p 439 para 36.
[276] Home Owner Association.
[277] Transcript p 912 lines 2 – 14.
[278] Transcript p 912 lines 15 – 19.
[279] Transcript p 912 line 20 to p 913 line 1.
[280] Transcript p 915 line 17 to p 916 line 9.

259. Mr Masalesa says that the main challenge with FTTH is its uptake or penetration. In terms of penetration numbers, he testifies that "… *Vumatel has got a home connection rate of 31%. I think the highest connection rate that you have is with Openserve at* [redacted]*%.*"[281] He also makes the point that the technology must serve the customers and that FWA has a much higher connectivity rate than FTTH: "… *I always make this point, we don't do technology for the sake of doing technology, we do technology to service customers, right. And purely looking at the numbers you have much higher connectivity rate on FWA as opposed to FTTH. So, yes, as much as that's from a technology capability point of view, the reality on the ground is the uptake is a different story. The uptake paints a different story altogether*."[282] (Own emphasis)

260. Mr Masalesa explains: "… *fixed wireless technology because of its ubiquitous nature, i.e. I put up a base station and I'm able to cover a large area almost immediately, you know there I think it's a lot easier to interpret the signs and after interpreting the signs, take decisive action to put up infrastructure and more often than not you don't end up with a situation where you have underusage of that infrastructure. So, if I may call it the hit rate on fixed wireless access is much higher ….*"[283]

261. Mr Van Der Merwe indicates that as of end February 2024 where Frogfoot is not overbuilt (i.e., where it is has no fibre-to-fibre competition), its median penetration rate is [redacted]%, while this penetration rate falls to [redacted]% where there are one to three other FNOs overbuilt.[284]

262. Mr Mare testifies that the average penetration rate for fibre in South Africa currently is at 48%: "*So, effectively it's 5 million homes covered. And if you look at that there's about 2.4 million homes connected at this point. You know? So, roughly the uptake is about 48%, if you look at it*".[285]

[281] Transcript p 345 lines 8 – 11; p 353 lines 12 – 22.
[282] Transcript p 345 lines 11 – 18.
[283] Transcript p 468 line 18 to p 469 line 5.
[284] FWB p 39 para 29.1.
[285] Transcript p 2891 lines 7 – 10.

263. At the end of December 2023, the number of active premises serviced by ISPs using the Vuma Reach product amounted to [redacted], with over [redacted] homes passed.[286] This indicates that a relative low percentage of homes passed by Vumatel are actually connected to the fibre that has been rolled out.

264. As at 18 September 2023, Africa Analysis reports that a total of 5.5 million homes have been passed with FTTH in South Africa. Of this total number of homes passed with fibre only 1.95 million homes are connected. The total number of overbuilt homes is only 1.51 million.[287]

Low fibre overbuild in practice

265. Overbuild refers to the duplication of fibre infrastructure by two or more fibre infrastructure providers that have laid their own fibre optic cables in the same area or even in the same roadside trench. Where there is more than one fibre network in an area, the network or area is referred to as being 'overbuilt'.

266. Where a fibre provider is the first to lay infrastructure in a particular area, it typically achieves a monopolistic position in that area unless another provider is willing to overbuild on its network.[288]

267. Mr Nunes indicates that the willingness of providers to overbuild is dependent on several factors, including customer take-up rates or demonstrated interest, poor performance from another FNO, single-trench policies in certain precincts, and Home Owner Association preferences regarding multiple fibre providers within an area.[289]

268. He further explains why fibre infrastructure providers "*are reluctant to overbuild on the networks of others*": (i) deploying fibre infrastructure requires significant investment; and (ii) duplicating infrastructure reduces the return on investment

[286] Mare FWB p 441 para 47.
[287] FWB p 253. Africa Analysis Report, FTTH Market Tracking Programme, Quarter Ending June 2023 (Updated 18 September 2023).
[288] Nunes FWB p 155 para 6.7.
[289] Nunes FWB p 155 – 156 para 6.10.

for fibre providers since revenues are dispersed amongst the providers in an area. As a result, providers often prioritise areas that are underserved to maximise investment returns.[290]

269. Mr Mare indicates that Vumatel does not consider it economically feasible to overbuild, in light thereof that where there is overbuild, there is not the required take-up per FNO to show an acceptable return on investment.[291]

270. Dr Scheffer testifies that Vodacom does not overbuild anyone.[292]

271. Mr Botha of Herotel testifies that "*It's not our strategy to overbuild. We specifically do not intend to overbuild*", and if another FNO has entered into an area before Herotel it will "*immediately*" be inclined to leave that area alone.[293]

272. Mr Nunes indicates with reference to FTTH, that only 18% of the total number of reported homes passed by FNOs has been overbuilt.[294] He is also referred to a statement of his attorneys reflecting that only 23% of FTTH is overbuilt and indicates that in that case overbuild will primarily be by Openserve because they use their old copper network to "*blow fibre*" through.[295]

Growth in demand for data and consumers' disposable income

273. All the fibre markets relevant to this transaction are poised for substantial growth, as FTTH enters a second 'land grab' for secondary cities/towns and lower income areas, FTTB through business broadband extension to outlying business areas and secondary cities/towns, FTTS to support the rollout of 5G on mobile networks and metro fibre backhaul to support all of these initiatives.

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[290] Nunes FWB p 156 para 6.13.
[291] Mare FWB p 439 para 36. Transcript p 2592 lines 11 – 14.
[292] Scheffer Transcript p 2443 lines 13 – 20.
[293] Botha Transcript p 2944 lines 3 – 8.
[294] Nunes FWB p 16 para 6.11.
[295] Transcript p 756 lines 5 – 15.

274. It is common cause that South African consumers' need for data is ever increasing and accelerating. The importance of data in an increasingly digital economy is recognised by all parties. In that context both data/internet access and future prices are important.

275. Consumers in higher income communities in South African have access to the internet through fibre connections. There however is currently a significant deficit in the ability of South Africans in low-income communities to access similar opportunities. As indicated above, the factual evidence is that the high-income fibre areas in South Africa are saturated and that FNO competition has now moved to the lower income areas. It is important to note that this transaction is proposed at a time when FNOs are looking to expand into the lower income areas. These lower income areas are currently mostly supplied by MNOs supplying mobile broadband and FWA home internet products. Further context to note is that MNOs have received spectrum to roll out the latest 5G technology, with FWA as the only use case currently to get a return on their spectrum investment.

276. The merger parties argue that the proposed transaction will contribute to bridging the digital divide by reducing data costs and bringing fibre coverage to areas previously not connected. The Commission, on the other hand, argues that the proposed transaction will harm competition, and that it is competition in the relevant markets that will ultimately lead to the roll-out of infrastructure and cheaper prices for consumers.

277. Mr Motlekar submits that the digital divide is not based on technology or tech. His view is that "*We create a gateway. Allow you to move up the price points. So, that's how we think about it. We don't think about it as a divide that's not insurmountable. And that's how we've structured fixed wireless access. And that's why you see the growth in the amount of Gigs that's now being consumed by the customers*."[296] We shall assess the FWA and FTTH competitive interaction below.

[296] Transcript p 559 line 17 to p 560 line 1.

278. The factual testimony confirms the market growth and opportunities. We give some examples: Mr Van der Merwe confirms that the fibre sector continues to develop rapidly.[297] Mr Masalesa confirms that the demand for data will continue to grow in South Africa and indeed accelerate in the years to come.[298] Dr Van den Bergh confirms "*data is growing so that demand in general is everywhere*".[299] Vodacom's strategy documents confirm the growing demand for fibre and that "*We [Vodacom] have a right to play in this market. We can become the preferred provider to meet the growing demand*".[300] Mr Uys agrees that there is a growing FTTH market with potential: "*you can see on both the quarterly and also the annual that there is definitely still growth in the market and the competitors, let's take Herotel or metro fibre, showing the last quarter …* [redacted] *and* [redacted] *versus the Vumatel quarter of* [redacted]*. So, there is potential in the market* ..."[301]

279. In terms of what South African consumers spend monthly on the internet, a study conducted by BMIT, a technology industry research and advisory firm, shows that 75% of South Africans have a spend of R500 or less for internet services. Of that 75%, 50% only have the ability to spend R300 or below.[302]

280. Mr Masalesa observes given the above numbers: "*The numbers are tight and my view based on that is you know the two technologies; both fibre and fixed wireless access technology are competing for a share of that wallet*."[303] We shall assess FWA and FTTH competitive interaction below.

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[297] FWB p 32 para 14.
[298] Transcript p 344 line 19 to p 345 line 1.
[299] Transcript p 2281 lines 7 – 8.
[300] Transcript p 1836 lines 1 – 5.
[301] Transcript p 1139 lines 4 – 12.
[302] Masalesa Transcript p 298 line 18 to p 299 line 4; p 349 line 11 to p 350 line 11; p 462 lines 7 – 9.
[303] Transcript p 299 lines 4 – 6.

COUNTERFACTUALS

281. The disputed issues in this case include the relevant counterfactuals. The counterfactuals to the proposed transaction are important to both the competition and public interest assessments that follow. The counterfactuals are: (i) the 'competition' counterfactual; and (ii) the 'investment' and 'fibre rollout' counterfactuals. We deal with each in turn.

Competition counterfactual

282. Based on the documentary and factual evidence, the Commission argues that the counterfactual to the proposed transaction is a world where Vodacom increasingly puts itself in competition to both DFA and Vumatel. The merger parties disagree.

283. Highly relevant to this assessment is the (true) rationale for the proposed transaction that we have dealt with in paragraphs 105 to 139 above, which must be read together with this section.

284. Vodacom, as per the merger parties' strategic documents discussed in these reasons, has a strategic imperative to look for an expansion in fibre (including FTTS), to expand its network for 5G purposes and to densify and fiberise existing 4G sites[304] and FTTH/B to share in the profits in these markets.

285. As indicated in the assessment of the true rationale, Vodacom's rationale relates to the Value at Risk to its mobile business, estimated at R11.8 billion in the documents (or half of R11.8 billion in Mr Joosub's version)[305] where Mr Joosub estimates that there could be a loss of up to 30% of mobile data spend within a household if they move to fibre, although he sought to claim it was less than the stated "*Consumer VaR estimated to be R11.8bn (Euro570mn) for the total*

[304] Bundle M p 3498.
[305] The figure of R11.8 billion was presented to the Vodacom Board. See, for example, Transcript p 2003 lines 2 – 12.

period up to FY24".[306] Vodacom wants to compete in fibre to compensate for this VaR, for revenue generation and financial gain.[307]

286. Recall Mr Uys's evidence that Mr Joosub of Vodacom made it clear to him that Vodacom has 'other options' if they do not conclude the deal (see paragraphs 116 and 12019 above). Vodacom's strategic documents of August 2021 refer to Vodacom establishing both a *TowerCo* and a *FibreCo* on a "*Vodacom* [redacted]" with a "*Focus on* [redacted] *and cover* [redacted] *where there is no fibre*".[308]

287. Vodacom sees an opportunity to participate in the fibre market rather than being a customer to infrastructure players such as [redacted] where it does [redacted] including the option of "[redacted] *model)*".[309]

288. Vodacom's Project [redacted][310], albeit that certain of its assumptions are disputed by the merger parties' factual witnesses in the hearing, still indicates that Vodacom can [redacted], either with [redacted] or [redacted] or through [redacted].[311] The magnitude of Vodacom's contemplated investment and expansion shown in Project [redacted] indicates that Vodacom wanted to create a [redacted] Maziv in both FTTH and FTTB.[312] Vodacom had [redacted]: the plan was to become the [redacted] FTTB player and the [redacted] FTTH player, and to operate [redacted] model.[313] Mr Joosub confirms that Project [redacted] projected to [redacted] the proposed transaction, although he contends that the assumptions [redacted].[314] We note that other than Vodacom's factual witnesses disputing the assumptions made in Project [redacted] in oral

[306] Bundle M p 3498.
[307] Otty FWB p 360 par 18 to 20; p 362 and 363 para 25; Transcript p 2012 line 16 to p 2014 line 4.
[308] Bundle M p 2702.
[309] Bundle M p 12854.
[310] This is based on a self-build plan with 100% Vodacom ownership.
[311] Bundle M p 12483: Project [redacted] – VSA Fibre rollout acceleration, 21 May 2021.
[312] Bundle M p 12475 and 12476.
[313] Bundle M p 12475.
[314] Transcript p 1760 lines 4 – 11; Bundle M p 12482.

testimony at the hearing, it produces no contemporaneous documents (e.g. a minute of any meeting or discussion or any other document) indicating which of the assumptions made in Project [redacted] were wrong (and which not) and, if wrong, how they were wrong, and if corrected, what the position would be.

289. We further note that Vodacom's Project [redacted] strategy document of 2021 – containing Mr Joosub's name – identifies [redacted] opportunities which will deliver significant [redacted] and [redacted]. One of these is "[redacted]".[315]

290. At the hearing Vodacom's factual witnesses argued that Vodacom would not be willing to invest in its own fibre infrastructure absent the merger, as its shareholder, Vodafone, would not fund Vodacom's self-build fibre projects. They argue that this is because its main business is that of an MNO and it does not have the capability to build, especially in lower income areas. Absent the merger, as they argue, Vodacom would not scale-up its fibre network and it would continue to lease.

291. We do not accept the above assertion on a thorough consideration of all the evidence, including the merger parties' strategic documents and Mr Uys's evidence that he was told that Vodacom had 'other options'. What the merger parties' argument ignores, is that Vodacom has an imperative strategy to share network infrastructure to reduce its costs. In this strategy, it is looking to enter into JVs and partnerships so that it can participate in fibre, and not just lease.[316] Mr Joosub confirms this strategy, and that the strategy remains absent the proposed merger. He confirms that Vodacom's strategic imperative has [redacted] but that "[redacted]".[317]

[315] Part A of the Record p 3807 *Project* [redacted]– *Vodacom's* [redacted] *Strategy, September 2021, Shameel Joosub.*
[316] Transcript p 3993 lines 10 – 17.
[317] Transcript p 1765 lines 12 – 15.

292. Mr Joosub furthermore confirms that in the counterfactual, to the extent that DFA fails to build enough FTTS, Vodacom would find alternatives to DFA, whether through self-build or JV partnerships: "*...Now, if the deal doesn't happen, will we continue to use DFA and so on? As long as it make sense for us we will continue to – and if they continue to build. But if they don't build we still have to be able to then either self-build it or go and build it with somebody else. But Fibre to the Site needs to happen. So, that essentially will – you know it's going to – is a need that will be there …*";[318] and "*… Vodacom's need, which is different in Fibre to the Home versus Fibre to the Site. Fibre to the Site is creating a shared infrastructure path and to the extent that the CIVH has the capability to deliver that we will continue to do business with them. And to the extent that they don't we – and we need the path, we would then have to seek alternatives*".[319]

293. Mr Joosub testifies, and Vodacom's annual results confirm, that Vodacom has R23.7 billion in cash and a nett debt to EBITDA ratio which improved from 1.1 to 0.9.[320] Mr Joosub further testifies that there is room to take on more debt since Vodacom's upper limit for its nett debt to EBITDA ratio sits at 1.5.[321] Mr Otty of Vodafone testifies that banks and shareholders consider factors such as the stability of a company, which Vodacom is, when deciding to give a business access to funding.[322]

294. Notably, Mr Joosub explains that, as is evident from Vodacom's strategy documents, it can do [redacted] "*… we build* [redacted] *and the context of that is that <u>you can</u>* [redacted] *<u>the investment</u>. What does that mean? So, if you don't own the fibre, if you don't own the entity or you don't control the entity, then effectively you don't have to* [redacted] *calculation and so you can go and look for – so you'd go and so example what we're looking at in some of the other entities is* [redacted]

[318] Transcript p 1771 lines 2 – 7.
[319] Transcript p 1774 lines 1 – 6.
[320] Exhibit AB1 – Vodacom Group Limited Reviewed Annual Results and cash dividend distribution, Slide 18; Exhibit AB2 – Vodacom Group Annual Results for the year ended 31 March 2024, Slide 28; Transcript p 1700 lines 7 – 13.
[321] Transcript p 1700 lines 16 – 20.
[322] Transcript p 1996 line 19 to p 1997 line 2.

[redacted] *and then* [redacted] *and so then basically that stays* [redacted]. *So, when you look at the Vodacom* [redacted]*, that will not be* [redacted] *in and then when you – then of course then it doesn't get* [redacted] *as well*".[323] (Own emphasis)

295. Mr Joosub does not contest that Vodacom can find other fibre partners to roll out fibre in South A[redacted] absent the proposed transaction), but testifies that it would not suit Vodacom because it will be a "*very small play*" and you would be "*coming late to the party*".[324] This is inconsistent with the abovementioned evidence that Vodacom had 'other options'.

296. Significantly, the current transaction is off-balance sheet. Mr Joosub explains the benefit of this, "*so your debt doesn't go up. You don't get to consolidate the revenue, but you don't also consolidate the CapEx, so it's all off balance sheet as we call it*".[325] Vodacom has been able to raise billions of Rands off-balance sheet for this transaction.

297. Dr Scheffer also confirms that Vodacom does have capital available for fibre investments in the form of the R14 billion to R19 billion currently set aside for this proposed transaction:

> "*ADV BERGER SC: But there is capital available, and that capital is the 14 to R19 billion which is being set aside for this deal?*
> *DR SCHEFFER: Yes*."[326]

298. Regarding skills and capacity as a potential barrier, Mr Otty claims that, now that most of the high income areas are covered, Vodacom does not have enough skills or capacity and any model to expand into low-income areas which would require a different way of doing things.[327] Dr Scheffer however concedes that the skills and know-how required to roll out successfully in the lower income

[323] Transcript p 1649 lines 4 – 16.
[324] Transcript p 1763 line 18 to p 1764 line 5.
[325] Transcript p 1671 lines 7 – 11.
[326] Transcript p 2474 lines 12 – 18; also see p 2478 lines 10 – 13.
[327] Transcript p 2020 lines 7 – 11.

areas can be acquired: "*If you're asking whether these skills can be acquired, yes, we can*";[328] "*Yes, that's correct*" Vodacom could acquire the skills and the know-how for rolling out fibre successfully in low-income areas.[329]

299. We do not find the merger parties' argument credible that Maziv is the only entity capable of in the future rolling out fibre with sufficient scale.[330] The *Project* [redacted] Discussion Materials dated September 2020 identify [redacted], [redacted] and [redacted] as "*good, challenger*" FNOs.[331] It is also contrary to the clear factual evidence that Vodacom had 'other options', as discussed under the true rationale.

300. As also discussed under the transaction rationale, CIVH's assessment of the world without the proposed merger lays bare the counterfactual of real and effective competition with Vodacom. As indicated, CIVH's internal documents where it discusses the threats of not doing this deal articulate this counterfactual. The documents reflect that CIVH was anxious to conclude a deal with Vodacom to avoid it pursuing 'other options' in the market, which would see Vodacom becoming a significant competitive force against both DFA and Vumatel, possibly triggering further competition with other FNOs as they conclude similar deals to counter Vodacom.

301. Recall further that Mr Uys concedes that CIVH's business is under the threat of competition and saw the proposed merger as likely to de-risk CIVH's business. When questioned about whether the transaction de-risks the core business of CIVH by taking away the risk of losing Vodacom as a client and gaining it as a formidable competitor Mr Uys testifies:[332] "*...that's correct. That's what I'm saying. So, in light of these scenarios that management put to us, they said that this will – <u>this deal will also commercially de-risk the core business of CIVH because then they hopefully will keep their business with us</u>*". (Own emphasis)

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[328] Transcript p 2476 lines 6 to p 2477 line 18.
[329] Transcript p 2477 lines 15 – 18.
[330] See Hodge Transcript p 3575.
[331] Bundle M p 3544.
[332] Transcript p 1229 lines 10 – 13.

302. The evidence furthermore indicates that Vodacom has [redacted] in the previous five years. This is largely because, as Vodacom was still pursuing the proposed transaction, it expanded its network by completing the construction of [redacted] FTTS links and [redacted] km of [redacted] metro fibre, seemingly to keep its self-supply alternatives open in case the deal fell through.[333] This infrastructure would compete with Maziv absent the proposed merger.

303. In summary, the documentary and oral evidence confirm that Vodacom is a competitive threat to Maziv, and we conclude that the counterfactual to the proposed transaction is a world where Vodacom increasingly puts itself in competition to Maziv.

Investment and fibre roll-out counterfactual

304. The merger parties argue that Vodacom's investment in Maziv will assist Maziv to roll out fibre faster and to speed-up the process of bridging the "digital divide".

305. The Commission's case is that, in the counterfactual, Maziv would have access to funds to roll out fibre as it has done in the past, and even if it does not, the evidence shows that other market players will roll out fibre in any event.

306. We first consider investment and then roll-out.

Investment

307. The Commission argues that the relevant counterfactual is that, absent the merger, the rollout into low-income communities will occur anyway. Either Maziv will obtain the necessary funding from other sources to finance further FTTH rollout or, if it does not obtain funding, that other FNO's in South Africa will do so in its stead.

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[333] Hodge EWB p 117 para 179.

308. The merger parties argue that currently, Maziv is [redacted], which limits its ability to pursue its [redacted] objectives and that Vodacom's R6 billion investment will unlock Maziv's [redacted] and enable it to roll out fibre faster, enabling it to narrow the "digital divide".[334] They argue that without the merger, as conceded by Mr Hodge, Maziv cannot draw on its [redacted].

309. We note that Mr Hodge concedes that Maziv has a [redacted] at the moment but that it [redacted] that until it meets certain [redacted] and is able to then, in future, [redacted] on it once it does meet those [redacted].[335]

310. The merger parties argue that the relevant counterfactual is the status quo since as a result of having [redacted][336] and having no [redacted], Maziv cannot pursue its plans to pass homes in low-income areas. Instead, it will have to focus on connecting homes in middle- and high-income areas (which have already been passed with fibre).[337]

311. Regarding further funds from existing shareholders, Mr Uys testifies that the [redacted] and other shareholders "… *would be* [redacted] *to put in the money and that's why there would be a delay. We'll have to go and find* [redacted]"[338] (Own emphasis). When asked if this was discussed at the [redacted], he says that he has only [redacted] *…*".[339]

312. The merger parties do not contend that Maziv cannot seek alternative investors. They argue that Maziv will have to try to find new investors. However, they say that will take a number of years, and there is no guarantee that it will be successful.[340] They rely on Mr Uys's evidence that "*I can't say we can find it. I will try my best to find one, but I can't guarantee that we will find one*".[341] They

[334] Uys Supplementary Witness Statement FWB p 548 para 11.
[335] Transcript p 4024 lines 4 – 19.
[336] Uys FWB p 486 para 59. Transcript p 1593 line 19 to p 1594 line 10.
[337] Uys Supplementary Witness Statement FWB p 551 para 23.
[338] Transcript p 1593 lines 19 – 22.
[339] Transcript p 1594 lines 5 – 10.
[340] Merger Parties Heads of Argument ("**HOA**") p 115 para 219.2.
[341] Transcript p 1593 lines 14 – 17.

also rely on the company's prior experience with '[redacted] in which it sought to [redacted] from [redacted] and [redacted][342]

313. Regarding the Commission's argument that other firms in the market will roll out fibre, the merger parties submit that no other competitor besides Telkom/Openserve can roll-out fibre at scale and pace – and Telkom/Openserve has never led the market in penetrating low-income areas given the risks involved.

Our assessment

314. The evidence shows that Maziv has up to recently always found capital to fund its infrastructure rollout plans.

315. Given the CIVH shareholders' [redacted], the evidence is that they had a plan of action to [redacted] and prepared and executed a further R[redacted] in 2021 to [redacted] and support the growth of the business.[343] That capital supported the [redacted] of DFA and the [redacted] of Vumatel in FY2023 and FY2024.

316. Along with the above was a further R[redacted] to acquire Herotel. Mr Uys confirms: "*CIVH provided funding – remember there's this* [redacted] *sitting there that we have to* [redacted], *so part of that R*[redacted] *to Vumatel to acquire the 49% in Herotel*".[344]

317. Although the merger parties claim that because of Maziv's financial situation the existing shareholders could not provide further funding to the business absent the merger, the evidence is that they did provide significant further funding while the merger was under consideration. This capital injection by shareholders supported R[redacted] in capex (of the R10 billion proposed in the merger parties'

[342] Uys Transcript p 1108 lines 1 – 16.
[343] Transcript p 1189 line 19 to p 1190 line 12.
[344] Transcript p 1331 line 18 to p 1332 line 1.

initial tendered condition) and delivered on almost [redacted] homes passed since 1 April 2022 (that the parties initially made a condition to the merger).[345] Thus, the previous roll-out commitments (that were claimed to be a benefit of this merger and were to be achieved over 5 years) were met (without this deal) and in a relatively short space of time.

318. Furthermore, CIVH refinanced its debt and renegotiated and extended its debt facility with the banks in December 2023 to R25 billion. This resulted in an additional R[redacted] facility above its current debt levels, accessible on meeting its debt covenants.[346] With regard to meeting the [redacted] for September 2024 and March 2025, Mr Uys confirms that Maziv's management has sought [redacted].[347] He testifies that the banks have [redacted] but "*they are* [redacted]" and there is a good chance that the banks will give Maziv [redacted] *or so*".[348]

319. Furthermore, Mr Uys and Mr Mare indicate that Maziv through concentrating on connecting the homes passed rather than new rollout (as it has been doing), will drive EBITDA and make it easier for Maziv to meet its debt covenant requirements.[349] The presence of the facility means that the R6 billion is not all required for capex.

320. We also note that Maziv has agreed with Vodacom "*to take out some of the money that comes in*" in that part of the cash injection that was going to be used as a [redacted] to CIVH's shareholders of R[redacted].[350]

321. The worst-case scenario absent the proposed transaction, according to the evidence of Mr Uys, is that it will delay Maziv's plans by [redacted], although he

[345] Transcript p 1354 lines 12 to p 1355 line 5; Hodge EWB p 165 para 317.
[346] Transcript p 1121 lines 1 – 15; Bundle M p 10590.
[347] Transcript p 1124 lines 2 – 12 and p 1142 lines 11 – 16.
[348] Transcript p 1124 lines 13 – 17.
[349] Uys Transcript p 1123 lines 9 – 11; and Mare p 2926 lines 13 – 22.
[350] Transcript p 1118 lines 7 – 13.

does not explain why it would take that [redacted] We refer to the following exchange between panel member, Ms Kessery and Mr Uys:

> "*ADV KESSERY: And then to just get to what I call the counterfactual, which is if the deal doesn't go through, if the transaction is not approved. You spoke about your vision and your strategy, and you said that you will find a way to do it and you will find funding elsewhere. So, I'm taking that you're not saying that it won't happen; you're just saying there will be a delay in it happening.*
>
> *MR UYS: Yes. It will take another* [redacted]."[351]

322. With regard to potential investors in Maziv, CIVH's brief to the banks at the time of contemplating an external investor in CIVH was to source investment in the market in return for a minority shareholding in CIVH.[352] Mr Uys confirms that subsequently "*there was definitely interest from local investors*".[353] Furthermore that there were discussions with MTN as well, not just about South Africa but the rest of the continent.[354] Notably, Maziv however only engaged with Vodacom post-Covid.[355]

323. Even when market conditions had changed post-Covid, and it had raised R[redacted] from its shareholders, CIVH did not consider other potential investors. We note that whilst it may be CIVH's preference to have a single new shareholder, the evidence confirms that there was interest from multiple investors of under R[redacted]

324. There is no evidence to suggest that absent the merger, Maziv would not continue to look for investors, but only that it would take time.[356] On the question of Mr Uys not being able to guarantee an investor, he puts up no evidence of having made a serious attempt since talks initially started with Vodacom years ago, even during the period when a deal could not be reached that Mr Joosub

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[351] Transcript p 1592 lines 10 – 16.
[352] Transcript p 1179 lines 1 – 15.
[353] Transcript p 1180 lines 18 – 21.
[354] Transcript p 1181 lines 7 – 16.
[355] Transcript p 183 line 20 to p 1184 line 4.
[356] Transcript p 1593 lines 5 – 18.

was upset about. In the context of a growing sector, with rapidly growing demand for data, and given the skills and expertise of CIVH as the market leader and largest incumbent in fibre, together with attractive margins and limited overbuild generally in FTTH, we see no reason why external investors would not be interested in a stake in Maziv. Vodacom certainly sees its investment in Maziv as one that will reap attractive benefits and profits and Maziv puts up no evidence to the contrary.

325. Furthermore, given the market characteristics (as discussed above) Maziv will be incentivise to seek an investor in order to achieve its rollout goals since FTTH is a market where there is so-called ‘competition *for* the market’ and significant first mover advantages, with limited overbuild – as borne out by the factual evidence. If Maziv does not roll out FTTH, it will lose significant market share to its competitors actively involved in the second land grab and these areas would then be permanently sterilized for Maziv given that it would be reluctant to overbuild. This will significantly incentivise it to speed up any external investor seeking process.

Fibre rollout

326. We have above dealt with the key market characteristics of FTTH in South Africa, as confirmed by the factual evidence. This includes (i) competition *for* the market; (ii) the second land grab phenomenon; (iii) significant first mover advantages to the first FNO to roll out fibre in an area; and (iv) limited overbuild by other FNOs (see paragraphs 22765 to 272 above). Given the combination of all these factors, this means that if Maziv fails to roll out fibre into the lower LSM areas absent the proposed transaction, other operators will as part of the second land grab to achieve the first mover advantages.

327. The merger parties’ own factual witnesses confirm that there is competition *for* the market and what the consequences would be for Maziv if it stops rolling out fibre. Mr Joosub states that, were Maziv to stop rolling out fibre in a particular

area for any reason, "*fibre will go to those areas* and then *effectively CIVH has completely lost out*".[357] (Own emphasis)

328. This was echoed by Mr Otty who stated that without this merger in areas which are "*ripe for fibre*", if Maziv does not rollout fibre, other competitor FNOs, like Openserve and others, "*would roll out very soon thereafter and capture the benefits which otherwise would be Maziv's*".[358] (Own emphasis)

329. Mr Mare explains the fluidity of the market and what happened in practice in the case of the Reach product: "… *basically what we saw in Reach is the competitors then copy the solution and then suddenly they start building at speed as well. And that's what I think – that's what I believe is the positive of this. If you get a workable solution then basically the competitors follow suit. So, basically we started in 2019 with our Reach. In 2021 two of the biggest operators were building Reach* ***at scale****. And if you look at it today* ***everybody is building Reach at scale****. And that's how you penetrate the 4.8 million homes*".[359] (Own emphasis)

330. Mr Mare further indicates that Vumatel is a significant player with [redacted] homes passed, and that competitors are active and collectively have passed 1.2 million homes: "… *I can't track every – all the competitors, but I think what I can say is we launched Reach or the prepaid product in 2019. Our competitors started following us only in 2021. We got* [redacted] *homes in I think in – we got* [redacted] *homes passed at this point. I think our competitors or the whole rest of the market is about 1.2 million roughly the figure I have, yes*".[360] (Own emphasis)

331. He states that "*You're seeing* [redacted] *and then you've got* [redacted] *that's quite aggressive in this market at the* [redacted] *front*".[361]

[357] Transcript p 1829 lines 8 – 11.
[358] Otty FWB p 365 para 34.2; Transcript p 2016 line 19 to p 2017 line 11.
[359] Transcript p 2893 line 17 to p 2894 line 4.
[360] Transcript p 2580 lines 7 – 12.
[361] Mare Transcript p 2756 lines 1 – 2.

332. He further states "*If you look at today, I mean on par people are building Reach more than us at this point*."[362] (Own emphasis)

333. He also gives the example of Soweto where [redacted] and are competing "*in Soweto* [redacted].[363]

334. Openserve we have heard is more likely to overbuild because it has exclusive access to an existing duct and pole infrastructure that was previously used for Telkom SA SOC Ltd's far-reaching copper network. This allows it to install fibre on existing infrastructure and avoid some of the construction costs incurred by other FNOs.[364] Openserve is part of the second land grab and would be able to roll out fibre in the Reach areas.

335. Mr Mare further indicates that if "*you look at Stats SA and you look at all the census type of information, there's disposable income also there. So, we're seeing a very positive, lucrative economy in the Reach area* …"[365]

336. Mr Joosub testifies that the fibre train will happen regardless of the proposed transaction: "… *the fibre train is going to happen anyway, whether it's through Vuma or it's through Openserve or it's through any one of the big fibre providers, fibre will expand and fibre has to expand and so it's a natural phenomenon all over the world where you've got mobile and fibre being complementary. So, you do – it's about connectivity*".[366]

337. Mr Van der Merwe of Frogfoot testifies that in the counterfactual world if the merger is not implemented, either a market participant will "*step up and say we want a slice of the pie*" or the rest of the market will catch on to the opportunity that exists to *"disrupt the extortionate pricing of wireless operators in the*

[362] Transcript p 2894 lines 12 – 13.
[363] Transcript p 2869 lines 4 – 7.
[364] Scheffer FWB p 240 para 42.
[365] Mare Transcript p 2596 lines 2 – 10.
[366] Transcript p 1641 lines 6 – 11.

townships".[367] If competition is allowed to play out over the next couple of years, "*it will be disruptive and it will change that market*", "*create jobs*" and do the positive things which the merger parties are saying they are going to do in circumstances where this will happen anyway without the merger.[368]

338. Given that Maziv is the largest fibre player in South Africa, and the undisputed market characteristics of (i) competition *for* the market; (ii) the second land grab; (iii) significant first mover advantages; (iv) coupled with the fact that Maziv does not overbuild, as confirmed by the factual testimony, we are unconvinced by the merger parties' argument that Maziv would stop rolling out fibre for a significant period of time just because it did not get the cash injection from Vodacom through this transaction. In any event, Mr Uys's evidence reveals that if this merger does not proceed, this would only delay Maziv's rollout as it [redacted]

339. Mr Otty agrees that it does not matter to the consumer who provides the fibre and that rollout will happen without the proposed transaction, but contends that it will take longer without the deal: "*fibre rollout would happen more slowly without the Vodacom investment in Maziv*."[369] Mr Otty however concedes that he does not know the capabilities of other players such as Openserve and other FNOs.[370] Competitors' investment plans will obviously be influenced by whether or not the proposed Vodacom/Maziv deal proceeds or not.

340. The merger parties also assert that Maziv has a track record of pioneering the rollout of fibre in new areas. Vumatel was the first to roll out FTTH. They claim that Openserve/Telkom was not doing it despite their previous monopoly and the availability of their copper network. However, the factual evidence, as discussed above, is that Vumatel's competitors have caught up and are now seriously competing in the second land grab in relation to the Reach areas.

[367] Transcript p 285 lines 6 – 14.
[368] Transcript p 285 line 15 to p 286 line 2.
[369] Transcript p 2018 lines 9 – 12.
[370] Transcript p 2076 lines 1 – 8.

341. The merger parties also claim that none of the other FNOs has managed to develop a commercial model to roll out at scale into the lower income areas – when Vumatel rolled out in 2019, the other operators followed only much later, in 2021. That Vumatel did so first in our view is not material – what is relevant is that the other operators followed and are now actively competing to provide FTTH access in the Reach areas.

342. Mr Reynolds concedes under cross-examination that "*yes, if Maziv doesn't roll out to Reach, other players will start taking some of those addressable – some of those homes, yes, so you'll reduce the size of the potential sort of future customer base of Maziv, ja, but that could take a process*".[371]

343. We conclude that the relevant counterfactual will be a combination of all interested market participants, including Maziv without the proposed deal, competing for the land grab in the lower-income areas. This applies specifically to the Reach market segment. We shall deal with the Key segment under the public interest analysis.

344. In relation to the Key segment there is no player at scale at this stage. Mr Mare indicates that there are different players in this market with different solutions at this point. He does not think that there are big players at scale at this point, and Vumatel is also not at scale.[372]

MARKET DELINEATION

345. There is consensus between the parties that the broad markets for wholesale metro fibre and last mile fibre can be further segmented into the following narrower relevant markets:

345.1. within the metro fibre market, there are separate relevant markets for (a) FTTS, wholesaled to MNOs; and (b) fibre backhaul, wholesaled to FNOs; and

[371] Reynolds Transcript p 4111 lines 9 – 17.
[372] Transcript p 2755 lines 16 – 19.

345.2. the broad last mile fibre infrastructure market can be further delineated into separate relevant markets for (a) FTTH; and (b) FTTB, wholesaled to ISPs because of the different needs of household and SMME customers who typically consume FTTH versus enterprise customers who consume FTTB.

346. The first contentious market definition issue is whether dark and lit fibre are part of the same relevant market or distinct markets in the provision of wholesale metropolitan backhaul to MNOs/FNOs and last mile fibre (FTTH and FTTB) to ISPs.

347. The other contested market delineation issue is if retail FTTH services and FWA services are part of a broader market or in totally separate relevant markets.

348. We first consider the issue of dark vs lit fibre.

Dark vs lit fibre

349. Dark or passive fibre is network fibre that has been installed but not yet turned on by a network provider. It is only once the dormant cables are lit that data can be transmitted through the cables by pulses of light.[373] Lit fibre, also known as active fibre, refers to fibre that has been turned on by the network provider using specialised equipment; it is already operational and being used to transmit data by pulses of light.[374]

350. Dark fibre at long-haul (to an extent), metro and last mile levels constitutes "*the core 'trunk' of the fibre infrastructure tree that extends across South Africa*".[375]

[373] Nunes FWB p 132 para 2.7.
[374] Nunes FWB p 132 para 2.8.
[375] Nunes FWB p 153 para 6.3.1; p 165 – 167 paras 6.51.1 – 6.51.4.

351. In terms of DFA's product rules, all customers (including Vodacom) who lease dark fibre from DFA are precluded from reselling (i.e., sub-letting) such dark fibre.

352. Vodacom does not currently offer dark services on any of its fibre infrastructure, with the exception of one link to each of MTN and FibreCo. In addition to its self-provided fibre, Vodacom leases dark and lit fibre where self-supply is not viable, mainly from DFA, [redacted] and [redacted], which it uses as an input into its downstream fixed and mobile network services.

353. The Commission defines separate relevant markets for dark and lit fibre.[376] MTN submits that dark and lit fibre are not substitutable products or services, do not place significant competitive constraints on each other and are therefore in separate relevant product markets.[377] Rain submits that its experience supports the finding of a separate relevant product market for dark fibre.

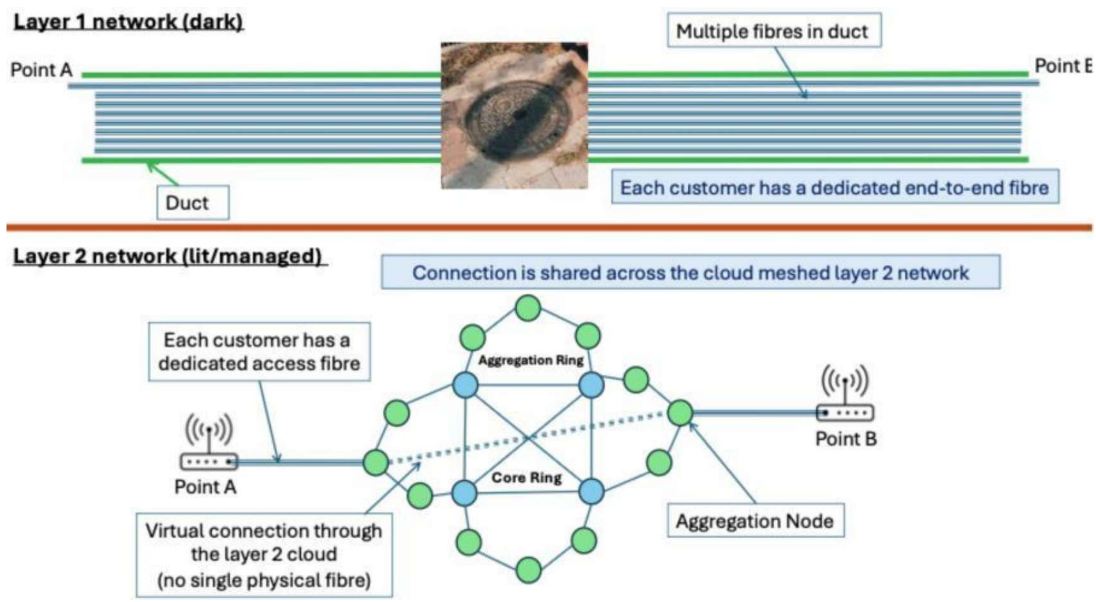
354. The merger parties submit that the Tribunal can leave open whether dark and lit fibre are in the same or separate relevant markets, because it does not alter the competitive assessment.[378] Prof Theron clarifies: "… *we are very happy to work within an assumption that there is a separate dark market because it doesn't impact on our theories of harm*".[379] They argue that (i) since Vodacom does not offer dark fibre products, the proposed transaction will have no impact on shares in a putative dark fibre market;[380] (ii) if a combined market is considered for both dark and lit fibre, the increase in Maziv's market share as a result of the proposed transaction is small and there are many other market players[381] including Openserve which is significantly larger than Maziv.[382]

[376] Hodge EWB p 51 – 53 paras 33 – 37.
[377] Nunes FWB p 142 – 147 paras 5.3 – 5.18; Smith EWB p 234 – 238 paras 104 – 125.
[378] Theron EWB p 389 – 393 paras 346 – 364; Exhibit BQ Theron's Slide 21; Transcript p 3478 and 3479.
[379] Transcript p 3478 lines 8 – 10.
[380] Theron EWB p 393 para 363.
[381] Theron EWB p 393 and 394 paras 365 – 368; para 318 and Table 7; para 319 and Table 8, p 383 and 384.
[382] Transcript p 59 line 19 to p 60 line 13.

355. We note that DFA provides both dark and lit fibre whereas Openserve only provides lit fibre services. Therefore, market definition is important to the concentration (i.e., market share) assessment and the analysis of effects that will follow.

Our assessment

356. The evidence of Mr Uys in relation to the network levels suggests that dark and lit fibre are in separate relevant markets, illustrated in the following diagram:[383]



357. The above diagram illustrates how dark and lit fibre operate at different levels of the value chain. Dark fibre is an input into lit fibre since it comprises the underlying infrastructure (i.e. passive fibre optic cables) that transmits data once activated. Lit fibre is what is used by customers to provide the bandwidth capacity for applications (including internet, email, file sharing, web hosting, data backup, video, VOIP and VPN).[384] In industry terminology, dark fibre is provided

[383] See Exhibit Q read with Transcript p 1090 line 5 to p 1093 line 6.
[384] *Inter alia* Nunes FWB p 147 para 5.16.1.

as a 'layer 1' network product[385] whilst lit fibre is provided as a 'layer 2' managed service.

358. Mr Van der Merwe of Frogfoot provides a useful analogy illustrating the differences between dark and lit fibre in the context of the telecommunications value chain:[386] "*...we're looking at the vertical segmentation of the market...at the bottom of that value stack we really have layer one physical infrastructure or what we call dark fibre and if I can use an analogy, if we were in the business as a fibre operator of building houses or business parks or so forth, dark fibre would be the bricks that we build the houses with. So, we go and acquire these bits and pieces of dark fibre and we then use it to create a finished product and then if we then go up the value stack we see the layer 2 service providers, so that would be the analogy of that property developer that goes and builds a house and then if we go further down the value stack to layer 3 operators, that would almost be the WeWork or the Workshop17 that goes and leases a premises, furnishes it, provides all sorts of services on top of that*."

359. In the case of dark fibre, each customer has a dedicated end-to-end line. However, a lit or managed network involves a connection that is shared across the 'cloud' without each customer having a point-to-point dedicated solution.

360. Dark fibre (as a layer 1 product) can be 'switched on' via ancillary network equipment to create a component of a layer 2 lit service offering. This does not mean that a provider of dark fibre can readily become a supplier of lit fibre. Mr Uys explains that for DFA to supply lit fibre, it had to 'rebuild' a lit network, which required substantial capital expenditure.[387]

361. In terms of the dark fibre products offered by DFA, Mr Uys indicates that DFA developed the Titan dark fibre product specifically for MNOs and developed the

[385] There are three stages or 'layers' of activity involved in providing end-users with connectivity: layer 1 involves deployment; layer 2 involves lighting of fibre optic cables and managing of lit cables; and layer 3 involves the provision of internet connectivity to end-users via lit fibre. Nunes provides a description of each of these layers at FWB p 133 – 134 paras 2.11.1 – 2.11.3.
[386] Transcript p 88 line 5 to p 89 line 3.
[387] Transcript p 1090 line 13 to p 1091 line 2; p 1092 line 2 to p 1093 line 6.

Peregrine dark fibre product, which was the initial dark fibre product, for other FNOs. Variants of the dark fibre products, namely Tachyon and Helios were added to target enterprise customers and large ISPs. It is only when DFA sought to target smaller customers that it introduced lit services.[388]

362. Notably, lit fibre cannot readily be 'switched off' to provide dark fibre as this would require providers to disconnect ancillary equipment and switch off the lit fibre so that it could be leased as an asset to other providers[389] and, even then, it would still be necessary to source a separate dedicated end-to-end (dark) fibre line.[390] There is no evidence of this been done in South Africa.[391]

363. Mr Schoeman testifies that it is Rain's "*strong preference to use dark fibre only*", i.e., to lease dark fibre from DFA, as opposed to lit fibre services.[392] Mr Van der Merwe of Frogfoot also regards dark and lit fibre to be in separate relevant product markets: "*It's also very concerning for us, you know, in the merger filings the merging parties make clear that they see no distinction between dark fibre and lit fibre and so that lit fibre could very well become a substitute for dark fibre, which means all the critical infrastructure that we're dependent on could very well disappear or become more and more unattractive and I can give a lot of examples of how that has actually affected us in the past*".[393]

364. In addition to the above, certain demand-side factors are indicative of separate relevant product markets for dark and lit fibre: (i) they are generally procured for different intended uses by different types of customers; (ii) customer switching between dark and lit fibre cannot occur quickly and/or without significant investment; and (iii) material differences exist in the commercial terms on which dark and lit fibre are procured. We address each of these factors in turn.

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388 Transcript p 1094 lines 16 – 22.
389 Smith EWB p 237 para 119; Hodge EWB p 53 para 36.2.
390 Transcript p 1090 line 5 to p 1093 line 6.
391 The European Commission, in paragraphs 97 to 102 of its decision in *Telefonica/ Liberty Global JV* Case No. M. 9871, considers the significant differences between 'passive lines' (dark fibre) and 'active lines' (lit) but it does not conclude on the issue of separate relevant markets. Available at: https://ec.europa.eu/competition/mergers/cases1/202115/m9871_543_3.pdf (accessed on 25 March 2025).
392 Schoeman Transcript p 941 line 19 to p 942 line 2.
393 Transcript p 107 lines 9 – 15.

Different uses and customers

365. Different customers groups prefer and use either dark or lit products/services due to the nature of and conditions of supply. Dark fibre is typically used by businesses that wish to establish their own connectivity either for own use or for on-supply to third parties. The business can lease or purchase the fibre network and use its own equipment to light the fibre network.[394] The business will assume responsibility for deploying, operating, managing, securing and maintaining the equipment. Since the entire fibre network is leased by, and dedicated to, a particular business, the business benefits from having control of the network as well as flexibility in determining its capacity/bandwidth.[395]

366. Due to the scalability and flexibility of dark fibre as articulated by Mr. Uys,[396] infrastructure provider customers have a strong preference for dark fibre to supplement their own self-build in order to offer a competitive lit managed fibre service.[397]

367. Lit fibre, on the other hand, is generally operated by an FNO that sells connectivity to an ISP or sometimes directly to enterprises in the case of FTTB. The ISP then supplies it as a retail service to end-users such as businesses and homes.[398]

368. The ISP, as a lit fibre customer, is not responsible for the deployment, operation, management, security or maintenance of the fibre infrastructure and outsources these responsibilities to a third party (i.e. the FNO) that has the requisite equipment and expertise.[399]

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394 Transcript p 736 line 15 to p 737 line 2.
395 Nunes FWB p 144 para 5.7. Also see Transcript p 1073 line 18 to p 1074 line 1.
396 Transcript p 1093 lines 13 – 20.
397 Van der Merwe FWB p 34 para 16.4.
398 Nunes FWB p 145 para 5.11.
399 Nunes FWB p 145 para 5.12.1.

369. Lit fibre also does not offer the same control or flexibility as dark fibre in terms of the capacity/bandwidth of the fibre network.[400]

370. Mr Van der Merwe indicates that a further problem with procuring lit services is that *"one has no control over redundancy / routing of network which means it becomes difficult or even impossible to engineer high levels of resilience*".[401]

Customer switching and costs

371. In the case of leasing or purchasing dark fibre, the upfront costs involved are substantially higher than those associated with procuring lit fibre.[402] Over and above those upfront costs, the customer is required to cover the costs *inter alia* of managing and maintaining the infrastructure and is required to purchase the ancillary equipment necessary to light the dark fibre.[403]

372. It takes significantly longer for a customer of dark fibre to establish and use connectivity via dark fibre deployment involving extensive configuration and set up processes that contribute to longer lead times[404] - in contrast to the immediate connectivity offered by lit fibre.[405]

373. Dark fibre constitutes essential infrastructure for FNOs and MNOs that could not be replicated without significant investment. Mr Van der Merwe testifies: "*if that dark fibre didn't exist, we as fibre operators would have to build that entire route and that would break the business model*".[406] Mr Uys confirms "… *all the MNOs really need dark fibre because that's what their business plans are based on and it will harm Vodacom if we [Maziv] just terminate dark fibre. It will harm the mobile operators*".[407]

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[400] Nunes FWB p 145 para 5.13; Transcript p 626 lines 15 - 19.
[401] Van der Merwe FWB p 53 – 54 para 62.
[402] Nunes FWB p 145 para 5.12.2.
[403] Nunes FWB p 144 para 5.8; Transcript p 1092 lines 6 – 7.
[404] Nunes FWB p 144 para 5.9.
[405] Nunes FWB p 145 para 5.12.1.
[406] Transcript p 94 line 5 to p 95 line 22. This is consistent with the evidence of Mr Nunes, FWB p 162 para 6.39; p 163 para 6.41.
[407] Transcript p 1145 lines 9 –14. This is consistent with the evidence of Mr Nunes, FWB p 157 and 158 para 6.19 and 6.20.

374. Prof Theron's submission that *"[d]ark and lit fibre [are] seemingly more substitutable for ISPs compared to MNOs*" and that *"[l]arge ISPs may prefer dark fibre to capitalise on economies of scale, while smaller ISPs may favour lit fibre, if they want to avoid risk of having their own active equipment and large, dedicated core network capacity*"[408] finds little support in the factual evidence.

375. Customers of lit fibre in our view are unlikely to view dark fibre as a viable alternative to lit fibre because of the significant costs and lead times involved in lighting dark fibre (including the costs associated with securing the necessary infrastructure which is itself a significant barrier to switching). Conversely, customers that purchase dark fibre do so with the intent of lighting it to provide a managed, value-added lit service downstream. This means that it is unlikely that such customers would view lit fibre as a substitute for dark fibre.[409]

Different commercial terms of procurement

376. The evidence suggests significant differences in the manner in which dark and lit fibre are priced and contracted:

376.1. Dark fibre is typically contracted as an asset on the basis of a (largely) fixed monthly rental charge on a price per metre or link.[410] There are different procurement models, including lease options (typically for [redacted] years) and indefeasible right of use options (usually for [redacted] to [redacted] years) that offer an exclusive and unrestricted right to the dark fibre infrastructure. Customers may light or operate these assets at various levels of utilisation and capability.[411]

376.2. Lit fibre, on the other hand, is typically contracted as a service and is charged on the basis of port speed (e.g. per Mb of upload/download

[408] Exhibit BQ Theron's Slide 21.
[409] Smith EWB p 236 para 112.
[410] Nunes FWB p 146 para 5.15.1.
[411] Nunes FWB p 146 para 5.15.1.

speed), capacity or usage (e.g. in the case of prepaid options). Where an end-user requires changes to capacity/bandwidth, it will generally need to contact the ISP to alter the terms of the connectivity package.[412]

376.3. Furthermore, dark fibre pricing is based on distance (i.e. price per metre) whereas lit fibre pricing is based on speed (i.e. price per Mb).[413]

Conclusion

377. Given the above, we conclude that there are separate relevant product markets for dark and lit fibre respectively and that these products/services do not place significant competitive constraints on each other. This is relevant to the wholesale markets for provision of wholesale metro fibre and last mile FTTB and FTTH.

Concentration and dependence

378. The above distinction between dark and lit fibre is important since the extent of DFA's dominance/market power in dark fibre has a bearing on whether the proposed merger would give rise to a substantial prevention or lessening of competition.[414]

379. DFA is the dominant provider of dark fibre in South Africa to MNOs (FTTS) and to FNOs (metro backhaul) with a national market share of well above [redacted]%. By revenue share, its national market share of the dark fibre market is estimated at [80-90]%. Furthermore, adding to DFA's market power, it in many cities provides the only open access dark fibre network, or the only network of acceptable density.[415]

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[412] Nunes FWB p 146 para 5.15.2.
[413] Hodge EWB p 52 para 35.
[414] If dark and lit fibre were to be regarded as being in the same relevant market, which is not supported by the factual and economic evidence, it significantly dilutes DFA's significant market position in dark fibre (mostly given Openserve's activities in lit fibre).
[415] Exhibit C Slide 12.

380. The above is consistent with the evidence of Mr Nunes of MTN who indicates: "*They've [DFA] got about 85% of the major – the metros and secondary towns covered today from a fibre perspective. A lot of the operators have climbed onto them in terms of leasing fibre to build theirs*".[416]

381. Vodacom states that "*DFA dominates the passive metro and long-haul network with c[redacted]% and c.[redacted]% of the market share*".[417] Vodacom further states that the metro market is expected to show strong growth driven by the deployment of 5G and expansion of the access market.[418] Vodacom also indicates that "*DFA have [redacted] the metro as it sells dark fibre as a standard product and is well positioned to [redacted] future MNO backhaul opportunity associated with densification*."[419] Also that DFA gets up to c.80% of wallet share.[420]

382. Prof Theron does not dispute DFA's market share estimates in the dark fibre market. She argues, however, as already indicated, that the relevant market could include both dark and lit fibre, in which case DFA would have a much lower market share.[421] We have dealt with this issue and indicated why we disagree.

383. The second-largest player of dark fibre for metro fibre connectivity in South Africa, Liquid Telecoms, is significantly smaller than DFA with an estimated national market share of [0-10]%; and the third-largest player is Link Africa, with an estimated [0-10]% national market share.[422] This illustrates the dominance of DFA.

384. Of importance to the vertical competitive assessment that will follow, is that customers are heavily reliant on DFA for dark fibre. Customers regard DFA as "*a*

[416] Transcript p 757 lines 13 – 17.
[417] Bundle M p 3592.
[418] Bundle M p 3592.
[419] Bundle M p 10164.
[420] Bundle M p 10164.
[421] Exhibit BQ Theron's Slides 19 and 22. Openserve, DFA, MTN, Liquid Telecom and MFN provide lit services to the downstream market on a wholesale basis to ISPs.
[422] Smith EWB p 254.

critical player" in the industry and an unavoidable supplier of dark fibre as a key input.[423]

385. As indicated above, mobile operators mainly lease dark fibre from DFA, or may build their own dark fibre, to connect to their base stations.[424] Indeed, DFA's business was premised on the connectivity of mobile operators to their base stations.[425] Mr Nunes confirms that DFA's initial business model was to provide dark fibre assets so that the FNO market could be built, and the MNO market could be built.[426]

386. FNOs rely heavily on dark fibre to build their networks. Mr Van der Merwe testifies that approximately [redacted]% of Frogfoot's links are from DFA.[427] He explains "*we're all locked into that ecosystem, we can't actually move anywhere else because <u>I can't go and buy dark fibre from anyone else</u> because the product rules of DFA's dark fibre doesn't allow me to buy any service from anyone else that interconnects with this network and also there may not be another provider that even has a feasible dark fibre offering that I can buy from them*".[428] (Own emphasis) These product rules entrench DFA's dominant market position.

387. Mr Schoeman explains why Rain is highly dependent on DFA for the provision of dark fibre services: (i) Rain is [redacted]% dependent on DFA for the provision of fibre backhaul services;[429] and (ii) because DFA is so dominant in the South African market, and because of how connected Rain's network is with DFA's network, it would be exceedingly difficult for Rain to uncouple itself from DFA by finding an alternative service provider or by self-building. In Mr Schoeman's words: "*It's very difficult for us [to] unplumb ourselves from DFA*".[430]

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[423] Schoeman Transcript p 1034 lines 4 – 5, Van der Merwe p 77 lines 1 – 6; p 88 line 6 to p 89 line 3; p 89 line 22 to p 90 line 10; p 95 lines 13 – 20; p 108 lines 2 – 3.
[424] Van der Merwe Transcript p 84 lines 6 – 16; p 107 line 18 to p 108 line 3.
[425] Van der Merwe Transcript p 94 line 13 to p 95 line 5; p 232 lines 15 – 18.
[426] Transcript p 909 lines 10 – 20.
[427] Transcript p 108 lines 3 – 6; p 153 line 18 to p 154 line 2.
[428] Transcript p 114 lines 8 – 14.
[429] Rain Founding Affidavit para 38, intervention bundle p 20.
[430] Schoeman Transcript p 956 line 9.

388. Mr Nunes confirms that Openserve only provides lit services and indicates that although MTN has some reliance on Openserve, it is marginal. MTN only utilises Openserve where there is no other fibre infrastructure or if it is in sparse rural area.[431]

389. Furthermore, overbuilding is uneconomical and rare, particularly in respect of FTTS. Mr Van der Merwe explains "… *DFA volunteered to say on an offtake basis we will go and interconnect all these base stations, they signed very large agreements with DFA that enabled them to finance and deploy this national MetroFibre network that interconnected all the base stations. Once that network existed, the business case disappeared for anyone else to go and build MetroFibre, because all the base stations are already connected*."[432]

FWA and FTTH

390. A major issue of contention during the proceedings was whether, or the extent to which, retail FTTH services compete with FWA services.

391. From a market delineation perspective, Mr Hodge for the Commission submits that at the retail level there is a market for the retail provision of home and SMME broadband services with differentiated products where fibre (FTTH/FTTB) competes with FWA.[433]

392. MTN submits that FWA and FTTH are neither demand- nor supply-side substitute technologies or, at most, there is immaterial competitive interaction between FWA and FTTx products and services. It submits that more immediate and intense competition exists within (i.e., fibre competes with fibre) and not between these technologies. Recall however that there is limited overbuild of FTTH (see paragraphs 265 to 272 above).

[431] Transcript p 629 lines 1 – 8.
[432] Van der Merwe Transcript p 94 line 13 to p 95 line 8.
[433] Hodge EWB p 71 para 74.

393. Mr Reynolds and Prof Theron for the merger parties contend that FWA does not compete in the same market as fibre. Mr Reynolds specifically argues that FWA is inferior to FTTH. For this assertion these economic experts, as well as Mr Smith, rely mainly on arguments around supply-side substitution.

394. The merger parties advance the following reasons for why FWA and FTTH are complementary rather than substitutable:

394.1. they allege that the witnesses confirm that FWA is not an alternative to fibre;

394.2. FWA and FTTH have significant differences in capacity, quality and price;

394.3. FWA and FTTH cater for different use cases;

394.4. Telkom's consumers who buy its FWA products are unlikely to be customers for whom FTTH would be a viable substitute for their needs;

394.5. there is no market evidence of churn and pricing pressure between FWA and FTTH;

394.6. the Aetha Report confirms that in countries with greater 5G take-up, FWA services are generally not considered by regulators to be close substitutes for FTTH; and

394.7. even if there was a level of substitutability between FWA and fibre, Vodacom's (current) low FWA market share and its limited ability to offer FWA due to the demands of its mobile customers, show that the merger would not have any material horizontal effect on competition[434]

395. The Commission disputes all the above factors relied on by the merger parties. The Commission contends that the merger parties' strategy and other documents, which are not prepared for contested proceedings, reveal the following:

395.1. from a demand perspective, FWA and FTTH are both home broadband products and target the same demand;[435]

[434] In a market for the retail provision of home and SMME broadband services, i.e., a combined fibre/FWA market.

[435] See Transcript p 3491 lines 11 – 18.

395.2. CIVH in its Board Strategy Session dated 2 February 2022, explicitly cites [redacted] and [redacted] as [redacted];[436]

395.3. Hardiman Telecommunications ("**Hardiman**") (Vodacom's Due Diligence consultant) concurs in a report prepared for Vodacom that [redacted] *by competitors in* [redacted] *neighborhoods may impact* [redacted] *and* [redacted]". Hardiman not only identifies as one of the two threats being the [redacted] neighbourhoods, but it also articulates how this could likely impact on [redacted], namely through a potential impact on [redacted] and [redacted]. In essence, if [redacted] a share of household demand, then this will reduce [redacted] by FTTH in those areas, making those areas [redacted] or [redacted] A reduction in ARPUs may occur either through [redacted], and improving [redacted] or pushing more [redacted] FTTH connections. Importantly, where there is no fibre overbuild in an area, which FTTH operators seek to avoid, then LTE/5G FWA is the only alternative to the FTTH provider for consumers and hence the only remaining direct constraint;[437]

395.4. FWA and fibre both deliver the speeds that are consumed by most consumers, i.e., 100Mbps and lower;[438]

395.5. FWA and fibre are both marketed by operators as substitutes to one another, for example, MTN and Vodacom have considered FWA as a 'fibre-like' service;[439]

395.6. their pricing and packaging have evolved to align with one another;[440]

395.7. there is a shift by both to towards playing increasingly in the middle to low-income segments;[441]

395.8. FWA access is growing in coverage and subscription numbers, and Vodacom markets speeds up to 100Mbps on its 4G and 5G FWA. The Commission refers to Dr Van den Bergh conceding that the coverage

[436] Exhibit BA p 67; Hodge FWB p 66 Figure 16.
[437] Bundle M p 3113. EWB p 67 para 64 and Figure 17.
[438] Transcript p 3491 lines 11 – 18.
[439] Transcript p 3497 line 22 to p 3499 line 9.
[440] Exhibit BO Hodge's Slide 17.
[441] Bundle M p 12949.

maps, showing that a large portion of the country is covered with Vodacom's 4G FWA, indicate the areas where Vodacom markets and can deliver up to 100Mbps of FWA broadband;[442] and

395.9. market analysts, Africa Analysis and BMIT, include FWA and FTTH together in analysing home broadband services.[443]

396. We note that it is common cause that FWA and FTTH are both home broadband products, the dispute is around the extent of any competitive interaction.

Our assessment

397. In *Corruseal*,[444] the Tribunal cautioned that the boundaries of market definition do not determine the outcome of an analysis of the competitive effects of a merger in a mechanistic way. The purpose of market definition is to provide a framework for an analysis of the competitive effects of the merger.[445] The Tribunal further explained that in practice, the analysis underpinning the identification of the market(s) and the assessment of the competitive effects of a merger may overlap, with many of the factors affecting market definition also being relevant to the assessment of competitive effects, and vice versa. Therefore, market definition and the assessment of competitive effects should not be viewed as distinct analyses.[446]

398. In this matter the evidence that we rely on in relation to market delineation should be read alongside our competitive assessment.

399. Those that seek to contend that there is a lack of competitive interaction between FWA and FTTH would typically argue that FTTH is a superior product in terms of speed and is uncapped, which means that consumers/households prefer

[442] Transcript p 2279 lines 1 – 4.
[443] Transcript p 3495 lines 4 – 15; Bundle M p 12756 – 12824.
[444] *Corruseal Group (Pty) Ltd and another v Competition Commission of South Africa and others* (IM196Mar22) [2023] ZACT 12 (22 February 2023) ("***Corruseal***") at paras 36 - 38 and 47 with reference to the UK CMA Merger Assessment Guidelines (2021).
[445] *Corruseal* para 36.
[446] *Corruseal* para 38.

FTTH absolutely where it is available. These proponents argue that FWA is complementary, not substitutable, offering home broadband services where FTTH is yet to roll out and once FTTH is available then households will switch to it. We shall test whether this applies to South African consumers, noting the relative low levels of uptake or penetration in South Africa where FTTH has been rolled out.

400. The factual witnesses of the merger parties and MTN, and their respective economic experts, largely take a technology-based or supply-side perspective to market delineation when arguing that FWA and fibre do not compete. The panel asked what evidence is available from a demand-side perspective. As Mr Masalesa points out, which we concur with, customers consume data not technologies: "*Customers consume data, right. Customers don't say I'm consuming fibre; I'm consuming fixed wireless access. They consume data*".[447] As we shall explain below, once fibre has been rolled out in a specific area, the marginal consumer is relevant in the assessment of the competitive interaction between FTTH and FWA.

401. Mr Van der Merwe of Frogfoot explains how FWA and fibre compete. He testifies that FNOs target a terminal take-up (also referred to as penetration rate) of 50% (also see penetration discussion above in paragraphs 248 to 264) and that once they achieve the 50% terminal take-up, they compete with LTE and 5G FWA to fight for the marginal consumer. He states "*So, predominantly those mobile services are either packaged as <u>fixed wireless access products, so LTE or 5G service</u> or it may be the normal mobile services that we've all grown accustomed to. [...]. They <u>do compete with the fibre operators and what is important to highlight there is really how they compete</u>. [...]. But what is important to understand is that once the fibre operator reach terminal penetration, so we typically enter into a suburb and say we're going to deploy fibre and we aim to get to around 50% of the subscribers signing up onto our network, that would be a good business case. So, <u>once we get to the 50% then we have to ask ourselves the question of why is the other 50% of subscribers not signing up</u>*

[447] Transcript p 293 lines 11 – 22; p 460 line 15 to p 61 line 1.

<u>with the fibre networks</u> and that's really an affordability issue. So, those subscribers are typically subscribing to entry level fixed wireless or mobile wireless services. [...]. so <u>once the fibre operator really gets terminal penetration, it will then start creating packages that directly compete with fixed wireless access services</u>."[448] (Own emphasis)

402. Dr Scheffer concedes that for FNOs to increase their fibre/FTTH penetration rates over time, they compete with FWA, for (in economic terms) the marginal customer, as is evident from the following exchange with counsel:

> "*ADV BERGER SC: And what the FNOs have to do, in order to win the trust of people above the 35% and to get them up to the 90%, is to convince them that fibre is better for them than, for example, fixed wireless or other means of connecting to the internet. And so you have to compete and – against the fixed wireless operators to attract those customers that, initially, are not being attracted to fibre. Not so?*
>
> *DR SCHEFFER: Yes, customers will connect to the appropriate solution out of their free choice and, typically, ISPs will offer beneficial products and so forth that allow the customer to use that advantage.*
>
> *ADV BERGER SC: Yes, and so once you get – it's easy for you to get to the 35% and then as – in order to increase it over 35%, connection to 45% and 55 and all the way up to 90, you've got to compete harder and harder to get those customers to come from whatever other means they've connected to the internet, to come onto fibre. Would you agree with that?*
>
> *DR SCHEFFER: Yes, the – one has to keep on providing products that customers would prefer and that would become more and more competitive products as one progresses during this time*".[449]

403. Based on the evidence before us, for purposes of our assessment FWA includes (i) LTE/4G FWA; and (ii) 5G FWA. This is because, from a consumer perspective, the two are considered as home broadband technologies, and

[448] Transcript p 84 line 6 to p 85 line 22.
[449] Transcript p 2455 lines 3 – 22.

MNOs offer FWA services using both these technologies. Mr Otty explains: "*So, the 5G market will be driven strongly by migration of customers. Ja, I mean to be honest <u>I don't see a difference between a 5G market and a 4G market. You still have an FWA product and the customer receives a broadband product. They probably don't care what G it is for fixed wireless access</u>*".[450] (Own emphasis)

404. Mr Motlekar of Telkom CSB submits that in Telkom's experience FTTH and FWA are substitutable products for home-connectivity depending on the primary use requirement. He says that market participants continue to develop and introduce innovative fixed wireless and mobile products into the market which provide alternative last mile options for consumers. The degree to which these newer technologies will compete with FTTH and FWA will only be known in the future.[451]

405. Similarly, Mr Masalesa submits that Telkom CSB's view is that FWA and FTTH are substitutable technologies for the majority of consumers in terms of a home broadband solution. From a customer perspective, he indicates that customers consider a variety of factors in making their purchasing decisions. He states that generally, Telkom CSB's customers choose a FWA or FTTH product based on their individual connectivity needs, affordability and the pricing of available products both within, as well as across, different technologies.[452]

406. Rain submits to the Commission that competition exists between 5G and FTTH services as both services offer internet connectivity at similar speeds and price to the end consumer. It adds that 5G provides the customer with flexibility to move with their router to different locations where there is coverage, whereas FTTH does not provide such flexibility. It further submits that wireless access technologies such as LTE, LTE-Advance or 5G can be used effectively as an alternative to FTTH. This it says is evidenced in South Africa by the large percentage of customers using wireless access technologies as their primary

[450] Transcript p 2036 lines 9 – 13.
[451] Motlekar FWB p 9 – 10 paras 7 – 11.
[452] Masalesa FWB p 21 and 22 paras 6 – 9.

broadband connection. In regard to price, it submits that in the South African market wireless services typically offer similar value to FTTH services.[453]

407. Mr Otty agrees that in relation to the lower income segment of South Africa substitutability between FWA and FTTH offerings makes sense in the short run where the customer's spend is limited.[454]

408. Dr Scheffer concedes that 5G FWA and fibre both offer customers access to broadband services and that Vodacom in August 2021 was of the view that its 5G FWA deployment must be aligned with its fibre offering in that it would not provide the same rollout in the same area.[455]

409. As indicated above, the Tribunal asked questions around the consideration of the demand side, i.e., evidence from the perspective of consumers. In our view a vital portion of the demand-side evidence is the take-up or penetration levels that typically are achieved by FNOs in South Africa where they have rolled out FTTH. The Tribunal wanted to know if fibre is as technologically superior as the merger parties argue, why the average penetration levels are relatively low when fibre has been made available in an area, especially in the Core segment areas where high LSM households live. We have dealt with the relatively low average penetration levels actually achieved in the factual evidence in paragraphs 248 to 267 above. This suggests to us that South African consumers have alternatives other than FTTH. The merger parties and their experts could not satisfactorily respond to this.

410. Mr Nunes when asked by the Tribunal what the large portion of customers use that choose not to connect to FTTH where it has been made available (given the relatively low penetration rates) indicates: "*there's a myriad of technologies that they're using including old legacy technologies and fixed wireless access*".[456]

[453] Bundle M p 8575.
[454] Transcript p 2032 line 21 to p 2033 line 12.
[455] Transcript p 2462 lines 3 – 22.
[456] Transcript p 914 line 7 to p 915 line 16.

411. Responding to the same issue about what the large portion of customers use that do not use FTTH where it is available, Prof Theron testifies "*Mr Hodge also said I mean what is the aim of the market definition and I think listening to the debate and the question <u>if the fibre penetration even in higher income areas is only 50%, then what do the rest use</u>. I think the answer is we don't know. We can speculate they use FWA*".[457] (Own emphasis) One can from the factual testimony infer that many use FWA.

412. In relation to the competitive dynamics in township areas, which is of particular relevance in this case, Mr Van der Merwe testifies that when fibre enters those areas, MNOs will have to respond to keep customers through lower prices or less restrictive packages.[458] He describes the competitive interaction between fibre operators and mobile operators as follows once fibre enters these areas: "*… the prime candidates to lose market share there is the mobile operators and so we can expect that once the fibre operators enter those markets, they will start reducing pricing and actively compete with the fibre operators in those markets*".[459]

413. Mr Motlekar confirms that [redacted] is one of the factors taken into account by Telkom in its pricing of [redacted][460] and that in relation to the lower LSM areas Telkom is seeing switching to fibre and "*back to what the consumer is using, some other fixed wireless access product*" by customers in low-income areas.[461]

414. A further important issue when considering the dynamics of the market, is the fact that there exists in many local geographic areas in South Africa local monopolies in the provision of FTTH. Recall the evidence regarding the reluctance of FNOs to overbuild and the low percentage of actual overbuild in South Africa (see paragraphs 265 to 272 above).

[457] Transcript p 3543 lines 16 – 20.
[458] Transcript p 86 line 13 to p 87 line 7.
[459] Transcript p 86 lines 17 – 21.
[460] Transcript p 491 line 17 to p 492 line 10.
[461] Transcript p 506 lines 2 – 19.

415. In all of these local areas that are not overbuilt there is no direct fibre-to-fibre competition and FWA is an alternative. Mr Hodge explains: "*I think 80% of Vumatel's network is not overbuild, or roughly that figure, which means in those areas it's not fibre that can compete for it. You've got to do a lot of different price increases to get to build in overbuild, especially where Telkom never had infrastructure before, which is the majority of the country. So, this idea that they are distinct, I think the evidence does suggest quite the contrary*".[462] We concur that this is a strong indication that FTTH and FWA are not in distinct product markets where there is no overbuild (also see Dr Scheffer's evidence in paragraph 402 above).

416. We accept that when there is overbuild of FTTH in a specific area (which is overall limited), one or more other FTTH providers would provide competition and that fibre-to-fibre competition would be more homogenous. Mr Hodge explains: "*I think in this case and given the framework of how these markets operate, you know, <u>you've got some overbuild where you might think about that, FTTH being closer, but you've got a lot of other – majority of areas where it's not the case</u>*".[463] (Own emphasis)

417. One has to consider what would constrain the local FTTH monopolies in the many geographic areas where there is no overbuild. In that context it becomes imperative to consider the potential (future) competitive interaction with other technologies, i.e., FWA.

418. All of the above is persuasive to conclude on the market delineation issue, and we shall deal with the Commission's and the merger parties' other arguments regarding the competitive interaction between FWA and FTTH under the effects analysis.

[462] Hodge Transcript p 3299 line 19 to p 3300 line 6.
[463] Transcript p 3644 lines 7 – 17.

Conclusion

419. As we have explained above, the purpose of market definition is to provide a framework for an analysis of the competitive effects of the merger and market definition and the assessment of competitive effects should not be viewed as distinct analyses. We noted that the evidence that we rely on in relation to market delineation should be read alongside our effects assessment.

420. We conclude that, for market delineation purposes, there is sufficient evidence to consider a broader market for the provision of home broadband services including FWA and FTTH.

Geographic scope of the markets

421. We focus on metropolitan and last mile fibre given their relevance to the merger.

422. Mr Hodge for the Commission submits that the geographic scope of the metropolitan and last mile markets has three dimensions: (i) local; (ii) regional; and (iii) national, and that each dimension is important for competition.[464] He submits:

    422.1. A last mile infrastructure provider, whether FTTH, FTTB or mobile, is ultimately interested in securing backhaul from a specific location. The options available to them depend on local competition for metro fibre and the existence of alternatives within a short distance. Options that are not as close pose less of a competitive constraint as the greater distance makes them relatively more expensive. Metropolitan fibre providers compete to offer coverage in an area, including aggregation nodes, to win customers located in those areas. It is also cheaper for a metro fibre provider to extend its coverage once it has a local presence, connecting adjacent areas at incremental cost.

[464] Hodge EWB p 54 para 38.

422.2. A metro fibre provider will benefit from a greater regional presence too, as it enables them to offer build and support services with greater scale and cost efficiencies. This includes across enlarged metro areas, but also in cities and towns across a region. Once more, it is easier to extend their network build and service in regions where they already have a presence, and they benefit from the economics of density.

422.3. Lastly, there is a national dimension to competition insofar as most infrastructure providers operating across regions tend to have a single rate card that applies nationally. However, the pricing will reflect the strength of the provider's position across the local and regional markets in which it is active. The ability to raise capital and enter new areas (competition for new markets) is also likely to depend on the national position of a metro fibre provider, as this will determine the extent of EBITDA margin generated from existing business which can be channelled or leveraged to secure funding into new build expansion.

423. Prof Theron does not conduct a geographic market delineation exercise but criticises Mr Hodge for considering local markets;[465] she assesses the effects of the proposed merger at a national level. In oral evidence, Prof Theron does not dispute Mr Hodge's findings on the geographic dimensions of competition and the relevant geographic markets.[466]

424. In relation to FTTH, Mr Reynolds agrees that the market is highly localised.[467]

425. In our view the geographic dimension of the markets, both metro and last mile, is important in understanding the dimensions of competition in that it relates to scale economies and efficiencies. A greater regional presence enables operators to offer build and support services, and also to extend their networks to cover wider areas, benefitting from economics of density.[468]

465 Theron EWB p 375 to 380.
466 Transcript p 4171 line 18 to p 4172 line 13.
467 Transcript p 4086 lines 2 – 5.
468 Hodge EWB p 54 para 38.2.

426. FTTH and FTTB providers compete for local markets and benefit from economics of density if they expand locally. In addition, national players who are present in local markets tend also to compete on localised pricing and discounting to improve churn rate and take-up within specific local geographic markets.

427. Mr Otty in response to a question from the Tribunal regarding how he sees the geographic market for the fibre operators indicates "… *fibre is naturally covering a geographic area. So, you go into a geographic area and you then become hopefully the first entrant into that geographic area, which means it makes it a less attractive proposition for the next person to come along and that makes it a completely unattractive proposition for the third person to come along*".[469] (Own emphasis)

428. The impact of the proposed merger on the local, regional, as well as national markets is relevant.

HORIZONTAL EFFECTS

429. On horizontal effects the Commission argues that there will be a loss of future competitive rivalry if the proposed merger is approved. The merger parties argue that there will be no significant accretion and no meaningful loss of rivalry as a result of the proposed merger.

430. We consider the horizontal effects in relation to respectively (i) a lessening of competition in FTTH; and (ii) the removal of a competitor, Vodacom, in metro fibre and FTTB.

HORIZONTAL ASSESSMENT: FTTH

431. The Commission argues that FWA and FTTH are in the same relevant product market, that they are home broadband substitutes and that consumers stand to

[469] Transcript p 2076 line 9 to p 2077 line 2.

benefit from increasing competitive rivalry between FWA and FTTH that will lower prices. It argues that absent the proposed transaction, Vodacom will compete more aggressively with FWA and that will benefit South African consumers.

432. The merger parties argue that FWA and FTTH are not in the same relevant product market and that FWA and FTTH are not sufficiently close substitutes to place a material competitive constraint on each other. They argue that FWA complements FTTH and is only useful where fibre is not available and is a “failsafe” or temporary solution until such time as fibre becomes available. In other words, FWA competes with FWA, and fibre competes with fibre.

433. The merger parties qualify their assertions regarding the lack of competitive interaction between FWA and FTTH by arguing that to the extent that there is competitive interaction between these technologies, this is not a primary constraint as there are other constraints on each of Maziv and Vodacom. They argue that the closest substitutes for Vodacom’s FWA services are the FWA services of other MNOs and that Vumatel is constrained by rival FNOs, particularly Openserve, which has overbuilt Maziv the most. MTN makes similar arguments.

434. They further submit that Vodacom requires its spectrum to service its mobile customers. More of these mobile customers would be in the densely populated lower-income areas where fibre is to be rolled out. In these areas, Vodacom would not have the spectrum capacity to provide a sustainable FWA service for large numbers of FWA customers (in addition to its mobile services) as its radio network could not carry the load.

Our assessment

435. We first deal with the horizontal overlap between Vodacom and Maziv, through Vumatel, in relation to wholesale FTTH. We consider current as well as future dynamic competition.

436. We then deal with the extent of competitive interaction between FWA and FTTH in the context of the market characteristics as previously discussed.

FTTH overlap in merger parties' current and future activities

437. In terms of homes passed at a national level, Vumatel is the largest wholesale FTTH provider in South Africa. It has an estimated national market share of approximately [30-40]% with approximately [redacted] homes passed.[470] Vodacom's strategic documents confirm this and describe the proposed transaction as the "*Acquisition of 40% equity in the largest enterprise & FTTH FNO in SA*".[471]

438. The next player in FTTH in terms of size is Openserve with an estimated national market share of approximately [20-30]% with [redacted] million homes passed. We note that Openserve's market share is significantly smaller than that of the merger parties. Furthermore, in terms of future competition, Vumatel is seen by the merger parties as able to achieve more sustainable investment and growth relative to Openserve.[472]

439. We have above dealt with Herotel and indicted that (i) CIVH already has a [redacted]% shareholding in Herotel; (ii) in terms of a proposed merger notified to the Commission it intends to increase this [redacted]% shareholding; and (iii) "*CIVH retains* [redacted]*% economies of secondary cities*" (see paragraph 212.1 above).

440. The implications of Herotel for the concentration analysis in this matter are that at the very least Vumatel has a [redacted]% economic interest in Herotel's FTTH network and furthermore Maziv does not intend to challenge it in the secondary cities. Based on Africa Analysis's numbers, this means that the merger parties have a market share of approximately [redacted]% in South Africa in homes passed with

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[470] Hodge EWB p 84 para 104.
[471] Part A of the Record p 3804 *Project* [redacted] *– Vodacom's Acceleration Strategy, September 2021, Shameel Joosub.*
[472] Hodge EWB p 82 para 101; Bundle M p 3544.

FTTH. (Vumatel has a market share of approximately [30-40]% and its [redacted]% share in Herotel's [0-10]% share, translates to approximately [0-10]%, together with Vodacom's approximately 3% share).

441. In terms of homes connected with FTTH, the merger parties have a national market share of approximately [30-40]%. (Vumatel has an approximately [30-40]% share, it has a [redacted]% interest in Herotel's approximately [0-10]% market share, and Vodacom has an approximately [0-10]% share).[473]

442. As we have found under the geographic market, competition in FTTH is highly localised, although there is a national dimension to competition as national pricing can be observed. Mr Reynolds confirms under cross examination that the FTTH market is highly localised:[474]

> "*ADV BERGER SC: Ja, but my – again, my question is simply that you recognise local markets. In fact, you say they are highly localised?*
> *MR REYNOLDS: Yes, that's right, ja*."

443. As we have found in the market characteristics section, there is competition *for* the market and FTTH providers tend not to overbuild each other, i.e., they compete in the land grab and want to obtain the first mover advantages in new rollout areas. It is common cause that the land grab is ongoing, with the high-income areas of South Africa largely covered, and that the FTTH providers are now focusing on secondary towns and cities and low-income areas.

444. We first deal with the local markets where Vodacom and Vumatel's activities overlap in the provision of FTTH since they have overbuilt each other.

445. The Commission argues that in these local areas the removal of Vodacom as a competitor will result in a loss of choice and loss of competition in both price and non-price factors such as marketing and service.

[473] Hodge EWB p 84 para 104.
[474] Transcript p 4086 lines 2 – 5.

446. As of October 2023, Vodacom and Vumatel have overbuilt each other with respect to an estimated [redacted] homes passed.[475] In respect of approximately [redacted] of these homes the proposed merger results in a merger to monopoly. For the rest of the affected homes the proposed merger would represent a three-to-two or four-to-three merger.

447. Mr Reynolds concedes that for the areas where the proposed merger reduces the number of competitors from two to one, there will be a reduction in choice for consumers:

> "*ADV BERGER SC: Okay, …if you look at the 2-1 concentration, those consumers are – have no choice anymore, until perhaps Openserve comes in.*
> *MR REYNOLDS: Yes, that's right.*
> *ADV BERGER SC: And so, in those localised markets there most certainly would be a substantial lessening of competition.*
> *MR REYNOLDS: There'd be a reduction in choice, yes, that's right*."

448. Furthermore, the Commission has found that in local markets that are overbuilt, there is more competition with lower prices and greater discounting to improve take-up.[476] Some FTTH operators will remain focused on the particular local markets in which they entered and will price locally. National FTTH (and FTTB) providers which have national pricing policies will still engage in localised discounting and ISP offers designed to improve take-up and churn from competitors within specific local markets as ISPs in turn pass them onto prospective customers.[477]

449. Mr Hodge's analysis confirms that Vodacom's prices are lower in markets where there is an overlap with other FNOs.[478] He testifies that Vodacom discounts wholesale rates where they are overbuilt.

[475] Reynolds EWB p 507 para 5.52 (a).
[476] Commission Report, summary, para 23.
[477] Hodge EWB p 54 – 55 para 39.1.
[478] Transcript p 4088 line 11 to p 4089 line 5.

450. He also indicates that Vodacom's ARPUs are lower than Maziv's and that post-merger there will be a push to close that gap.[479]

451. Although Dr Scheffer argues that too high fibre prices will attract new entry, he when questioned about this by the Tribunal indicates that in his past experience the price increase would have to be about 20% before competitors would be attracted to enter/overbuild.[480] This means that a SSNIP[481] can be successfully implemented by the merger parties post-merger without attracting new entry.

452. Furthermore, regardless of overbuild, CIVH's internal documents demonstrate that it, when assessing the proposed transaction in October 2021, and Vodacom's FTTH assets in particular, recognised that part of the value proposition for the deal was that post-merger it would be able to [redacted] Vodacom's [redacted] by a [redacted].[482] This was not seriously contested by any of Maziv's factual witnesses.

453. Mr Reynolds sought to justify the above difference in ARPUs by referring to his pricing analysis showing that Vodacom's and CIVH's wholesale FTTH prices are broadly similar, and therefore argued that any expectation of higher revenues must be customers that will be "trading up" by choosing greater volumes or better quality service. There is however no evidence or reason proffered as to why customers might trade up post-merger (i.e., chose greater volume or better quality services) if they could already do so pre-merger.[483] Mr Reynolds's assertion is also not supported by any evidence to be found in the relevant CIVH internal documents assessing the proposed transaction. A more plausible explanation is that ARPUs (effectively prices) would rise because of a lessening of competition or the exercise of market power.

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[479] Transcript p 3293 line 19 to p 3294 line 4.
[480] Transcript p 2555 lines 4 – 16.
[481] A small but significant non-transitory increase in price.
[482] Bundle M p 1352 and 1398.
[483] Transcript p 4103 lines 1 – 5.

454. Mr Reynolds also notes that there is different pricing for the Vuma Reach and Vuma Key areas[484] and acknowledges that comparable products to Vodacom's lower speed packages would only be found in the Reach areas, not the Core areas where Vodacom's FTTH network would have been predominantly located.[485] Customers purchasing lower speeds and lower priced products are likely to be those with lower disposable incomes. Those customers that prefer cheaper packages with lower speeds should not have to pay for products with higher prices. Thus, the impact of Vumatel's strategy, even in the so-called Core areas, would fall disproportionately on consumers at the lower end of the income distribution in these areas.

455. We conclude that where the proposed merger results in a merger to monopoly in respect of approximately [redacted] homes passed with FTTH (and a reduction of competition in relation to [redacted] homes), this will reduce the choice of those consumers and cause likely price increases. Furthermore, Vodacom's ARPUs are lower than that of Maziv and that means higher ARPUs post-merger which will be to the detriment of consumers.

456. The merger parties offer a divestiture remedy in relation to the FTTH overlap in activities[486], but reserve the right for Maziv to apply for a waiver of the condition if it is unable to find any potential purchasers for the assets within [redacted] of the implementation date. The latter in our view will remove the incentive to find a buyer or buyers for these assets. The proposed condition does not make provision for the by now customary "Trustee divestiture period" to ensure that the assets are sold and that the competitive harm caused by the transaction is neutralised. The proposed condition furthermore makes no provision for a

[484] Transcript p 4120 lines 6 – 7.
[485] Reynolds EWB p 516 para 5.92.
[486] See clause 8.1 of the tendered remedies that reads: "*In all areas, including suburbs, estates, or business parks, where Vodacom SA Group has rolled out infrastructure which: (i) has overbuilt Maziv Group FTTH infrastructure as at the Implementation Date, (ii) is being transferred to Maziv in terms of the Merger; and (iii) Vodacom SA is using to provide Wholesale FTTH Services as at the Implementation Date, the Merger Parties shall apply good faith and best endeavours to divest the overlapping infrastructure of either Vodacom SA Group or Maziv Group within* [redacted] *of the Implementation Date (or as soon as regulatory approvals required for such disposal have been granted) but, if Maziv is unable to find any potential purchasers for the assets within* [redacted] *of the Implementation Date, Maziv may, in terms of clause 21 apply to the Tribunal for this condition to be waived*."

pricing remedy until the assets are sold. We deal with the shortcomings of this proposed condition further under remedies.

457. As we have further indicated, competition analysis is forward looking, and a non-static analysis is appropriate in this case. Context is crucial, and thus the competition counterfactual, as well as Maziv's defensive reasons for the proposed transaction must be considered in the horizontal competition assessment. The proposed transaction will also impact competition *for* the market i.e., the land grab in wholesale FTTH, which leads to irreversible 'winner-takes-all', monopoly-like outcomes in future as we have discussed. The merger parties proposed conditions do not address this.

458. As we have indicated, it is common cause that FNOs are engaged in a second FTTH land grab, focusing on the lower-income areas following the near complete coverage of the high-income areas. Based on the strategic evidence, absent the proposed transaction, Vodacom would be looking for opportunities to build FTTH, and importantly Vodacom would be looking to partner in off balance sheet JVs to expand its whole fibre offering in South Africa.[487] The removal of Vodacom as an FTTH player means that there would be less competitors in the land grab and thus lower incentives across the market to build out more quickly.

459. The merger parties' strategic documents clearly indicate DFA's concern about the loss of other MNO customers to Vodacom in the event that Vodacom enters the fibre market as an infrastructure player. CIVH's internal documents reveal the [redacted] that Vodacom would present either through [redacted] o[redacted] its fibre [redacted] and [redacted] resulting in DFA and Vumatel [redacted] and [redacted] (see paragraph 133 above).[488] Rather than [redacted], CIVH decided that it must conclude the proposed transaction as a [redacted][489]

[487] Bundle M p 12454, 12475 and 12483.
[488] Bundle M p 1223 and 1224.
[489] See *inter alia* Bundle M p 1174.

Interaction between FWA and FTTH

460. FWA services were initially offered in South Africa using unlicensed non-GSM spectrum with end-customers having antennas installed in their homes directed at the tower of the FWA provider. These services have been supplemented and largely displaced by FWA services provided over LTE/4G mobile networks. Rain launched 5G FWA services in South Africa in 2019.[490]

461. We note that this section must be ready together with the evidence in the market definition section.

462. The two factual witnesses from Telkom CSB, both testified that FWA and FTTH are substitutable access technologies which consumers use to consume data.[491] FWA does not complement fibre but competes with fibre.[492] Rain also submitted to the Commission that FWA and FTTH compete (see paragraph 4066 above).

463. The various factual witness of the merger parties and Mr Nunes from MTN disagree. Much of the evidence lead by them focused on supply-side considerations of the market and the alleged superiority of fibre.

464. As already indicated, the Tribunal was interested in demand-side considerations, in other words, how customers that make the choice between these technologies, FTTH and FWA, see the market.

465. The factual evidence confirms that customers considering whether to opt for FTTH or FWA consider a wide range of factors such as price - specifically relevant for the lower-income households; connectivity speed; connection reliability; and product flexibility.[493]

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[490] Reynolds EWB p 450 para 2.28.
[491] Masalesa FWB p 21 para 6; Transcript p 293 line 19 to p 294 line 4, p 460 line 10 to p 467 line 20.
[492] Masalesa Transcript p 403 lines 5 – 14.
[493] For example, Masalesa FWB p 21 para 7, also see, for example, Masalesa Transcript p 294 line1 to p 299 line 16.

466. From a customer perspective Mr Masalesa explains that a customer will walk into a store and ask questions before he/she decides on a product/service: "*… to prove the point of substitutability, a customer might actually walk into a store with a mindset of buying an LTE product and he gets educated about availability of fibre products and how fibre works and you know, he can walk out of a store with a fibre product instead of an LTE product. And the same could be true with a customer going into a store to buy fibre and only to be told that you know what, you can actually get decent speeds on fixed wireless access*".[494]

467. On affordability Mr Motlekar states: "*... affordability but the features of the technology and obviously linked to affordability, is the pricing of the technology of what the customer want. Ultimately, it's the same use that's being transmitted across this technology. The customer wants access to the Internet and the features of those technologies together, where the price will determine which product the customer selects";*[495] *"… Consumption behaviour is not driven by the technology; it's driven by the market to trading. And the market to trading is based on a price point and affordability, …*";[496] and "*From our experience it starts with affordability and price and then the technology that services that demand and what are the price points within the various categories and this refers to again that R300.00 gambit and it's similar to what we said earlier in the previous slide and that talks to what the customer – how the customer consumes, when they want to consume it and where they want to consume it*."[497] (Own emphasis)

468. Mr Nunes confirms that in lower-income areas, the flexibility of pricing and pre-paid options is important when consumers make decisions about which products to choose.[498]

[494] Transcript p 465 line 8 to p 466 line 5.
[495] Transcript p 481 lines 7 – 12.
[496] Transcript p 557 lines 5 – 16.
[497] Transcript p 606 lines 1 – 7.
[498] Transcript p 923 line 8 to p 924 line 6.

Evidence about consumer conduct in South Africa

469. The best evidence that we have from a demand-side, i.e., customer, perspective is how many South African consumers actually choose FTTH where it has been rolled out. We have provided the average FTTH penetration rates for the Core, Reach and Key market segments. This factual evidence confirms that relatively low average FTTH penetration rates have been achieved in South Africa – meaning that consumers have other options for accessing the internet other than FTTH. Those home broadband alternatives to consumers include LTE 4G and 5G.

470. Furthermore, in the market characterisation section, we have made the point that an important characteristic in FTTH is that FNOs compete against each other in the so-called land grab, i.e., there is competition *for* the market. What is crucial is that - unless the FTTH FNOs overbuild each other - they do not compete. Overbuilding however is something that they typically would avoid according to the factual evidence. In fact, [redacted]% of Vumatel's FTTH areas are not overbuilt by other FNOs. In the non-overbuild areas, FWA is available as an alternative for millions of South African consumers. Put differently, FWA is FTTH's closest competitor in all of the non-overbuild areas. Since both technologies are growing, the future will continue to see this interaction between FWA and FTTH, specifically competition for the marginal customer as explained above.

471. We have already referred to Dr Scheffer confirming that to drive up connectivity rates in relation to fibre, there is constant and ever-increasing competition to formulate competitive products to attract customers to switch to fibre where those customers use methods other than fibre, such as FWA:

> "*ADV BERGER SC: Yes, and so once you get – it's easy for you to get to the 35% and then as – in order to increase it over 35%, connection to 45% and 55 and all the way up to 90, you've got to compete harder and harder to get those customers to come from whatever other means they've connected to the internet, to come onto fibre. Would you agree with that?*

DR SCHEFFER: Yes, the – one has to keep on providing products that customers would prefer and that would become more and more competitive products as one progresses during this time".[499]

472. The above makes sense from an economics perspective since an FNO has the incentive to improve its FTTH penetration rates to drive revenue returns on the capex that has been spent to roll out the fibre. To improve that, the operator will increase marketing and be incentivised to offer discounts and do promotions, as is happening in practice in South Africa. This is competition for the marginal customer.

473. We next consider certain inconsistencies between the merger parties' oral submissions in these proceedings and their internal documents, as well as their submissions to the sector regulator, ICASA, regarding the competitive interaction between FWA and FTTH. The same applies to MTN.

What Vodacom told ICASA

474. One has to be sceptical of the Vodacom factual witnesses' stance in this merger hearing about a lack of interaction between FWA and FTTH, since it is inconsistent with Vodacom's earlier stance recorded in a response submitted to ICASA during or about 2019/2020 in which Vodacom submitted:[500]

"*The assessment should also have considered the role of fixed-mobile substitutability. ICASA should also have considered the potential effect that the expansion of fixed broadband services may have on mobile broadband prices. In particular, there is a degree of substitutability between fixed and mobile services which can be expected to grow over time: customers may offload data usage to fixed services relieving capacity constraints currently faced by Vodacom and other operators, and forcing them to compete with fixed broadband services that offer high or unlimited usage caps. Both factors may result in lower prices for mobile broadband services.*

[499] Transcript p 2455 lines 14 – 22; p 2456 lines 14 – 17.
[500] Exhibit AG: Vodacom's confidential response Discussion Document on the Market Inquiry into Mobile Broadband Services p 13057 – 13058.

...Overall, we consider fixed services to represent an important and growing competitive constraint on mobile services.

...

- *With wider availability of higher quality fixed services, customers are likely to off-load an increasing amount of their mobile data traffic to Wi-Fi, both at home and in public places.*
- *The wider adoption of fixed broadband services may also enhance the use of devices that are reliant on fixed broadband services over mobile services (for example, customers may start using video streaming services on a computer instead of a smartphone). In this context, we note that Vodacom South Africa's network busy hour for mobile data is 9 pm, i.e. a time at which people are normally at home and could use Wi-Fi.*
- *The results from ICASA's own regression analysis of the drivers behind mobile prices ... suggest that higher levels of fixed line penetration are significantly correlated with lower mobile data prices. This is consistent with there being a material degree of substitutability between fixed and mobile services – indeed ICASA notes that 'This may be due to consumers having alternatives available'.*"

475. We note the above to highlight the inconsistencies in submissions to regulators. Mr Joosub testifies in relation to this that the reference to "mobile broadband" includes bundles that are used through data SIMS, MiFi[501] devices and through routers.[502] Mr Joosub sought to argue that Vodacom distinguishes between mobile broadband (a SIM and data package only) and FWA.[503] However, FWA would clearly be an even closer competitor to FTTH than mobile broadband (normal data on one's phone) and thus the position expressed above by Vodacom

[501] MiFi stands for Mobile Wi-Fi. A MiFi is a mobile router that, when equipped with a SIM card, connects to a provider of mobile broadband.
[502] Transcript p 1852 lines 17 – 20.
[503] Transcript p 1854 lines 17 – 21.

only rings truer for FWA. However, the factual witnesses and economic experts in this matter agree that normal data on one's phone and FTTH do not compete, the dispute here is about FWA and FTTH interaction.

476. Furthermore, the merger parties in their respective internal documents identify FWA/fibre as threats.[504] Vodacom has identified a strong fibre constraint on its business, calculated as Value at Risk, in addition to any other MNO competition.

Vodacom's additional spectrum

477. It is common cause that Vodacom has acquired significant additional spectrum in the recent spectrum auction. The use of that spectrum will enable Vodacom to add large amounts of capacity on its network. In Vodacom's application to ICASA for additional spectrum allocation, it submitted:[505]

477.1. There is congestion on its network, and the additional spectrum would allow the effective deployment of additional capacity not just to deal with congestion but also provide significant capacity for other services.

477.2. Vodacom's business case was largely that there is low fixed penetration in South Africa and the additional spectrum would enable Vodacom an opportunity to provide a fibre-like service to customers, that fibre-like service referred to being 4G and 5G FWA.

477.3. The additional spectrum is required to support the ever-increasing demand for data services.

477.4. By acquiring access to the new 2600 MHz frequency band, Vodacom would be able to add a 'significant' amount of additional 4G network capacity.

477.5. Amongst the 5G use cases identified by Vodacom is fibre-like mobile broadband and it is stated that 5G fibre-like mobile services, namely FWA, are anticipated to be a particularly important new product portfolio.[506]

[504] See, for example, Bundle M p 1212: 27 October 2021 CIVH Board pack and Bundle M p 3102: Project Lindt - Technical Assessment - 21 September 2020.
[505] Exhibit AM; Transcript p 2199 line 14 to p 204 line 21.
[506] Transcript p 2199 line 7 to p 2204 line 21. Also see Exhibit AM.

478. Dr Van den Bergh confirms that Vodacom told ICASA that it would be able to expand its carrier footprint, improve customer experience, and enable and support a wide variety of internet of things applications.[507]

479. The evidence of Vodacom's factual witnesses also confirms that FWA is a viable commercial use-case for Vodacom's acquired spectrum. Mr Otty of Vodafone concedes that FWA is a good commercial option for Vodacom's current unused capacity.[508] Mr Otty also confirms that FWA provides useful incremental revenues for Vodacom's business.[509]

480. Even before the additional spectrum was acquired, Vodacom offered 4G through refarming with the spectrum that it had.[510] Dr Van den Bergh confirms that the upshot of Vodacom's submission to ICASA was that the additional 110MHz of spectrum (which increased Vodacom's total spectrum holdings by 21/2 times) should enable significant 4G coverage.[511]

481. Dr Van den Bergh concedes that Vodacom did not tell ICASA that, with the increased spectrum, Vodacom would remain a congested network and barely able to serve the same customers as it had before the spectrum allocation.[512]

Inconsistencies in MTN's stance

482. Although Mr Nunes of MTN concedes that fibre and 5G FWA serve the same basic function of providing connectivity to end users, he still argues that they are not interchangeable.[513] Mr Nunes however concedes that FWA at least in the short term offers a tool by which MTN as an MNO is able to compete for market share.[514]

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[507] Transcript p 2204 lines 6 – 10. Also see Exhibit AM.
[508] Transcript p 2030 lines 3 – 6.
[509] Transcript p 2039 lines 15 – 21.
[510] Transcript p 2203 lines 10 – 14.
[511] Transcript p 2204 line 22 to p 2205 line 10.
[512] Transcript p 2205 lines 15 – 20.
[513] FWB p 148 para 5.20; Transcript p 638 lines 2 – 3.
[514] Transcript p 650 lines 11 – 16; p 678 lines 7 – 10.

483. MTN's position that fibre and FWA are in different relevant markets is not consistent with its own internal documents, as we show below.

484. In response to the announcement of this proposed transaction in the market, MTN with its "marginal" fibre footprint needed to "own the home" by pushing FWA products. MTN's February 2023 strategy documents reveal "*MTN to pursue a* [redacted] *strategy targeting* [redacted] *and* [redacted] *and operate under* [redacted] *until they can be* [redacted] *into the* [redacted].[515]

485. MTN (with Supersonic) also sought to reach its growth targets and attack any available opportunities by using both its fixed and FWA products. Its strategy is to obtain organic growth of [redacted] customers and inorganic growth to add an additional [redacted] customers.[516]

486. MTN's strategy documents show that 5G FWA presents a primary use case globally in that the "*low latency of 5G offers the opportunity* [redacted][517]

487. Despite MTN's claim that substitutability between 5G FWA and FTTH "*is only possible in a narrow category of intended uses such as voice calls and single device video streaming*",[518] its FWA products are, in fact, able to perform many more functions, as is evident from its own advertising.[519]

488. Importantly, MTN markets its 5G as "fibre-like" or "fibre replacements" to compete in the market with slogans such as "*Don't dig fibre, 5G your life*"; "*Home is where the speed is. Goodbye Fibre, Yellow 5G. Fibre ties you down. It's time to fire fibre*";

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[515] Transcript p 647 line 20 to p 648 line 2; Bundle O p 231 – *MTN SA Board Plan B Update* dated February 2023; also see Bundle O p 253 and following - MTN Slide presentation "*MTN SA – FTTX Way Forward, Role of Fibre and Options to Consider*" dated December 2021.
[516] Transcript p 648 line 21 to p 649 line 21; Bundle O p 222 and following – *MTN SA Board Plan B Update* dated February 2023.
[517] Transcript p 707 lines 8 – 21.
[518] Nunes FWB p 150 para 5.23.6.
[519] Transcript p 683 line 19 to p 684 line 6.

and "*Blistering speeds for fastest gaming and streaming. Reduced latency*".[520] Mr Nunes is questioned about these 'fibre-like" adverts and his response is: "… *it's targeted at the consumer and what the consumer needs within his house. So, his needs, all right, for a better connected life*".[521]

489. MTN, in its efforts to compete by using FWA, is incentivised to price aggressively to grow its market share, which results in a benefit for consumers.[522]

490. During cross examination, Mr Nunes sought to distance himself from any claim of substitutability between FWA and fibre and alleges that FTTH and FWA are not substitutable based on MTN's experience with the introduction of an Airfibre product which saw little traction in the market relative to "competing" fibre offers.[523] Airfibre however is a different product. It is a product developed by Supersonic (MTN's ISP) which uses unlicensed public Wi-Fi frequencies to provide a point-to-point link.[524] Furthermore, the Airfibre product and MTN's FWA products are distinguishable in that the former had a slow uptake whilst the latter, which is the source of comparison with FTTH, and as conceded by Mr Nunes,[525] We note that both Mr Smith and Mr Reynolds rely on this Airfibre example in their price comparisons without any adjustments based on the cross examination of Mr Nunes.

491. Recall also Mr Nunes evidence that "*there's a myriad of technologies that they're [consumers] using including old legacy technologies and fixed wireless access*" when asked by the Tribunal what the high number of South African consumers - in the high-income areas - use that have chosen not to use the rolled out FTTH in these areas (see paragraph 4100 above).

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520 Transcript p 681 line 12 to p 682 line 22; p 688 lines 5 – 13; Exhibit J: MTN 5G Integrated Campaign; Exhibit K: '*Fibre now has competition*'.
521 Transcript p 684 lines 7 – 15.
522 Transcript p 677 line 16 to p 678 line 13; also see Exhibits H and I.
523 Transcript p 638 lines 4 – 15; p 640 lines 15 – 21; FWB p 152 para 5.27.
524 Transcript p 664 line 20 to p 665 line 11.
525 Transcript p 669 lines 1 – 8.

492. We note that MTN's internal documents show that it has high growth rates both for 4G and 5G FWA: between April 2023 and April 2024, its 4G FWA subscribers grew by [redacted]% from approximately [redacted] to [redacted] and its 5G FWA subscribers grew by [redacted]% from approximately [redacted] to [redacted][526]

5G FWA competition with FTTH

493. It is common cause that 5G usage is growing globally, and that the devices and equipment associated with 5G will in future reduce in cost.[527]

494. Vodacom's internal documents support the [redacted] in areas where other players have FTTH networks, suggesting that Vodacom does not see FWA as an inferior product that would not survive where fibre is available. This is contradictory to the merger parties' claim that once fibre arrives in an area, all FWA subscribers switch to fibre. As we have noted, this is further contradicted by the factual evidence regarding relatively low average penetration rates where FTTH has been rolled out in South Africa.

495. Dr Scheffer concedes when taken to Vodacom's internal documents, the creation of which he and his team were involved in, that in 2021 Vodacom recommended that going forward, it would [redacted] in those areas where Vodacom has no fibre.[528] This suggests that Vodacom assessed that both products serve the same purpose from an end-customer perspective. Vodacom itself thus sees substitutability and competitive interaction between 5G FWA and FTTH.

496. Rain indicates that it is not seeing high churn rates of customers from its 5G in areas that received fibre,[529] suggesting most of Rain's customers remain satisfied with their FWA service. This contradicts the argument that FTTH is superior to FWA.

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[526] Transcript p 666 line 16; p 667 lines 10 – 22.
[527] Transcript p 2460 line 22 to p 2461 line 2.
[528] Transcript p 2468 lines 3 – 17.
[529] Rain letter dated 23 August 2022, para 4.1. Part B(2) of the Record p 6252.

497. Recall also Mr Otty's evidence that he does not see a difference between a 5G market and a 4G market since you still have an FWA product and the customer receives a broadband product. He noted that the customers probably do not care what G it is for fixed wireless access[530] (see paragraph 4033 above).

Responses in the market and price competition

498. We have referred to a study conducted by BMIT[531] showing that 75% of South Africans have a spend of R500 or less for internet services, and of that 75%, 50% only have the ability to spend R300 or below.[532] It is in this part of the latter market segment that Telkom sees its FWA LTE products compete with fibre-based products. Furthermore, Telkom indicates that it does consider FTTH prices when it prices its FWA LTE products. In Mr Masalesa's view both fibre and fixed wireless access technologies are competing for a share of that wallet.[533]

499. We have referred to Dr Scheffer confirming that to drive up connectivity rates in relation to fibre, there is constant and ever-increasing competition to formulate competitive products to attract customers to switch to fibre where those customers use solutions other than fibre, such as FWA (see paragraphs 402 and 4721 above).

500. Consumers have different needs, some require less usage at a cheaper price, and other consumers' demand is much higher. Options are being offered in the market and trade-offs are being made. Mr Hodge provides examples of the closeness of pricing by FWA and FTTH providers currently in the market.[534] His evidence on current Vodacom FWA pricing shows that it is lower than the

[530] Transcript p 2036 lines 9 – 13.
[531] A technology industry research and advisory firm.
[532] Transcript p 298 line 18 to p 299 line 4; p 349 line 11 to p 350 line 11; p 462 line 6 – 10.
[533] Transcript p 299 lines 2 – 6.
[534] Exhibit BO Hodge's Slides 6 and 16.

Vodacom ISP advertised pricing for fibre, and substantially so as against Vodacom ISP services on the Vumatel network.[535]

501. We accept Mr Hodge's criticism that the evidence relied upon by Mr Reynolds is problematic (price drop comparison)[536] or could not be used to make inferences on the competitive interaction question (correlation analysis).[537] There are two issues with Mr Reynold's analysis: (i) it does not deal with FWA penetration but with population coverage; and (ii) in rapidly growing markets "*there's space for everyone to grow. And so the fact that you're both growing doesn't tell us that you're not substitutes. It just tells us that – and we know these markets are growing. So, from that perspective I don't think it takes us any further*."[538] Mr Reynolds had no convincing response to these criticisms. We note that Mr Reynolds himself finds that LTE FWA pricing is similar to low-cost FTTH products.[539] Mr Hodge similarly showed that Mr Smith's argument based on a comparison of usage levels using data from 2021 was unreliable and ignored other evidence.[540]

502. What we have found to be persuasive evidence of the competitive interaction between FWA and FTTH, is that FWA has over time responded in the way it is marketed and sold to more closely mimic fibre. FWA used to be marketed on a Gigabits basis with unlimited speeds, and now is throttled and offered at different speeds and marketed as uncapped.[541] For example, MTN reduced its pricing since 2021 by 46% for 10Mbps, 39% for 20Mbps and 38% for 35Mbps.[542] MTN currently (when the analysis was done) prices 10Mbps at R269, 20Mbps at R429, and 35Mbps (5G) at R499, all with a free router. MTN has also introduced faster 5G FWA packages priced at R699 for 60Mbps and R999 for unlimited

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535 Exhibit BO Hodge's Slide 6. The Vodacom leaflet on the left shows that Vodacom offers FWA packages from R299 with a 1TB 50Mbps service at R399 and a 2TB 100Mbps service at R599 whereas the cheapest fibre package offered was R629 on Octotel, but on Vumatel it is R749. If this is a 50Mbps service, then it is almost double the lower range FWA price.
536 Transcript p 3498 line 9 to p 3503 line 9.
537 Transcript p 3506 lines 7 to 16.
538 Transcript p 3506 lines 11 – 16.
539 Reynolds EWB p 475 para 4.63.
540 Transcript p 3506 line 16 to p 3507 line 15.
541 Hodge Transcript p 3299 lines 1 – 21.
542 Exhibit BO Hodge's Slide 17.

speed. These are competitive against Vumatel FTTH priced at R449 for 25Mbps, R757 for 50Mbps and R927 for 100Mbps, and Vuma Reach at R399 for 20/10Mbps, R529 for 40/10Mbps and R987 for 100/50Mbps.[543]

503. All of the above evidence, together with the evidence covered in the market delineation section, in our view suffices to conclude that there indeed is competitive interaction between FWA and FTTH, as we have noted, specifically regarding the marginal customer.

504. We nevertheless deal with some of the more technical, supply-side arguments of the merger parties. They elevate the speed of fibre and assert that where fibre is available, customers will invariably opt for fibre.[544] As we have noted, what is important is not only what engineers assess are the technical advantages of fibre, but what consumers who buy these products do in practice. To quote Mr Masalesa, consumers buy data, not technology.

505. Although fibre, from a technical perspective, offers better performance in certain respects, this does not mean that FTTH and FWA do not compete for customers, specifically for the marginal customer (as we have explained in the market definition section). The merger parties and MTN could not, from a demand-side perspective, explain away the large number of South African consumers that in making their decisions about accessing the internet – in the more affluent areas of our country – do not opt for fibre despite FTTH being available to them. This means that FTTH to a very large extent does not displace the alternatives, 4G and 5G FWA, upon entry, since a high proportion of households do not switch to FTTH and are using alternatives and consider them to be viable. How competitive the FTTH is with the FWA will influence its penetration levels and ARPUs, and how competitive FWA is when fibre enters an area will determine how many customers churn.

[543] Exhibit BO Hodge's Slides 6 and 16.
[544] See for example Mare Transcript p 2664 line 12 to p 2669 line 8.

506. The other common cause key issue as we have highlighted is that there is no FTTH-to-FTTH competition in many local areas since FTTH FNOs tend not to overbuild one another.

507. There is no need for us to deal in detail with the other technical arguments about the alleged superiority of fibre. One can accept that FTTH and FWA technologies have their pros and cons. None of these technical differences change the fundamental facts that we have traversed above. We nevertheless below summarise some of the issues.

508. On reliability FWA may be at risk of unstable electricity supply and transmission line breaks, fibre is at risk of fibre breaks to individual homes.

509. Loadshedding was debated as part of assessing the comparative reliability of the technologies. The merger parties' view is that because FWA gets affected by factors such as loadshedding, it is less reliable than fibre. However, the industry has taken measures to ameliorate issues caused by loadshedding.[545] In the case of Telkom CSB, for example, if service is affected at a particular physical site, Telkom's FWA network is designed to accommodate overlapping coverage between different sites, providing backup service from neighbouring sites.[546] Where fibre services are affected due to loadshedding, the customer may be affected for longer periods.

510. Rain's submission on reliability is that both technologies offer similar levels of reliability in that the connectivity of fibre will remain stable as long as there is secure cable connection, whilst that of wireless will remain stable in areas where there is network coverage. The main cause for outages in Rain's network is unreliable electricity supply and frequent fibre breaks in the transmission network connecting its towers to its core infrastructure. FTTH operators are equally impacted by fibre breaks in the transmission networks, but also by breaks in the fibre connecting individual subscriber homes.[547] In terms of fibre

[545] Masalesa Transcript p 296 lines 1 to 8.
[546] Transcript p 296 lines 8 – 18; FWB p 21 para 7.3.
[547] Bundle M p 8575.

breaks (for example contractors digging up cables and damaging the fibre infrastructure or vandalism), there is no backup for fibre, and therefore it can take time to resolve these issues from a fibre point of view.[548]

511. Fibre lacks redundancy whilst this may be provided in wireless through other towers. Rain submits that FTTH does not offer any redundancy as once the cable breaks there is no second option for connection. Often restoring a fibre break to a user's premises may involve civil work and consequently it may take significantly longer to restore than a wireless service. Wireless operators are often able to offer redundancy by allowing subscribers to connect to the internet using a different technology within its coverage area, i.e. 5G to 4G or a different tower using the same technology, provided there is coverage in the area.[549]

512. Mr Van der Merwe testifies that many homes are aggregated to the same single fibre strand that goes to the head end equipment and so share that resource.[550] He explains that latency and buffering are challenges, but that fibre can have similar limitations: depending on how it is deployed, FTTH and FWA share common characteristics; fibre can also be a shared resource and face similar limitations as FWA, particularly where a single fibre strand is split between multiple customers, which can cause higher latency and degraded bandwidth performance; it is about how the technology is deployed.[551]

513. Whilst FTTH may have an advantage with subscribers that want high-throughput packages, wireless offers the flexibility to move with the router to different locations. FWA routers are nomadic, i.e., mobile, in general without requiring changes or additions to existing hardware, and within a customer's premise where the router can be moved to an optimum position.[552] Fibre on the other hand is a physical cable that terminates at a point in the building or house and there is equipment that is placed next to that.

[548] Transcript p 296 line 18 to p 297 line 5; FWB p 21 para 7.4. The evidence on Mean Time to Repair is dealt with under the analysis of vertical theories of harm further below.
[549] Bundle M p 8575.
[550] Transcript p 145 line 11 to p 146 line 2.
[551] Transcript p 144 line 18 to p 145 line 10.
[552] Transcript p 297 line 21 to p 298 line 12; Masalesa FWB p 22 para 7.6.

514. FWA, because it is a wireless offering without the need for significant infrastructure installation, can be deployed quicker into a customer's home than FTTH.[553]

515. Both are able to offer value-added services ("**VAS**") but wireless wins where the VAS is more suited to mobility and fibre where VAS is more suited to large uplink. Fibre is better placed to offer guaranteed speeds but ISPs are often congested, resulting in lower effective speeds.

Speed

516. Customers using the internet have different demands. Some consumers will require maximum speeds and others not, depending on what they use the service for. Products with different speeds are offered in the market. As we have indicated above, FWA has over time responded in the way it is marketed and sold to more closely mimic fibre.

517. Mr Masalesa indicates that for 5G FWA the connection speeds are comparable to those provided by fibre, but not for 4G.[554] 5G reaches speeds of over 200Mbps.

518. Rain submits that both fibre and wireless services are able to offer consumer level broadband speeds. In many cases, South African customers achieve higher download speeds from their 5G services than the fibre operator in the area is able to offer. Wireless services are however impacted by signal quality and congestion. Operators manage congestion by increasing capacity in their networks, but a challenge for wireless operators is that it is not always that easy to determine exactly what signal quality and consequently throughput a customer will achieve.[555]

[553] Masalesa Transcript p 347 line 19 to p 348 line 2; Masalesa FWB p 22 para 7.5.
[554] Transcript p 294 line 8 to p 295 line 1; p 335 lines 7 – 15; FWB p 21 para 7.1.
[555] Bundle M p 8575.

519. Whilst FTTH offers the highest speeds, depending on use cases, some customers may opt for entry level products with entry level speeds and are satisfied with speeds of 10Mbps and 20Mbps, with the most popular fibre speeds being 50Mbps[556] and most customers using 100Mbps or less. Mr Masalesa's evidence is that 20Mbps is a sufficient speed to consume broadband services like streaming without issues with buffering on the video.[557] In Telkom CSB's experience, the majority of its FTTH customers use 50Mbps with a very small number above 100Mbps.[558] LTE FWA is marketed by Vodacom with speeds up to 100Mbps.

520. Mr Nunes confirms that products with a speed of 10Mbps are sufficient for many consumers that do not stream and states that in the last two years the shift to 50Mbps has become the norm.[559] This is consistent with the evidence given by Mr Masalesa and Mr Motlekar. For fibre, average speeds are 50Mbps and the majority at 100Mbps or less, speeds that lie within the range for FWA services, even on 4G.

Congestion

521. Recall that Vodacom argues that it would not have the spectrum capacity to provide a sustainable FWA service for large numbers of FWA customers (in addition to its mobile services) as its radio network could not carry the load.

522. The evidence suggests that players running mobile networks all have challenges with congestion and they manage it. They have an incentive to manage congestion because it affects their revenue, and once a certain threshold is reached, additional investments will be made by them to relieve congestion. This is the common industry practice.

[556] For Vodacom's most purchased FTTH product, see Reynolds EWB p 487 para 4.95.d.
[557] Transcript p 467 lines 7 – 11.
[558] Transcript p 342 lines 6 – 11; p 344 lines 8 – 14.
[559] Transcript p 693 lines 8 – 18.

523. Telkom's evidence is that congestion is normal on mobile networks and operators use congestion thresholds as prompts to expand capacity. Mr Masalesa testifies "*I'm not going to wake up one day and the network is congesting. It needs to gradually get to that point where it congests and generally speaking we have enough time to deal with that congestion*".[560] Capacity is added because there is opportunity to grow revenue given there is demand in the area.[561]

524. The mobile operators use various methods to monitor and manage data demand daily as network utilisation fluctuates, depending on factors such as marketing campaigns which may cause a spike in data traffic.[562] It is managed through a variety of means: "*there's always ways of getting over our spectrum. There's also ways of deploying additional technologies, additional bands in terms of spectrum, and also moving up to Massive MIMO*"[563].[564]

525. Telkom further indicates that one of the many avenues available to it to deal with the issue of congestion is that it can manipulate the angle of antennas and direct customers who hog any radio coverage to other more resourced sites to relieve capacity where there is high utilisation.[565]

526. Telkom does not dedicate any spectrum for any particular service but instead steers FWA devices away from spectrum which encourages FWA devices to use Telkom's high-capacity spectrum as opposed to its mobility spectrum (or FDD spectrum).[566]

527. The industry has matured such that there is a proliferation of tower companies whose sole function is to build towers with the benefit that densification no longer

[560] Transcript p 375 lines 10 – 14.
[561] Transcript p 304 lines 3 – 8.
[562] Transcript p 229 line 21 to p 300 line 6.
[563] Mr Masalesa describes Massive MIMO as a technology where an operator can take an existing site, on which it has used up all the spectrum that it has, and it conducts an upgrade to Massive MIMO which can double the capacity that the operator has at the site level. Transcript p 302 line 8 – 13.
[564] Transcript p 561 lines 13 – 18.
[565] Transcript p 378 lines 2 – 13, p 378 line 18 to p 379 line 12.
[566] Transcript p 309 lines 7 – 19.

requires actually building a site but instead refers to negotiating with the particular tower company for access to a particular site to allow the operator to set up its equipment, use backhaul and switch on the site on a "plug and play" basis.[567]

528. Dr Van den Bergh of Vodacom testifies that it has certain benchmark measures for congestion and it continues to invest capex in relieving the observed congestion. Data presented by Dr Van den Bergh shows the percentage of 4G cells congested in FY2024 was [redacted]% reducing in the April 2024 to June 2024 quarter to [redacted]%.[568] Dr Van den Bergh testifies that Vodacom invests capex to relieve congestion with a "rough ballpark" national target of [redacted]% congestion.[569]

529. Notably Dr Van den Bergh indicates that Vodacom currently does not prioritise between data for [redacted] and [redacted][570] Importantly, despite the stated concerns about congestion, Dr Van den Bergh confirms in response to questions from the Tribunal that Vodacom does not presently [redacted] at all as congestion levels in reality have not reached a [redacted].[571] Furthermore, Vodacom is able to make adjustments in their annual financial planning cycle to respond to network information that the network in a particular area may be [redacted] this level[572], consistent with Mr Masalesa's evidence that congestion is essentially not an ad hoc occurrence to which MNOs are not able to respond effectively, and that they will address constraints where required. This is not surprising because the FWA revenue is incremental which Vodacom would want to keep.

530. Vodacom argues that it must prioritise its mobile businesses over its other businesses, and that its network is congested. The testimony of Dr Van den Bergh however shows that the level of congestion experienced by Vodacom is

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567 Transcript p 304 line 18 to p 305 line 12.

568 Exhibit AL: Van den Bergh's Presentation slide 12: "Mobile Data Traffic growth is exceeding Vodacom's available capacity on many sites, leading to significant congestion".

569 Transcript p 2346 lines 5 – 7.

570 Transcript p 2282 lines 7 – 18.

571 Transcript p 2286 lines 2 – 13.

572 Transcript p 2283 to p 2285.

[redacted] All MNOs manage and continuously invest to relieve congestion and grow their businesses including FWA. Importantly, Vodacom continues to market and grow its FWA business with data volume growth for FWA greater than mobile. This shows that congestion is not a factor currently and Vodacom continues to invest capex to relieve congestion in any event. FWA according to its own documents is a strategic focus.

531. We have above dealt with Vodacom's additional spectrum acquired in the recent auction and what its submissions were to ICASA.

532. Furthermore, as per government policy, 2G and 3G technologies will be phased out around 2027.[573] Dr Van den Bergh agrees that this transition from lower technologies will enhance actual capacity on the network.[574]

533. Furthermore, more spectrum is likely to become available in terms of the ICASA roadmap. Dr Van den Bergh's evidence confirms that Vodacom is not using all of its allocated spectrum, and there is more to come:[575]

"*ADV MUVANGUA: Am I understanding correctly from what you just said, that with reference to ICASA that more spectrum is on the way?*

DR VAN DEN BERGH: Certainly there's going to be more spectrum. There's spectrum on the [ICASA] roadmap".

534. In relation to future spectrum, Mr Masalesa testifies "*most of us are aware of the fact that the regulator had intended to go on a second phase of spectrum allocation … it should give or take [be] 190 megahertz of spectrum, that should be made available … We are of the view that the industry still – is still a wash off spectrum*."[576] He said that this spectrum auction possibly will take place next year.[577]

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[573] Transcript p 2208 lines 7 – 9; p 2220 lines 4 – 14.
[574] Transcript p 2210 lines 5 – 8.
[575] Transcript p 2268 line 22 to p 2269 line 4.
[576] Transcript p 318 lines 8 – 20.
[577] Transcript p 318 line 22 to p 319 line 2.

535. Dr Van den Bergh testifies that even without the additional spectrum to come, Vodacom has [redacted] for about for [redacted].[578]

536. Notably, data provided to the Commission in July 2024 shows that there is currently [redacted] on Vodacom's 5G FWA – permitting room for its growth. Dr Van den Bergh testifies "*we're* [redacted] *site*".[579] There is also no congestion that cannot be managed in the vast majority of areas offering 4G FWA as is evident from the Vodacom coverage map.

537. Moreover, Vodacom is currently under-utilising the spectrum it procured in the ICASA auction. This is reflected in data that the Commission received from Vodacom on 12 July 2024.[580] The Commission analysed Vodacom's spectrum configuration for each of its sites (as per the data at exhibit AN). The analysis was presented to the Tribunal as exhibit AO.

[redacted] Dr Van den Bergh argues that this analysis is not of value as it does not identify where the different sites are located, as remote sites may use limited spectrum.[581] However, in the context where [redacted]% of sites use less than 90MHz, or [redacted] available to Vodacom, it is apparent, that the majority of sites in urban areas have [redacted] by [redacted]

539. Furthermore, more capacity is released as 5G demand grows and displaces 4G, and as 2G and 3G are phased out by 2027. Dr Van den Bergh confirms:

"*ADV MUVANGUA: So, as 5G grows, 4G declines, and this frees up capacity on the spectrum. Do you agree?*

DR VAN DEN BERGH: I do".[582]

540. Vodacom further has access to substantial additional spectrum, through its roaming agreements with Liquid and Rain, which provides it with more capacity.

578 Transcript p 2319 lines 10 – 20.
579 Transcript p 2310 lines 20 – 22.
580 Exhibit AN.
581 Transcript p 2227 lines 3 – 14.
582 Transcript p 2296 lines 17 – 19.

Vodacom allocates [redacted]MHz to [redacted] in the 3500MHz band by roaming on Liquid spectrum.[583] This arrangement with Liquid gives it access to [redacted]MHz, which can be used for [redacted][584] Vodacom also uses wholesale 4G FWA capacity on Rain.[585]

541. The final point is that, and as conceded by Dr Van den Bergh, as more homes get connected with FTTH, then this too will create more capacity on the networks.[586] This point was also made in Vodacom's submission to ICASA where it identified that 'customers may offload data usage to fixed services relieving capacity constraints currently faced by Vodacom'.[587] It follows that as fibre is rolled out in an area, constraints are lifted in precisely those areas as FTTH is taken up. And as the Vodacom submission to ICASA identifies, in relieving the capacity constraints, this results in lower prices to not only meet fibre pricing but also to use the excess capacity that the network now has. Mr Otty agrees that "*FWA is a good commercial option for [Vodacom's] current unused capacity*" and that Vodacom would want to get a return on its investment in spectrum.[588]

542. The merger parties argue that the above confuses issues since the location of the alleged offload is (by definition) in areas where fibre is already installed. They say that this assumes that customers in the relevant areas would be connecting to fibre, and so there would be no reason to want FWA. However, as we have indicated not all customers will choose fibre. The factual evidence is that the average FTTH penetration rates are low and therefore customers will continue using LTE/4G and 5G for internet access.

543. Vodacom has the most sites in South Africa. When assessing overall capacity to provide FWA on a network, one must consider the total number of sites and the number of users that can be accommodated per site. Mr Masalesa indicates that

[583] Transcript p 2264 lines 4 – 21.
[584] Transcript p 2265 lines 11 – 22.
[585] Transcript p 2266 lines 9 – 11.
[586] Transcript p 2210 lines 9 – 12.
[587] Exhibit AG p 13057 – p 13058 "Vodacom's confidential response Discussion Document on the Market Inquiry into Mobile Broadband Services"
[588] Transcript p 2030 lines 3 – 11.

in terms of capacity for FWA per site, Telkom provisions for [redacted] users on each site for FWA[589] but that he can double this with Massive MIMO technology, and he furthermore has the option of site densification and more spectrum.[590]

544. Dr Van den Bergh states that Vodacom can only do roughly [redacted] that amount, or around [redacted] users per site using its [redacted]MHz spectrum for [redacted]MHz[591])[592] or half what Telkom can achieve. Considering 5G, Dr Van den Bergh indicated that one can get a [redacted] people.[593] In addition, Vodacom can access additional spectrum from roaming agreements, namely the [redacted]MHz from Liquid in the [redacted]MHz band[594] and [redacted] roaming on [redacted][595] Thus, considering all the spectrum available to Vodacom, and if it were to use [redacted] its actual capacity per site is likely greater than 190 users.

545. As indicated, site density must also be considered. Vodacom has the [redacted] sites in South Africa, currently [redacted] sites[596] and at [redacted] users per site this theoretically would provide overall capacity for [redacted] FWA users. We acknowledge that as some of the sites are not in [redacted], the actual capacity would be [redacted] This figure however does not consider 5G technology being used and Vodacom's [redacted].

546. In light of all of the above, we do not find Vodacom's reliance on the argument that congestion is a future primary constraint convincing. It is not consistent with its own submissions to ICASA, and the fact that it is currently not constrained to provide FWA. Furthermore, Vodacom has acquired significant additional spectrum, with a ICASA roadmap for further spectrum to come, and 2G and 3G technologies to be phased out around 2027. What is further significant is that as

589 Transcript p 338 lines 1 – 9.
590 Transcript p 381 line 8 to p 382 line 10.
591 Van den Bergh FWB p 195 Figure 4.
592 Transcript p 2168 lines 1 – 9.
593 Transcript p 2168 line 18 to p 2169 line 4.
594 Transcript p 2264 line 16 to p 2265 line 12.
595 Transcript p 2267 lines 1 – 22.
596 Exhibit AO: "Analysis of Vodacom's spectrum configuration for each site as per corrected information provided by Vodacom's attorneys on 12 July 2024 (Filename: "Copy of Site Spectrum Configs – 2024-07-12.xlsx")

FTTH is rolled out to the lower-income areas, that will further lift congestion constraints.

Vodacom's FWA market position, network quality and coverage

547. The merger parties argue that Rain and Telkom are better positioned than Vodacom to offer FWA services as they currently at a national level account for most FWA connections and this competitive interaction will remain post-merger, together with other primary constraints.[597]

548. The merger parties further argue that Vodacom needs its spectrum resources to service its mobile customers and will not have capacity for FWA customers. They add that Vodacom needs the new spectrum obtained in the recent auction to meet mobile demand on existing sites. However, as we have indicated, this is not consistent with what Vodacom told ICASA in its spectrum application.

549. Having regard to all FWA technologies (including non-mobile fixed wireless access), there are approximately 1.3 million connections in South Africa as of June 2023.[598]

550. There are five main 4G/5G FWA providers in South Africa: As of June 2023, Rain is the largest FWA network operator with [redacted] consumer FWA connections ([30-40]% of the market as at June 2023). Telkom is the second largest FWA network operator with [redacted] consumer FWA connections ([30-40]% of the market as at June 2023). Telkom offers a wide range of FWA products at various price points, with options including router or SIM-only offers and regular promotions. Mr Reynolds submits that Telkom's LTE FWA coverage extends across South Africa but is mostly distributed in the more densely populated and high-demand urban and peri-urban areas of South Africa. MTN is the third largest FWA network operator with [redacted] consumer FWA connections ([10-20]% of the market as at June 2023). Vodacom is the fourth largest FWA network

[597] Transcript p 57 lines 11 – 17.
[598] Reynolds EWB p 451 para 2.33.

operator with [redacted] consumer FWA connections ([10-20]% of the market as at June 2023). Cell C is the smallest FWA network operator with 25,000 consumer FWA connections (2% of the market as at June 2023).[599]

551. FWA services are also sold by ISPs at the retail level.

552. We again note that one should not take a static approach to the market and must consider evidence related to company strategy, such as Vodacom's planned growth in 5G, as well as the additional spectrum that it acquired in the latest auction, ICASA's roadmap for further spectrum to come, and the fact that as fibre is rolled out in the lower-income areas that we are concerned with, that will also alleviate some of the MNO's constraints.

553. As we have noted, competition analysis is forward looking and in our assessment Vodacom would offer FWA services on a larger scale in future given its significant spectrum holdings, spectrum roaming and far greater site density than Rain and Telkom. Furthermore, as confirmed in Vodacom's strategic documents, FWA, as a business case, [redacted] for it in order to [redacted] and particularly as household demand and use cases for data grow over the foreseeable future.

554. We note the following from Vodacom's submission to ICASA to acquire additional spectrum:
(i) it has been able to achieve [redacted]% population coverage;
(ii) data traffic is significantly growing year-on-year;
(iii) due to the low fixed penetration compared to mobile penetration in South Africa there is also an opportunity to provide a fibre-like service to customers;
(iv) by acquiring access to the new [redacted] MHz frequency band, Vodacom will be able to [redacted] network capacity;
(v) given Vodacom's already extensive network, customers will [redacted], in terms of [redacted] once Vodacom begins to [redacted];

[599] Reynolds EWB p 450 – 451 paras 2.30 – 2.32, Table 6.

(vi) [redacted] GHz and in the [redacted] GHz band [redacted] to deploy 5G on [redacted] will allow Vodacom to provide services in [redacted] and [redacted]. The type of services that 5G could enable are [redacted]

(vii) 5G-enabled fibre-like mobile services (fixed wireless access - FWA) are anticipated to be a [redacted] product portfolio;

(viii) access to additional spectrum will [redacted] on the Vodacom network and,[600] implementation of new technologies like 5G, Vodacom will be able to [redacted] from both [redacted] perspective and [redacted].[601] (Own emphasis)

555. As [redacted]%.[602] As we shall discuss under the public interest assessment, it plans to significantly increase the number of 5G sites in the [redacted] (see paragraphs 1168 to 1170).

556. Since acquiring the additional spectrum, Vodacom's 4G FWA and 5G FWA subscribers grew very significantly. The spectrum auction provided Vodacom with significant capacity in LTE and Vodacom provided statistics of its 4G FWA subscribers.[603] Exhibit AP2 shows that the number of Vodacom's 4G FWA and 5G FWA subscribers grew by [redacted]% to c.[redacted] in the short period from September 2023 to April 2024, or at a rate of c.[redacted] per month. Dr Van der Berg accepts these figures provided by Vodacom.[604] This illustrates how Vodacom can, absent this transaction, grow and compete against FTTH with its 4G and 5G offerings.

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[601] See Exhibit AM: Fundamental assumptions for the business plan with financial forecasts & economic efficiency.
[602] Reynolds EWB p 538 para 7.7.
[603] Exhibit AP1: Number of subscriptions and data usage for Vodacom consumer FWA subscriptions by tariff, April 2024.
[604] Transcript p 2245 line 15 to p 2246 line 10.

557. As we have indicated, the land grab is moving to the lower-income areas. Mr Van der Merwe's evidence is that although there are other FWA players in the market the two major mobile operators, Vodacom and MTN, are dominant in the townships and "*there are many townships where Vodacom is absolutely dominant … I wouldn't say the only one, but they might be the dominant one, or they might have better coverage of that township, yes*".[605] Mr Hodge echoes this "*And as we move out of the dense urban we're going to increasingly get into a world where there's only two*" (referring to Vodacom and MTN).[606]

558. Mr Reynolds provides information of LTE and 5G coverage and Vumatel's FTTH coverage in South Africa's 20 largest townships.[607] This shows that Vodacom, MTN, Rain and Telkom all cover these 20 largest townships with LTE, and some of these players cover some townships with 5G.[608] There are however more than 500 townships in South Africa, and therefore the 20 largest townships are a very small sample and not representative of the whole of South Africa including the many smaller townships.

559. Regarding FNO fibre-to-fibre competition, the factual evidence is that FNO's tend to not overbuild each other; and there are many local areas where there are monopolies in FTTH that are not constrained by other FNOs. As mentioned, in [redacted]% of Vumatel areas there is no fibre overbuild and so FWA is an alternative home broadband option for consumers in those areas. Here FTTH and FWA compete for the marginal customer as we have shown.

560. Furthermore, Vodacom and MTN have higher quality networks and pervasive coverage.[609]

[605] Transcript p 241 lines 5 – 20.
[606] Hodge Transcript p 3303 lines 8 – 10.
[607] According to the 2011 Census.
[608] EWB Appendix D p 595 Table 25.
[609] Otty FWB p 357 para 11.

561. From a costs perspective, Mr Hodge submits that Rain and Telkom are unlikely to offer FWA where they roam on Vodacom's network because the costs are too high.[610]

562. Vodacom, because of its extensive network, also has other advantages over other players. Hodge explains "*… we heard on FWA is, I think from Rain, that for someone who has a site large as Vodacom already is very low cost to put up that extra equipment and it's all margin after that. So, you have a lot to play with whereas an ISP has their input cost*".[611]

563. Vodacom and MTN both have acquired significant additional spectrum. Relative to the other players they were the two players that bought the most spectrum. Vodacom now has as much spectrum as Telkom. As indicated it further has roaming agreements with Rain and Liquid.

564. As the GSMA identified, FWA pricing has to be competitive against FTTH to woo customers.[612] As Vodacom submitted to ICASA, fibre offload from mobile results in lower prices as not only does it release capacity but also it is forced to respond on price.[613]

565. Mr Van der Merwe explains what the proposed merger means for future pricing in the townships. FNOs, including Frogfoot, have begun deploying fibre in the townships. Post-merger, once Maziv deploys fibre in townships there will be no incentive for other FNOs including Frogfoot to enter those townships with low FTTH pricing because they tend not to overbuild because of the economics.[614] This will sterilize a large portion of the market for competitor FNOs and entrench Maziv's leading market position. Importantly, it will shape pricing, innovation and consumer choice in these markets for the medium- to long-term, most likely irreversibly.

[610] Hodge Transcript p 3303 lines 5 – 8.
[611] Hodge Transcript p 3301 lines 18 – 21.
[612] Hodge EWB p 98 para 142. Bundle M 10967: The 5G Guide April 2019.
[613] Exhibit AG p 13057 – p 13058.
[614] Van der Merwe Transcript p 106 lines 6 – 11.

566. Price is not the only factor on which competition takes place in FWA, as MNOs have also sought to offer a range of speed and price plans, improve the data contained in the Fair Usage Policies ("**FUPs**") of the FWA packages, and offer free routers even for month-to-month deals. These are all to improve the value proposition of the packages for consumers. MNOs "… *will play price versus FUP versus speed, and offer differences. And even the different mobile operators might take different positions*".[615] Indeed, the growth in data demand (including during the COVID-19 pandemic), interacting with the expansion of fibre as an alternative in South Africa, appears to have stimulated significant innovation amongst the MNOs, and most importantly the two smallest MNOs, to provide customer-centric data solutions.

567. More aggressive pricing or other value propositions by Vodacom absent the proposed merger would force Vumatel to respond with lower prices to raise uptake rates in the areas where it operates. Hardiman and Mr Van der Merwe indicate that uptake or penetration rates are impacted by FWA competition, resulting in an FTTH response through lower prices to drive uptake[616] given the incentive to improve uptake due to the sunk cost of fibre deployment in an area. A better range of speed and price packages of FWA would also force Vumatel to continue to offer its own range of speed plans, including lower speed plans that are often retired so that consumers are forced to upgrade to higher speed plans with higher prices.[617] Recall Mr Reynolds's evidence that customers will (have to) upgrade post-merger, which will not be in their interest if their choices are thereby being limited (see paragraph 453 above).

568. Post-merger Vodacom has less incentive to price FWA as aggressively as pre-merger, or improve the value proposition of the packages in other ways such as better FUPs or lower router costs, given that it will recoup a large portion of lost spend with it through its up to 40% share of the profits of Maziv. Aggressive price strategies through discounts and offers would erode value for both Vodacom's

[615] Hodge EWB p 60 – 97. Exhibit BO Hodge's Slide 6; Hodge Transcript p 3501 lines 10 – 21.
[616] Hardiman identifies that targeted FWA in Reach areas may impact penetration and ARPU. Mr Van der Merwe identifies that FTTH needs to then offer more affordable i.e. cheaper products to raise penetration levels. Transcript p 85 line 8 to p 86 line 2.
[617] Transcript p 3579 lines 1 – 9.

mobile and post-merger FTTH interests. Less aggressive pricing by Vodacom will place less competitive pressure on Vumatel to itself price more aggressively to increase FTTH uptake rates in all the areas where it operates.

569. The proposed merger further affects Vodacom's rollout incentives. Post-merger Vodacom will have less incentive to prioritise 5G rollout in the Vumatel areas and to market both LTE and 5G FWA aggressively in those areas. We have indicated that Vodacom's internal recommendation on 5G was that the deployment of 5G FWA be [redacted] Recall that Dr Scheffer concedes when taken to Vodacom's internal documents, the creation of which he and his team were involved in, that in 2021 Vodacom recommended that going forward, it would [redacted] in those areas where Vodacom has no fibre[618] (see paragraph 4955 above).

570. The merger parties in relation to 5G rely on Mr Joosub's evidence that if Vodacom were to slow down the rollout of 5G, that would be the same as it "*writ[ing] its own death warrant*"[619] because "*[y]ou have to keep pace with technology. It's Telco 101*."[620] He went on to say that: "... *So, you have to keep pace. … We're also market leader in South Africa, so if we don't keep pace with technology our customers move. If there's a 5G capable network that's faster and so on and so on, customers will move, so you do have to keep pace with the market … and by the way, we just spent 5.4 billion buying spectrum, so if we're not planning to rollout 5G, why would we spend 5.4 billion in 5G spectrum*"[621]. This confirms how imperative it is for Vodacom to significantly grow its 5G offering in South Africa to keep pace with technology. It does not have an incentive to slow down its 5G rollout but can post-merger target and align this 5G FWA to avoid competition where Maziv has fibre. It will know Maziv's plans and they can feasibly coordinate their strategies.

[618] Transcript p 2468 lines 3 – 17.
[619] Transcript p 1659 lines 8 – 10.
[620] Transcript p 1659 lines 8 – 10.
[621] Transcript p 1659 line 17 to p 1660 line 13.

571. The Vodacom Group Board presentation, dated 2021, sets out the "*5G Strategy and footprint* [redacted]".[622] The strategy is this: to [redacted] 5G FWA, Vodacom [redacted] capacity to provide a [redacted] experience.[623] By February 2024, Vodacom had rolled out [redacted] 5G FWA sites. It intends to reach [redacted] sites by 2029.[624] (We note that Vodacom's anticipated 5G site growth is underplayed when it comes to its tendered public interest commitments, this will be dealt with in the public interest section.)

572. The merger parties, referring to Mr Joosub's evidence, submit that Vodacom has committed to spending R60 billion in South Africa in the next five years of which a large portion will be used to deploy 5G: "*Thirdly, we've made commitment that we will invest 60 billion in South Africa post the transaction in the next five years, so if we can't invest in 5G, what are we going to do with 60 billion* …".[625] This implies significant increased future competition from Vodacom in 5G that can be deployed strategically to avoid competition with Maziv's FTTH.

Conclusion

573. The competitive interaction between FWA and fibre is borne out by the evidence. This is important considering that FTTH is shifting to the lower-income segment of the market where there will be competition between FWA and FTTH for the marginal consumer.

574. For a very large part of the Vumatel FTTH areas, there is no overbuild and hence the only competition can come from FWA for home broadband services. The factual evidence is that average FTTH penetration levels in South Africa are relatively low across the spectrum. Given Vodacom's unilateral incentives due to its shareholding in Maziv, the proposed transaction will chill competition in those areas resulting in harm to consumers, in a growing market. Absent the proposed transaction, Vodacom will likely compete more aggressively with its

[622] Bundle M p 5626.
[623] Transcript p 2307 to p 2310.
[624] Transcript p 2309 lines 4 – 14.
[625] Transcript p 1659 line 21 to p 1660 line 10.

FWA, and in the areas where Vumatel has rolled out FTTH. That will increase absent the proposed transaction, forcing Vumatel to respond on price, and on overall value-proposition to consumers, including a mix of speed, FUP and router packages. Price levels influence affordability and usage, both of which are harmed by higher pricing.

575. Furthermore, as the proposed merger would be permanent, it will likely entrench Maziv as the leading FTTH provider going forward, and the harm to competition (together with the foreclosure effects that cannot effectively be remedied) will grow over time. The proposed transaction enables both the merger parties to strengthen their market positions and reinforce and grow existing concentration in the telecommunications sector as a whole.

576. As we find under the effects of the proposed transaction on the sector in the public interest section, this transaction between the largest MNO in South Africa, and the largest dark fibre provider and wholesale FTTH player, will likely trigger further consolidation in the sector since other players would need to compete with the Maziv/Vodacom combination. This is borne out in the strategic documents of MTN as the second largest MNO that is very concerned about its ability to compete post-merger. What this means is that the abovementioned lessening of competition between FWA and FTTH will spread further as other players pursue deals involving FNOs and MNOs. This would result in a structural change that would substantially lessen competition. As we have indicated, the evidence shows that MNOs with either no, or with a small, FTTH footprint are more aggressive on FWA home broadband substitution.

577. Apart from a divestiture condition in relation to the overlapping FTTH infrastructure between Maziv and Vodacom (assessed further below under remedies), the merger parties proposed behavioural remedies attempt to address the vertical effects and not the horizontal (i.e., price and non-price competition parameters such as FUPs) effects.

578. We note that the above horizontal effects must be considered together with the foreclosure effects of the proposed transaction on competitors including Telkom, MTN and Rain. All of these players have raised substantial vertical foreclosure concerns, as we shall discuss next under the vertical effects analysis. We also note that many more third parties that did not testify in these proceedings raised concerns with the proposed transaction during the Commission's investigation.

METRO FIBRE AND FTTB

579. The Commission argues that one must not take a static view of the effects associated with the proposed transaction in the metro fibre and FTTB markets when assessing dynamic future competition, and must have regard to the competition counterfactual, specifically evidence from the merger parties' own strategic documents. The merger parties rely *inter alia* on Vodacom's pre-merger market positions and argue that Vodacom currently is too small in both metro fibre and FTTB for the proposed transaction to result in a substantial prevention or lessening of competition.

580. Metropolitan fibre infrastructure comprises tower connectivity, as well as fibre infrastructure that connects core sites, branch sites and aggregation nodes (or transmission), which is used as backhaul infrastructure for the provision of FTTx.[626]

581. Metropolitan fibre infrastructure (and particularly backhaul infrastructure) is a critical input for the provision of wholesale FTTB and FTTH.[627]

582. Metro fibre is used by network operators, both FNOs and MNOs, to aggregate traffic from their last mile access networks (both fixed and mobile) or aggregation nodes (including major datacentres) and transports aggregated traffic between these networks and nodes, connecting them to the national long-distance infrastructure. Therefore, FNOs and MNOs are the primary drivers of demand

[626] Nunes FWB p 162 para 6.37.
[627] Nunes FWB p 162 para 6.39.

for metro fibre connectivity. These operators acquire fibre links from infrastructure providers such as DFA, Telkom, and Link Africa in the form of metro backhaul links in the case of FNOs, and fibre to the site/tower (FTTS/T) in the case of MNOs.

583. Metro fibre networks typically offer wholesale FTTB as their metro network brings them past businesses to whom services can then be sold through a break-out link. The FTTB business ensures demand for the metro fibre network too. As metro networks are extended to support the FTTB, there is a growing densification of the network and a metro network with a large FTTB portfolio is likely to be denser than rivals.

584. MNOs have provided the demand foundation for companies such as DFA but also have self-built metro networks given they have substantial demand from their own network requirements which also require a densification to provide coverage.

585. Operators with a large metro fibre network are also likely to hold a sizeable position in wholesale FTTB because the metro network rings are deployed using the 'distribution network strategy',[628] namely they are designed to pass as many customer opportunities as possible and therefore have denser networks in business districts within metro areas. As metro fibre rolls out on the back of MNO demand, that provides an opportunity to pass businesses and develop FTTB demand. As Vodacom notes, "*Expansion of mobile networks / Titan*[629] *links increases the size of the addressable market for enterprise services (i.e. greater densification)*".[630]

586. FNOs leverage off the metro backhaul infrastructure to supply FTTB services, as they need to be close to metro fibre to support FTTB.

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[628] Part B of the Record p 1305 para 61.3.3.2. Frogfoot letter to the Commission dated 30 March 2022.
[629] Titan and Peregrine are categorised as wholesale metropolitan fibre backhaul. These are dark fibre products, meaning that the products do not transmit data. Customers need to 'light' the fibre using their own equipment to enable data transmission.
[630] Bundle M p 1061: Vodacom Project [redacted] (20 October 2021).

587. In terms of the proposed deal, Vodacom will transfer its metro fibre transmission links which connect Vodacom base station sites to the access and aggregation layers of its transmission network. After the transaction, those ducts and links that connect to the Vodacom base station sites will be owned by DFA, and Vodacom will use the fibre in those ducts for its own use and to provide managed services.[631]

588. The rollout of last mile FTTB has historically been driven by customer orders as business/enterprise connections are typically built to order. Pricing for FTTB products is based on individual negotiations and may vary by customer depending on service type, quantity and bargaining dynamics.[632]

589. With regard to the metro fibre market, Prof Theron argues that (i) there is no overlap between Vodacom and DFA regarding the provision of dark fibre access; and (ii) the merged entity will have a combined national market share (dark and lit) of less than 30% – although it varies across regions and provinces. Thus, if one considers current market shares, there is no fundamental change in the structure of the market as a result of the proposed transaction and there is no major market share accretion warranting concerns over a substantial prevention or lessening of competition.[633] Prof Theron also argues that Maziv has a current competitive constraint in the form of Telkom/Openserve.[634]

590. In respect of the FTTB market, Prof Theron argues that the merger does not substantially prevent or lessen competition and that there is no change in the market structure as a result of the proposed transaction for three main reasons, namely (i) pre-merger, Vodacom's FTTB network is not open access i.e., other ISPs do not have access to the Vodacom FTTB infrastructure; (ii) there is a 'greater degree' of overbuild in the wholesale FTTB markets compared to FTTH; and (iii) in terms of market share accretion as a result of the proposed transaction, Vodacom's national market share is very small. She argues that

[631] Joosub FWB p 321 – 322 para 7.3.
[632] Hodge EWB p 82 para 98.
[633] Transcript p 3343 line 9 to p 3345 line 6.
[634] Transcript p 3348 lines 1 – 10.

therefore there is no change in the market structure of FTTB as a result of the proposed transaction.[635]

591. Mr Hodge, on the other hand, considers dynamic future competition from Vodacom absent the proposed transaction. He paints a picture of the future competitive impact of Vodacom in a dynamic market absent the merger: "… *on the evidence it removes a potential alternative. Vodacom, certainly it was the view of at least Mr Van der Merwe, … that Vodacom is uniquely placed to actually provide an alternative open access network because it is the largest MNO with the largest volumes and can commit, and even the story of DFA, as we've heard, is one of following the mobile networks and expanding the network reach and density. So, we are at that point that critical inflection point, where we have to be careful about how we set this path going forward*". [636]

592. Mr Hodge emphasises that one should consider dynamic future competition: "… *it's about dynamic competition. It's about what you will do going forward, not stop the clock and do nothing because we don't stop the clock when we're in the counterfactual. And we know that Vodacom very publicly has said it has a FibreCo and Telco strategy that's Africa wide, including South Africa. That's to be done off balance sheet with JV partners which could include other mobile operators, other fibre operators, financial institutions, and other partners. And, so, the idea there is they can leverage their equity. It doesn't' contribute to Vodafone or their debt situation. But they're bringing their anchor tenants in. That's the attraction.*"[637]

593. The merger parties argue that the Commission has not come close to discharging its onus to prove its dynamic competition argument.

594. This section must be read with our analysis of the competition counterfactual (see paragraphs 2822 to 3033 above).

[635] Transcript p 3342 line 11 to p 3343 line 6.
[636] Transcript p 3287 lines 10 – 18
[637] Transcript p 3294 lines 3 – 17.

595. The economic experts prior to the hearing agree on the following regarding FTTB: (i) Vodacom does not provide wholesale FTTB services to third party ISPs (neither dark nor lit); and (ii) the wholesale FTTB market has greater degrees of overbuild relative to FTTH, but they do not indicate what that degree is. We deal with our assessment of the FTTB overbuild evidence below.

Our assessment

596. The assessment of a substantial prevention or lessening of competition under section 12A is measured on a case-by-case basis, taking into consideration the strategic evidence from documents, factual and economic evidence. Merger analysis is forward looking and involves an assessment of actual current as well as future competition, including any changes brought about by the merger to the market dynamics and (future) market structure.

597. In this case we have strategic evidence from the merger parties' own documents that cautions against a static view of the markets based only on current market shares, considering *inter alia* the evidence as we have traversed in relation to the true rationale for the proposed transaction, including that the proposed merger from a Maziv perspective has a defensive motive, as Maziv's strategic documents plainly show, and the competition counterfactual (see paragraphs 282 to 3033). We consider the current market positions and how the proposed transaction will change or impact the market dynamics.

Metro fibre market shares

598. Mr Hodge, using data on the record, estimates the market shares of total metro fibre backhaul network in kilometres for 2021.[638] Openserve is the largest with a market share of [30-40]%, followed by the merger parties at [20-30]%, MTN at 17% and Liquid Telecom at [10-20]%. We note that MTN is largely self-provision whereas Liquid Telecom is wholesale.

[638] This excludes NLD but includes self-build by MNOs for their FTTS requirements along with own metro rings. As such, it is a perspective on capabilities not wholesale performance.

599. A distinction between dark and lit fibre is appropriate. As noted in the market definition section, MNOs and FNOs prefer dark fibre as this is both cheaper but also enables them to have more control and flexibility over their network design. For these operators that require unmanaged services or dark fibre, the options are generally limited to DFA, Liquid Telecom and Link Africa.

600. Openserve does not sell or lease dark fibre access to FNOs, which removes it as an option for infrastructure players that seek access to dark fibre. As we have indicated, DFA is the largest provider of dark fibre connectivity and backhaul in South Africa with a market share of more than 80%.

601. DFA and Vumatel have the largest networks in terms of wholesale FTTB/FTTH and the largest dark metropolitan fibre backhaul incl. FTTS, ensuring the most densified networks for dark fibre and lit FTTB/FTTH nationally. Although Openserve has a larger total network, it does not supply dark fibre which is preferred by other infrastructure providers such as MNOs and FNOs, and it has fewer FTTH/FTTB premises passed. Other dark fibre providers have a considerably smaller metropolitan fibre footprint, especially outside of the major metros. This means that DFA may be the only option in many areas for MNOs/FNOs seeking new dark fibre backhaul and is most likely to have the closest proximity and lowest build distances for new connections. Vodacom is the largest MNO and has a sizeable position as both a retail ISP for FTTH and a retailer of FTTB through Vodacom Business.

602. Mr Nunes submits that the merged entity would have control over scarce upstream infrastructure that is essential to the provision of both wholesale FTTB and FTTH;[639] and without access to DFA's infrastructure, rival FNOs cannot provide wholesale FTTB or FTTH services, even if they self-build metropolitan or last mile fibre infrastructure.[640]

[639] Nunes FWB p 163 para 6.41.
[640] Nunes FWB p 166 – 167 para 6.51.3.

603. Regarding metro fibre, Vodacom's assessment is that DFA has [redacted] the market because of its dark fibre offering and its [redacted] high-quality network, with customers including the main MNOs and ISPs. It seems Openserve's presence in smaller towns and rural areas is where it has an advantage.[641]

FTTB market shares

604. FTTB infrastructure is largely provided by metro fibre networks given these networks pass businesses as they seek to find backhaul customers which may be either MNOs or businesses. This includes the MNOs that have self-built metro fibre backhaul networks.

605. DFA launched as a dark-fibre-only infrastructure provider. However, it has started providing lit FTTB (in the form of its Business Broadband product[642]) in addition to dark FTTB (in the form of its Helios and Lumic products). DFA has a growing lit FTTB presence and Vodacom has an existing and growing lit fibre presence.[643]

606. Recall that the assets that are to be transferred as part of the purchase consideration include Vodacom's FTTH and FTTB infrastructure assets and wholesale business, including contracts (with ISPs) fixed assets and software.

607. Vodacom does not only sell FTTB on its own infrastructure but also sells it on the infrastructure of other parties.[644]

608. Mr Van der Merwe of Frogfoot notes that data for FTTB (and FTTT/S) is not as readily available and the breakdown of market shares between these different technologies is less clear.[645] There was a dispute between Mr Hodge and Prof

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[641] Bundle M p 3498: Vodacom's [redacted] Discussion Materials dated September 2020.
[642] DFA's Business Broadband is a best effort FTTB product which is offered on a wholesale open access basis to ISPs. A best effort FTTB product is a contended service as no specific bandwidth is guaranteed.
[643] Nunes FWB p 169 para 6.55.
[644] Theron Transcript p 3793 lines 15 – 17.
[645] Van der Merwe FWB p 36 para 19.

Theron specifically about the number of businesses passed and connected by Vodacom with FTTB.

609. We start by considering revenue-based market shares that gives a useful big picture of the relative size of some of the different operators in the FTTB market, although businesses passed (discussed below) provide a better indication of future competition since it is not based on sales performance but on the potential customer base. We concur with Mr Hodge that "… *[businesses] passed must have weight because it shows the reach of your network and the potential to connect those businesses*".[646]

610. The revenue estimates are based on BMIT's 2022 total market size estimate and share estimates for FTTB fixed access services. BMIT indicates that revenue estimates are at wholesale prices. It is not clear whether any dark FTTB services of DFA are included in this revenue estimate and therefore the figures may understate the DFA position. However, BMIT estimate that FTTB services in terms of actual revenues are led by Telkom/Openserve ([20-30]%) and DFA ([20-30]%), who also lead metro fibre. The other metro fibre operators, Link Africa ([10-20]%) and Liquid Telecom ([0-10]%), each have less than half the share of either Openserve or DFA. MFN, which is more of an FNO, has a similar share to the smaller metro fibre operators ([10-20]%). Vodacom has a 5% share in terms of 2022 revenue.[647]

611. DFA, according to Mr Hodge's estimates based on the available information on the record (submissions from the merger parties and third parties, excluding Liquid Telecom), is the single largest FTTB provider in South Africa with the merger parties having [60-70]% of businesses passed in wholesale FTTB (2021).[648] Vumatel provides limited wholesale FTTB services to ISPs with

[646] Transcript p 3802 lines 7 – 9.
[647] Hodge EWB p 77 – 78 para 93 Figure 26.
[648] This is based on data provided by DFA to FTI for the merger filing, along with third party submissions. See Hodge EWB p 78 Figure 27 showing the estimated share of total business passed in wholesale FTTB (2021).

approximately [redacted] business customers connected via the Vumatel FTTB network.[649]

612. According to the Commission, Vodacom represents [0-10]% of the abovementioned combined figure of [60-70]%, and Herotel has a [0-10]% market share (not included in the [60-70]%, and if included adds up to a [60-70]% share for the merger parties). We note that these estimates exclude data for Liquid Telecom, and therefore the actual shares will be overstated here. We further note that there is a difficulty with the data submitted by Liquid Telecom in that they were asked by the Commission to indicate the total number of business buildings passed in metropolitan areas, but responded that in metropolitan areas Liquid's fibre network passes [redacted] "stands/erfs" (calculated using a 30m network line buffer) - thus not businesses passed.[650]

613. According to the Commission, Vodacom's FTTB network, operating on a [redacted] basis, had passed over [redacted] businesses[651] with [redacted][652] businesses connected, and it had [redacted] km of metro backhaul in 2021 to support its operations and to resale to third parties on a lit basis. Mr Joosub indicates that Vodacom's FTTB assets relate to "*fibre access routes to approximately* [redacted] *business office <u>connections</u>*".[653] (Own emphasis) He does not provide a date for this figure; his witness statement is also not dated but was filed in April 2024.

614. The Commission finds that Openserve is a much smaller player in FTTB than Maziv with a market share of approximately [20-30]% (again, excluding Liquid Telecom's figures and thus its market share is overstated here), and the rest of the market players, such as Link Africa, Octotel and Metrofibre, have small

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[649] Mare FWB p 436 para 25.
[650] Bundle M p 6866.
[651] Vodacom did not provide the number of buildings passed, but provide premises passed. However, data on overlaps provided by the merger parties shows that Vodacom's network has passed [redacted] businesses in 2021. Hodge EWB p 79 para 94 Figure 27 footnotes.
[652] Hodge EWB p 108 para 158.
[653] Joosub FWB p 321 para 7.2.

estimated market shares of [0-10]% and less. [654] Frogfoot and MTN have very small market shares.[655]

615. Importantly, Vodacom's transaction materials confirm the leading position of DFA in South Africa in terms of businesses passed. Vodacom in its Board Pack examining the proposed transaction in September 2020 considers the 'DFA Competitive Landscape', and places DFA as the market leader in both businesses passed and connected, with Openserve as the next largest player with [redacted] of businesses connected as DFA, and with [redacted] as the only other key player listed with half the kilometres of FTTB fibre and a fraction of the businesses connected. Of the smaller players, Vodacom rate [redacted] but no others – [redacted] largely operates on [redacted] dark fibre infrastructure. Vodacom estimates that DFA's network passes [redacted]% of South Africa's GDP.[656]

616. Therefore, the South African FTTB market is already highly concentrated with two significant players, DFA and Openserve, (and Liquid Telecom as the third sizeable player) with Maziv being the largest player and that market position will increase as a result of the proposed transaction.

617. We note that the original FTTB market share data for both Vodacom and DFA, as relied on by Mr Hodge,[657] was done by DFA.[658] Prof Theron disputes the figures provided for Vodacom and the associated 8% market share for Vodacom, saying that the figures provided by DFA were a "mistake".[659] She argues that a later submission by Vodacom on its own number of FTTB businesses passed was more accurate in determining the merger parties' combined market share in FTTB. She argues that the lower number of businesses passed for Vodacom accords with what is being transferred in the

[654] Hodge EWB p 79 Figure 28.
[655] This is a perspective on the players' potential customer base and not actual sales performance. This will include duplicates as the same businesses may be passed by more than one metro and FTTB network.
[656] Bundle M p 1061: Vodacom Board Presentation, Project [redacted] (20 October 2021).
[657] Together with the other players' available data.
[658] Transcript p 3794 lines 1 – 14.
[659] Transcript p 3554 lines 4 – 17.

transfer asset agreement and what Mr Joosub indicated.[660] Mr Hodge disagrees arguing that the original figures submitted for Vodacom "*seem to be reliable because it was submitted and it seems extremely detailed and assessed in that way*".[661] It is true that the original figures submitted are detailed. Mr Hodge notes "… *if you look at figure 48, incredibly detailed. This is not some rough estimate, this is down to so many in two buildings passed. And, as I understand through this transaction, because of the transfer of assets DFA would, presumably, have information on the Vodacom FTTB assets if they were to agree on a valuation as part of the transaction*".[662]

618. As indicated above, Mr Joosub (in his April 2024 witness statement) indicates that Vodacom's FTTB assets relate to "*fibre access routes to approximately* [redacted] *business office connections*".[663] Prof Theron says that Vodacom has less than [redacted] wholesale FTTB infrastructure businesses connected in South Africa in 2021.[664] We cannot reconcile these figures. This suggests to us that there is no reason not to accept the original figures for 2021 submitted to the Commission of Vodacom's FTTB network having passed ove[redacted] buildings with [redacted] businesses connected.

619. As noted above and indicated by Prof Theron, she has found figures for Liquid Telecom in the record that are not included in Mr Hodge's market share calculations of businesses passed.[665] This is correct, but as indicated the data of Liquid Telecom do not relate to businesses passed and therefore is also unreliable. This means that Mr Hodge's figures are overstated since it does not include Liquid Telecom, but we have indicated the difficulty with the data provided by Liquid Telecom, which means that Prof Theron's figure for Vodacom is understated.

660 Transcript p 3558 lines 12 – 14.
661 Transcript p 3557 lines 1 – 3.
662 Transcript p 3792 line 18 to p 3793 line 5.
663 Joosub FWB p 321 para 7.2.
664 EWB p 412 Appendix Table 15.
665 Transcript p 3554 lines 17 – 19.

620. Prof Theron testifies that because there are different metrics used i.e. distances used when reporting on business passed,[666] it is quite difficult to put together the data for FTTB.[667] She indicates that the market share results will depend on how one measures businesses passed i.e., based on what distance from the network is used as the metric.

621. There are clearly some issues with the data that we have been provided with, but what does seem apparent is that DFA and Openserve are the two most substantial operators in wholesale FTTB, with Liquid Telecom as a third but smaller operator. This is consistent with the metro fibre network size and revenue estimates from BMIT.

622. We further note that the above market shares are for FTTB wholesale (both dark and lit), without any distinction between dark and lit. Recall that Openserve, included in the above figures, does not provide lit FTTB. Prof Theron indicates "*if we're going to go to a dark market, FTTB market, that question has not been answered sufficiently in these RFIs for us to have market shares on FTTB for dark. So, for the moment I'm referring to the total market for FTTB, including both dark and lit and the only issue is I hear what Mr Hodge is saying that Openserve is not providing dark*".[668]

623. It is common cause that Vodacom at the FTTB wholesale level does not allow access to its wholesale FTTB infrastructure.[669] It is also common cause that if Vodacom's FTTB infrastructure is transferred to Maziv, it will be available on an open access basis. We deal with this aspect under efficiencies, where Mr Reynolds concedes that this aspect will not pass muster under the efficiency test applied in merger cases. What is however important to note is that, although the Transfer Assets will become open access, it will enhance the market position of the largest incumbent in FTTB, Maziv.

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666 One has to determine where fibre passes any business within a certain distance. Prof Theron indicates that sometimes it would be 500 metres; sometimes 50 metres; sometimes one kilometre. Transcript p 3794 lines 4 – 11.
667 Theron Transcript p 3793 lines 7 – 9.
668 Transcript p 3561 lines 2 – 15.
669 Theron Transcript p 3799 lines 10 – 12.

624. That DFA is the largest player in FTTB is also confirmed by Mr Van der Merwe. He indicates that with respect to businesses passed and connected, DFA's network is likely the largest. Mr Nunes indicates that DFA has near total control over upstream dark infrastructure at the national, metropolitan and FTTB levels.[670]

625. Mr Van der Merwe also notes that an important differentiator here is lit and dark services. DFA provides dark and lit fibre whereas Openserve only provides lit fibre services. This has implications for the FNOs providing FTTB or wholesale FTTH, which require metropolitan connectivity, and who may require dark infrastructure rather than lit.[671] Dark is preferred over lit because with lit services the connection speeds are limited and the price of the connectivity increases with speed. This becomes cost prohibitive when lit is used as backhaul. Also, the lit backhaul customer then becomes reliant on the lit backhaul provider's own network reliability and ability (or lack thereof) to upgrade their own network as and when additional capacity is required.[672]

626. He notes that even if some of Vodacom's network has been closed, Vodacom still competes for FTTB customers and can self-supply instead of using DFA.[673]

627. It is common cause that compared to households, i.e., FTTH customers, businesses require a higher degree of flexibility and customisation.[674] FTTB customers are also of a larger scale than individual household customers and have a more extensive set of requirements (particularly large businesses) compared to households. National FTTB customers often require services in multiple locations and are unwilling to contract with different service providers in each location. For example, a large retailer with numerous different stores and branches across the country would require an FNO to be able to service at least most of those stores or branches.[675] Since a wide geographic footprint is a

[670] Nunes FWB p 153 para 6.3.1.
[671] Van der Merwe FWB p 34 para 16.4.
[672] Van der Merwe FWB p 34 para 16.4.
[673] Van der Merwe FWB p 52 para 56.
[674] Nunes FWB p 168 para 6.51.5.3.
[675] Hodge EWB p 81 para 97.

requirement, the reliance which an FNO will have on DFA's infrastructure is higher for an FNO that wishes to have a prospective supplier of wholesale FTTB.[676] Without access to DFA's infrastructure, rival FNOs would not be able to provide wholesale FTTB services.[677]

628. Regarding FTTB overbuild, the merger parties rely on comments made by the small players in FTTB regarding the extent to which they overbuild other players (mainly Maziv and Openserve).[678] Interestingly, Prof Theron does not provide the extent to which Maziv's FTTB is overbuilt. Given Maziv's leading position in the FTTB market it is likely that the small players will have to overbuild Maziv in order to compete in the market. These smaller players are at a distinct disadvantage given their market positions. For example, Link Africa notes that approximately [redacted]% of its network is in areas where DFA also has a presence.[679] As we have indicated, the next player in FTTB in South Africa in terms of market share is Openserve, which itself is significantly smaller than Maziv. Openserve notes that only about [redacted]% (based on info as at 2019) of its FTTH/FTTB network overbuilds another FNO.[680] This shows that overbuild even in FTTB is relatively limited from the perspective of one of the larger players.

629. In relation to overbuild of DFA's infrastructure in general, Mr Nunes's evidence is that there are low rates of overbuild in most areas where DFA's infrastructure exists. He submits that market shares on their own do not yield insights into how providers compete, which is at a more localised level. For instance, due to the low rates of overbuild in most areas where DFA's infrastructure exists, there are no (or limited) alternatives to DFA in such areas.[681]

630. MTN submits to the Commission during its investigation that it is not aware that it has any FTTB infrastructure that currently lies alongside (i.e., overbuild) that

[676] Nunes FWB p 167 para 6.51.4.
[677] Nunes FWB p 166 – 167 para 5.51.3.
[678] These players have estimated market shares of 5% and below. Frogfoot and MTN have very small market shares in FTTB.
[679] Link Africa's letter to the Commission dated 25 February 2022, Answer to Questions 129.1 – 129.2 and 131, Confidential Record of Third Parties, Part B of the Record p 2287.
[680] Theron EWB p 377 para 289f.
[681] Nunes FWB p 159 para 6.26.

of a competitor. It notes that it builds fibre for FTTB based on a sell and build model. If overbuild occurred, it is because the customer ordered a service from MTN.[682] This is consistent with Mr Nunes's evidence during the hearing regarding FTTB overbuild: "*I see it less from what I've seen on metro networks that we've got availability to*".[683] However, as indicated, MTN is a small player in the FTTB market.

631. Mr Nunes further testifies in relation to the DFA footprint in general: "*So, we need to look at it in terms of potential out there. Would you see major fall off? No, because DFA has got high amount of footprint that you can't interact, you can't – people don't want to overbuild. So, some people will just have to pay this higher price and reduce or take the cost and in terms of being able to provide and remember there's not many other options. That's one of the other concerns*";[684] and alternatives are small and dispersed: "*And if possible, do I have an alternative provider that can provide it to[o]? All right, that would be small and in between.*"[685]

Non-static analysis

632. As we have indicated, the merger parties' economic experts' static approach is inappropriate in the context of assessing the horizontal effects in this merger. A static competitive assessment is deeply unsatisfactory when a merger has a defensive motive (as we have noted Maziv has) and furthermore takes place in markets enjoying substantial and dynamic growth. An assessment of dynamic competitive effects is appropriate given *inter alia* that the FTTH/FTTB space is set for a second land grab with follow-through growth for the backhaul infrastructure, driven by 5G rollout also. Recall further that Vodacom states that the metro market is expected to show strong growth driven by the deployment of 5G and expansion of the access market.[686] We have discussed Vodacom's

[682] Part B of the Record p 3557 para 89: MTN's submission to the Commission dated 23 March 2022.
[683] Transcript p 757 lines 3 – 6.
[684] Transcript p 775 line 17 to p 776 line 5.
[685] Nunes Transcript p 902 lines 15 – 16.
[686] Bundle M p 3592.

planned 5G expansion as per its submissions to ICASA when applying for additional spectrum (and further deal with it below under the public interest).

633. It is the dynamic competition that impacts on investment, pricing and innovation in the immediate future, and which will shape the future market structure and competitive dynamics more than the current structure.

634. Prof Theron asserts that the evidence relating to future increased competition from Vodacom in these markets is not robust enough for the Tribunal to consider.[687] We disagree, strategic evidence stemming from the merger parties' documents created in the normal course of business is robust and in fact more probative than documents, such as factual witness statements, prepared specifically for this merger hearing.

635. As discussed earlier, under the counterfactual, the merger parties' strategic documents show, and Mr Uys's testimony confirms, that Vodacom would pursue 'other options', i.e., alternatives to the proposed merger. It will grow its fibre footprint in both metro and FTTB and growing to be an effective and even a formidable competitor to Maziv's businesses in respect of these markets. Therefore, we submit that assessing the impact of this merger based on the current, static market shares, is flawed and that the strategic evidence contained in the merger parties' own strategic documents is sufficiently robust to determine the counterfactual and future competition dynamics absent the present deal.

636. The factual evidence has confirmed that Vodacom has a strategic imperative for infrastructure sharing and, in the counterfactual, it would look at JVs and partnerships to expand in fibre and compete with Maziv. The pro-competitive effects of Vodacom expanding without Maziv are acknowledged by CIVH in its assessment of the threats of not doing the deal, where CIVH identified the following in respect of Vodacom expanding in fibre absent the proposed transaction. This can be done [redacted] or with strategic [redacted] and [redacted]

[687] Transcript p 3345 line 6 to p 3347 line 11.

636.1. CIVH faced (i) the significant risk of losing DFA's [redacted] tenant, Vodacom, who is the largest MNO in the country, together with major revenue churn to a competitor FibreCo in which Vodacom will have a shareholding; (ii) the risk of losing R[redacted] million in revenue per annum;[688] and (iii) in addition to the above, all future new business from Vodacom which would shift to its own FibreCo (see paragraph 126.3 above).

636.2. "Vodacom will also not [redacted] products and services, resulting in [redacted] than currently forecasted [redacted] for DFA. DFA will not only [redacted] the [redacted] previously mentioned, but also stands to lose future and [redacted] from other [redacted]."[689]

636.3. CIVH would lose [redacted] insights from having no visibility of Vodacom's requirements.

636.4. Vodacom's Transfer Assets moving to a rival FibreCo, with the implications that DFA would be [redacted] as planned to match that rivalry and would be [redacted] to quickly and efficiently capture new [redacted] market share whilst mitigating downward pressures on pricing.

636.5. Vodacom's FibreCo would expand its existing routes to rooftop and indoor mobile sites in buildings to also include FTTB (see paragraph 128 above). The clear implication was that FibreCo would [redacted], resulting in further downward pressure on DFA's pricing.

636.6. It would expand the FibreCo model to [redacted] other markets on the continent (see paragraph 128 above).

688 Bundle M p 1223.
689 Bundle M p 1223.

636.7. DFA would lose the opportunity to partner with Vodacom [redacted] South Africa in order to enter [redacted] (see paragraph 128 above).

636.8. The final scenario was competitors concluding similar deals to establish their FibreCo with [redacted] to counter *Lindt* with the implication that "[redacted].[690]

637. The above illustrates the dynamic competitive landscape that will exist absent the proposed deal, and the competition lost from Vodacom if the proposed transaction were to be implemented. If the merger were to be implemented, all the above-mentioned pro-competitive benefits of future competition from Vodacom (and potentially others), seen by Maziv as a massive threat to its businesses with impacts on its pricing, will be lost.

638. It is apparent from this DFA/Vumatel assessment that a counterfactual where Vodacom establishes a TowerCo and FibreCo (with partners other than CIVH), is expected to result in a competitor to CIVH with the effect of not only lost business from Vodacom (a private loss), but also downward pricing pressure for all its services as FibreCo competes for share (a market wide social gain). That downward pressure resulting from lower pricing by FibreCo in an effort to secure market share will put downward pressure on DFA/Vumatel pricing, and presumably other market participants too. It is also likely to result in a more rapid rollout of infrastructure as competition intensifies for the land grab in FTTB/FTTH.

639. The above evidence is corroborated by the evidence of Mr Van der Merwe who confirms that Frogfoot would jump at the chance of rolling out behind Vodacom: "… *the reason why nobody would go and build or a replica of DFA's network is because the business case doesn't exist anymore to connect all these towers*

[690] Bundle M p 1223.

all across the country. Now, were such an opportunity to arise, I think lots of FNOs would jump at the opportunity to create that. So, I think Vodacom here hold – is the gatekeeper. They hold the key".[691] (Own emphasis).

640. Mr Van der Merwe explains that because Vodacom has so many base stations (as the largest MNO) that need to be connected, a business case truly exists to overbuild DFA or to give an offtake agreement to another FNO that results in an overbuild.[692]

641. The above shows that the threat from increased competition from or facilitated by Vodacom to Maziv is not merely academic and can be implemented in practice. Having a large anchor tenant in the form of Vodacom, as the largest MNO in South Africa, with a large demand, will derisk associated investments for other competitor FNOs. This means that Vodacom is uniquely placed, given it size, to facilitate entry and/or expansion. The proposed merger eliminates this, as Maziv's strategic documents confirm, and this substantially lessens future competition.

642. Mr Van der Merwe further explains what the current dynamics are and how the proposed transaction will change those dynamics: Vodacom at present is a large counterweight to DFA both as being its largest customer and as a player which poses the threat of overbuilding DFA – importantly, whether Vodacom elects to do so or not.[693] In that context, he explains the relevance of Vodacom to DFA's pricing and service decisions. He indicates that pre-merger DFA is disciplined by Vodacom in that if DFA substantially increased its prices or deteriorates its services to Vodacom it would risk alienating its largest customer, Vodacom.[694] He points out that with the proposed merger this continuous threat disappears: "*In fact, the opposite then exists, because I [Maziv] have a ROFR with Vodacom, so basically as long as it suits Vodacom they will always give me [Maziv]*

[691] Transcript p 235 lines 11 – 16.
[692] Transcript p 233 lines 9 – 15.
[693] Transcript p 102 line 16 to p 103 line 14; p 235 lines 14 – 18.
[694] Transcript p 103 lines 3 – 6.

business and they would basically offset the business that I [Maziv] lose from other third party operators".[695]

643. The ROFR, which derives from the Transfer Assets Agreement, is included in the merger parties' final tendered conditions (clause 5.3.).[696]

644. The ROFR to supply all of Vodacom's fibre requirements for mobile backhaul and FTTB compounds the merger-specific competition concerns and has important implications for future competition and market concentration. This ROFR is likely to give Maziv, as the largest incumbent in FTTB and a large player in metro fibre, a distinct advantage in expanding its market positions further in terms of all new fibre network build – importantly, during a future period of infrastructure growth. Maziv also identifies as part of the pros to the transaction, that the "*Vodacom* [redacted] *products*".[697]

645. We note that the merger parties were not willing to divest the metro and FTTB Transfer Assets to remove any overlap between them. Prof Theron is questioned about this and responds as follows: "… *why should you offer a divestment if there's no significant increase? Remember in FTTB we're talking about less than 1% and in metro also very small percentages. So, why should you offer a divestment?*".[698] We have dealt with the fact that Prof Theron's FTTB market share estimates for Vodacom appear understated. We do not find her argument persuasive, as we have shown, the Transfer Assets are significant in size and collectively are valued at approximately R4.2 billion. The more plausible explanation for the merger parties' unwillingness to divest in our view is that they

[695] Transcript p 103 lines 10 – 14.
[696] This clause reads: "*The requirements in clause 5.1.2. shall not preclude the Maziv Group from offering the Maziv Group, the Herotel Group or Vodacom SA Group prices that are lower than the standard rate card prices in instances where discounts are given in order to match a legitimate alternative competitor quote received by the Maziv Group, the Herotel Group or Vodacom SA Group for the same product or service, provided that Maziv Group notifies the Commission and the Monitoring Trustee of such discounted price and provides the Commission and the Monitoring Trustee with evidence of the alternative competitor quote that the discounted price seeks to meet* …"
[697] Part A of the Record, p 1267 – 1268: CIVH Board Pack Meeting dated 27 October 2021, Slide 45 'Key Transaction Considerations (DFA)',
[698] Transcript p 4168 lines 3 – 21.

did not want to see these assets move to a competitor(s) and strengthen their market position(s) and ability to compete with Maziv post-merger. The implications for Maziv not getting hold of the Transfer Assets are that DFA would be unable to expand its network footprint as planned to match rivalry and would be unable to quickly and efficiently capture new FTTB market share (see paragraph 127 above, and below discussion of DFA's ambitions to grow in FTTB.

646. Whilst Vodacom does not wholesale its FTTB, it still competes for overlap customers with DFA FTTB where there are overlaps, and Vodacom's final customer pricing will directly impact DFA's customers, and through them, DFA demand and pricing. The merger will reduce this competition and provide scope for higher pricing by DFA in the future for the buildings passed where the parties overlap ([redacted] buildings according to Hodge, based on Vodacom total buildings passed [redacted] and DFA total businesses passed [redacted]).[699] As we have indicated the important issue is that the Transfer Assets further enhance Maziv's metro and FTTB market positions.

647. As we have further indicated, there is correlation between metro fibre and FTTB rollout. FTTB infrastructure is largely provided by metro fibre networks given these networks pass businesses as they seek to find backhaul customers which may be either MNOs or businesses. In the counterfactual absent the proposed transaction, Vodacom will grow both its metro fibre and FTTB offering which will enhance future competition[700].

648. Mr Van der Merwe speaks to the implications for Maziv of future competition from Vodacom. Future competition from or facilitated by Vodacom would result in a massive loss in market share for DFA, "*disrupting DFA's network completely*".[701] This is consistent with CIVH's strategy documents that indicate that the ultimate result of increased competition from a [redacted] is

[699] Hodge EWB p 110 – 111 para 165 Figure 48.
[700] See Hodge EWB p 48 para 26. Bundle M p 1256 – 1257: CIVH Board Pack of 27 October 2021 (Part A of the Record p.1267/8).
[701] Transcript p 102 line 21 to p 103 line 6; p 235 line 18 to p 236 line 9.

"[redacted] *one of the providers of choice to the industry, due to the emergence of preferred new competitors that now have a shareholding*."[702]

649. As indicated, the evidence is that the FTTB market is dominated by DFA, with more than [redacted] the number of businesses passed than Openserve. Vodacom's FTTB network will add to its already dominant size giving it even more scale. We have also dealt with the implications of the ROFR for future competition and concentration.

650. In relation to FTTB, absent the opportunity of securing Vodacom's FTTB assets, DFA would be unable to quickly capture new market share without causing downward pricing pressure. As Vodacom extends its fibre to support rooftop and in-building mobile sites, selling FTTB in those buildings at incremental cost, this is likely to bring further downward pressure on DFA's pricing.

651. In summary, the proposed transaction changes the market dynamics: (i) there no longer is the pre-merger looming and continuous threat which disciplines DFA (in its pricing and other decisions) as there is no fear of alienating and losing its biggest customer, Vodacom, compounded by the ROFR (included in the tendered conditions); and (ii) if the Vodacom constraint disappears, DFA will be able to profitably increase prices. Increased prices will mean that costs for FNOs (and other purchasers of metro connectivity like MNOs) will rise, which will in turn feed through to ISPs and end-consumers.

652. Vodacom, due to its size and its commercial significance, is uniquely placed to credibly cause or facilitate increased competition for Maziv. Indeed, Vodacom sees the current market conditions as an important point for it to accelerate its fibre presence through both a TowerCo and FibreCo strategy. It using its R6bn cash from the CIVH proposed transaction to invest in competition, along with its significant fibre assets, (i) represents a significant threat that disciplines Maziv; and (ii) would change the market dynamics - DFA would lose its largest anchor

[702] Bundle M p 1223.

tenant, with Vodacom's revenue churning to the rival FibreCo along with all new business.

653. Indeed, Vodacom pursuing other options and the prospect of more competitive pressure on Maziv in the alternative played a large role in it agreeing a transaction, and on terms that favour Vodacom from a co-control and asset valuation basis. The very real threat of Vodacom expanding and competing more aggressively with Maziv in metro fibre and FTTB is confirmed by the strategic documents. Based on these strategic documents absent the proposed transaction, Vodacom would have expanded independently of Maziv, prompting Maziv to ultimately agree to this transaction to avoid dynamic future competition.

654. The proposed deal changes the future dynamics, since Vodacom would establish a TowerCo, as it has already done, but that TowerCo would source fibre from Vodacom's FibreCo, which would further significantly alter the market resulting in a loss to Maziv of existing and future Vodacom revenue. Vodacom TowerCo will then be positioned to provide an integrated wholesale mobile backhaul offer to other MNOs, resulting in DFA losing existing and future revenue from other MNOs. This would clearly increase competition for mobile backhaul and bring competitive pressure on DFA pricing for FTTS.

655. The land grab nature of fibre competition means that stronger dynamic competition results in *inter alia* more innovation and lower pricing. In contrast, the proposed transaction will reinforce and strengthen market concentration, with negative implications for the long run structure and competition to the detriment of consumers.

Conclusion

656. The markets concerned, which are expected to grow rapidly, compel us to take a non-static approach and consider future dynamic competition. For all the above reasons, we conclude that the proposed transaction, which eliminates Vodacom as a future competitor, will substantially lessen future dynamic

competition in metro fibre and FTTB to the ultimate detriment of South African consumers.

PORTFOLIO EFFECTS

657. The Commission and MTN contend that the proposed transaction is likely to result in a substantial prevention or lessening of competition through portfolio effects, specifically bundling.

658. The Commission submits that bundling can take the form of offering fixed and mobile services. This will allow an operator to 'own the home' by supplying all the household's communications needs in a single package and can also include complementary services that make use of connectivity (e.g., streaming and security) and equipment to support the connectivity.[703] 'Owning the home' is considered an attractive proposition for operators to increase ARPUs and helps reduce churn rates to competitors as they are able to offer the customer all the products they require. This is documented in MTN's February 2023 strategy documents where the benefits of fixed-mobile bundles are identified as "*owing the* [redacted] *to* [redacted] *of services,* [redacted] *and* [redacted] *through* [redacted]".[704]

659. MTN's strategy documents of December 2021 show that it is concerned about the Vodacom/Maziv deal that [redacted] *business. VC selling* [redacted] *and* [redacted] *into an existing customer base will* [redacted] *impact MTN's* [redacted] *and* [redacted]".[705] MTN convened a board meeting to respond to the threats posed by the Vodacom/Maziv deal and a resolution was taken that MTN should consider [redacted] or [redacted] to avert the threat of Vodacom/Maziv bundles.[706]

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[703] Hodge EWB p 124 para 192.
[704] Bundle O p 231.
[705] Bundle O p 2 – *MTN SA - FTTX Way Forward Role of Fibre and Options to Consider* dated December 2021.
[706] Commission HOA p 126 para 303.

660. The merger parties through Mr Scheffer of Vodacom argues that pre-merger, Vodacom can offer bundling and has tried to market fixed and mobile bundles in the past but has been unsuccessful.[707] In particular, Mr Scheffer states that "*Vodacom started offering a bundle consisting of a Vodacom fibre ISP product and a mobile product in 2018 and later tried a mobile and FWA bundle*" but was only able to achieve a take-up of [redacted] sales on the fibre-mobile bundle and [redacted] sales on the FWA-mobile bundles as at October 2023.[708] Mr Scheffer indicates that after investigating the reasons for the failure, Vodacom decided to discontinue bundles.[709]

661. Mr Reynolds rejects the bunding theory of harm on the basis that (i) the majority of customers purchase the products individually; (ii) bundles are already offered in the market without market impact; (iii) international experience show low take-up of bundled offers; and (iv) customers in low-income areas where fibre deployment will be happening are unlikely to sign long-term contracts.[710]

Our assessment

662. We first consider what bundles the merger parties could offer after the proposed merger since Vumatel's wholesale FTTH operations and DFA's wholesale FTTB operations would be combined with Vodacom's wholesale FTTB and retail FTTx operations, offering:

662.1. Maziv (as an FNO) will post merger have access to Vodacom's mobile retail subscriber base, which is the largest in the country, as well as its FWA capability; and

662.2. Vodacom (as an FNO/ISP) with a substantial customer base in retail connectivity – will have access to Maziv's fibre infrastructure (including DFA's 'tree trunk') and strategic information (including Vumatel's FTTH and DFA's FTTB rollout plans).[711] Given our above discussion of Herotel, the

[707] Scheffer FWB p 246 para 59.
[708] Scheffer FWB p 246 para 59.
[709] Scheffer FWB p 246 – 248 paras 60 to 65.
[710] Transcript p 3672 line 20 to p 3676 line 20.
[711] Nunes FWB p 165 – 168 para 6.49 to 6.51; Exhibit BP Smith's Slide 56; Smith Transcript p 3679 line 1 to p 3681 line 22.

same could well be true of Herotel's fibre infrastructure and confidential strategic information.

663. We next consider the post-merger 'Vumatel bundle' that MTN contends is irreplicable.

664. MTN submits that post-merger the merger parties could, before rolling out fibre infrastructure in an unserved secondary area, use Vodacom's (largest) mobile retail subscriber base and data[712] as a springboard off which to capture fibre customers by offering residents a bundled combination of mobile and fibre products and services.[713]

665. MTN gives the following example of how in practice the merged entity will market a bundle in the context of Vumatel's provision of open access FTTH connectivity: Vumatel would share with Vodacom its rollout plan for the area to afford the merged entity a decisive first-mover advantage, whilst Vodacom would share with Vumatel its area-specific subscriber information to enable focused and effective marketing. Vodacom ISP would then offer to Vodacom subscribers and other residents of the area a bundled internet access product/service comprising: (i) Vodacom will immediately provide FWA connectivity at discretionary (or potentially non-discriminatory) pricing;[714] (ii) Vumatel will in due course provide FTTH connectivity at discretionary (or potentially non-discriminatory) pricing;[715] and (iii) in relation to both FWA and FTTH connectivity, ISP services to be provided by

[712] Smith EWB p 256 and 257.
[713] Motlekar FWB p 12 para 25; Van der Merwe FWB p 51 – 52 paras 54 to 55; p 56 para 73; Nunes FWB p 165 paras 6.49 and 6.50; p 169 – 171 paras 6.56 to 6.64; Smith EWB p 278 para 251; Van der Merwe Transcript p 103 line 14 – p 104 line 8; Masalesa Transcript p 329 line 15 – p 332 line 12; Exhibit BP Smith's Slide 55.
[714] Absent any FWA pricing condition, Vodacom could discount its ordinary price for FWA to entice the retail customer to buy the bundled product or service, bearing in mind that Vodacom would share in 30-40% of Maziv's FTTH profits. If subject to a non-discrimination condition, Vodacom may have to offer the same FWA price to both wholesale and retail customers but would still enjoy its share of the FTTH profits.
[715] Absent any FTTH pricing condition, Vumatel could discount its ordinary price for FTTH to entice the retail customer to buy the bundled product or service, bearing in mind that a controlling shareholder, Vodacom, would share in 30-40% of Maziv's FTTH profits. If subject to a non-discrimination condition, Vumatel may have to offer the same FTTH price to both wholesale and retail customers while Vodacom would still enjoy its share of the FTTH profits.

Vodacom ISP at discretionary pricing.[716] Once the fibre infrastructure was rolled out in the area (which would be open access in the case of Vumatel) the merged entity could increase its FTTH and ISP pricing – to FNOs, ISPs and/or retail customers – without there being any real risk of over-building by a third party.[717]

666. MTN argues that it and Supersonic would not be able to replicate or rival the Vumatel bundle for the following reasons:[718] (i) MTN/Supersonic would not have access to Vumatel's rollout plan; (ii) MTN/Supersonic would not have access to Vodacom's extensive retail subscriber information; (iii) at best MTN/Supersonic could offer to MTN subscribers and other residents of the area a bundled internet access product/service comprising: (a) FWA connectivity to be provided immediately by MTN at discretionary pricing. MTN submits that although it could theoretically discount its ordinary price for FWA to entice the retail customer to buy the bundled product or service, the rationality of doing so would be undermined by the fact that MTN would not share in any percentage of Maziv's FTTH profits; (b) FTTH connectivity to be procured in due course from Vumatel or other FNO with network infrastructure in the area (if any), at discretionary (or potentially non-discriminatory) pricing, the cost of which would have to be borne by MTN qua reseller or passed on to the customer. MTN again submits that the rationality of doing so would be undermined by the fact that MTN would not share in any percentage of the FTTH profits; and (c) in relation to both FWA and FTTH connectivity, ISP services to be provided by Supersonic at heavily discounted pricing to offset the cost referred to in (b) above. MTN submits that the rationality of doing so would be undermined by the fact that Supersonic – already subject to low margins characteristic of the ISP market segment – would not share in any percentage of the FTTH profits. Once the merged entity rolled out fibre infrastructure in the area, MTN/Supersonic would have to bear or pass on any

[716] Absent any ISP pricing condition, Vodacom ISP could discount its ordinary price for ISP to entice the retail customer to buy the bundled product or service, bearing in mind that Vodacom would share in 30-40% of Maziv's FTTH profits.
[717] Transcript p 630 line 20 to p 633 line 17; Exhibit BP Smith's Slide 56; Smith Transcript p 3332 lines 7 – 9.
[718] Nunes FWB p 169 to 171 paras 6.56 to 6.64.

increased FTTH pricing without there being any reasonable prospect of over-building by a third party.[719]

667. MTN further argues that no other FNO or ISP (e.g. Frogfoot and Vox) would be able to replicate or rival the Vumatel bundle because:[720] (i) the FNO/ISP would not have access to Vumatel's rollout plan; (ii) the FNO/ISP would not have access to Vodacom's extensive retail subscriber information; (iii) at best for the FNO/ISP, it could offer to residents of the area a bundled internet access product/service comprising: (a) FWA connectivity to be procured immediately from Vodacom or other MNO with network coverage in the area (if any), at discretionary (or potentially non-discriminatory) pricing, the cost of which would have to be borne by the FNO qua reseller or passed on to the customer. MTN submits that the rationality of doing so would be undermined by the fact that the FNO would not share in any percentage of the FTTH profits; (b) FTTH connectivity to be procured in due course from Vumatel or other FNO with network infrastructure in the area (if any), at discretionary (or potentially non-discriminatory) pricing, the cost of which would have to be borne by the FNO qua reseller or passed on to the customer. MTN submits that the rationality of doing so would be undermined by the fact that the FNO would not share in any percentage of the FTTH profits; and (c) in relation to both FWA and FTTH connectivity, ISP services to be provided by the ISP at heavily discounted pricing to offset the costs referred to in (a) and (b) above. MTN submits that the rationality of doing so would be undermined by the fact that the ISP – already subject to low margins characteristic of the ISP market segment – would not share in any percentage of the FTTH profits. Once the merged entity rolled out fibre infrastructure in the area, the FNO/ISP would have to bear or pass on any increased FTTH pricing without there being any reasonable prospect of over-building by a third party.[721]

668. As indicated above, the merger parties argue that past bunding efforts have not been successful. Curiously however, despite Vodacom's [redacted] in the past with bundling, Vodacom has [redacted] this strategy, and it [redacted]

[719] Transcript p 633 line 18 to p 635 line 6; Exhibit BP Smith's Slide 56.
[720] Nunes FWB p 169 – 171 para 6.56 – 6.64.
[721] Transcript p 635 line 7 to p 636 line 10; Exhibit BP Smith's Slide 56.

[redacted] as detailed in a recent document dated August 2023.[722] Importantly however past bundling does not take into account the merger-specific advantages and bundling opportunities as articulated above by MTN. Bundling remains a potential strategy in the long-term plans for Vodacom and CIVH, but also MTN.

669. As explained above, the proposed merger brings about opportunities for consolidation, access by Maziv to Vodacom's large subscriber base, and unique opportunities to discount given Vodacom's share in FTTH profits as a result of the proposed transaction. An important aspect of any successful bundling strategy would be scale, which the proposed merger provides to (i) Maziv in terms of FWA/mobile; and (ii) Vodacom in terms of FTTH and FTTB. In other words, Vodacom will have access to the scaled FTTH and FTTB network of Maziv, and Maziv will have access to Vodacom's large scale mobile network. This then creates a conducive partnership for bundling in the context where Maziv has already considered [redacted] for its [redacted] business to improve its overall offer.[723]

670. Therefore, although past bundling may not have been as unsuccessful, and that customers tend to buy the relevant products separately pre-merger, the scale advantages that this merger affords the merged entity will enable such a bundling strategy. Mr Hodge notes "*…you've got a* [redacted] *which is August 2023, now a year old. And over on the next page an MTN plan B update. This is in relation to responding to this transaction, but this is February 2023. So, despite the apparent lack of success, this* [redacted] *of Vodacom, and it remains part of the ambition of MTN as well. And I would probably say there's a good reason for this is because if you look at the bundle, this is going to be targeted at your wealthier consumer because your starting price, if you have bundled the many products together is going to be a more expensive monthly offering. And if you look at the Vodacom approach, it's also looking to cross sell, upsell a whole range of other value-added offerings in the market where it's bound to be a wealthier customer*. [...]. *if you get it right and your competitor doesn't, your main*

[722] Bundle M p 12863.
[723] Exhibit BW p 24: CIVH Group Strategy Session dated 2 February 2022

competitor here being MTN who has high value customers, well then you could weaken them and that is precisely the concern that MTN has when it hears about this transaction …".[724]

Conclusion

671. The merger parties' own strategic documents reveal that bundling [redacted] post-merger and the proposed merger would, due to its size and other advantages from the combination, enable them to execute this strategy. Successful bundling as a result of the merger would further entrench the dominance of Maziv in fibre and entrench Vodacom's market position in mobile. Therefore, post-merger bundling is a merger-specific concern.

VERTICAL EFFECTS

Control and the incentive to foreclose

672. Prof Theron argues that the structure of the proposed transaction does not create an incentive to foreclose, and that Maziv will not have an incentive to preference Vodacom.[725] She premises this argument on the assertion that Maziv will not own a share of Vodacom and will thus have no profit incentive to align its interests with those of Vodacom at its expense.

673. In our view this is to take a relatively binary view of the theory regarding incentives, how they change through major transactions such as this one, and the strategic and commercial weight of the affiliation and alignment that a merger of this nature creates between firms.

674. We have dealt with post-merger incentives above considering *inter alia* the merger parties' strategic documents and we have seen no evidence or documents in which Maziv and its shareholders asserted that they did not see

[724] Transcript p 3669 lines 11 – 22, p 3670 line 1, p 3670 lines 21 – 22, p 3671 lines 1 – 2.
[725] Theron EWB p 366 – 368.

an alignment with the wider Vodacom business. To the contrary, the evidence we have been presented shows that Maziv perceives significant opportunities through an alignment with Vodacom, no doubt evidenced and shaped by ongoing and previous interactions between Maziv's primary shareholder CIVH and the Vodacom group at large including in relation to partnerships in South Africa as well as other countries in Africa.

675. If the above holds such that Mr Smith, Mr Hodge and Mr Johnson are correct regarding the association and incentives created structurally by the merger, then it should follow that Prof Theron's first key premise on which she bases the majority of her arguments in relation to vertical foreclosure must fail. It seems to us that the theory does not posit a binary lens in which a firm either has absolute control at 50% and beyond with fully aligned incentives, or none at all. This merger is also not one in which anyone could credibly argue or accept that the significant minority shareholding being acquired by Vodacom, which we note is associated with significant, relatively uncommon rights beyond those typical of a minority shareholder, cannot attribute some forms of preference, alignment or indeed economic incentives to favour Vodacom and its interest in Maziv board decision-making and strategy over those of others. One only needs to consider a scenario in which a proposition is being considered at board level in which a particular innovation or investment by Maziv would benefit it, but could in all likelihood be expected to, in some way, erode the competitive position of Vodacom. As a Maziv board member, Vodacom would surely resist such a position. An example might be if Maziv ever sought to obtain an operator's license or spectrum in a manner that might place it in competition with Vodacom or sought to invest in a firm that competes with Vodacom.

676. As we have indicated in the section above dealing with incentives, in this transaction Vodacom is far from being a passive shareholder in the general sense and indeed has rights which would allow it to at the very least shape key decisions of Maziv over time. In a dynamic and evolving market this is a significant risk that we perceive to the extent that it might lead to various anti-competitive outcomes or anti-innovation outcomes over time. Prof Theron

acknowledges in her report that there is at least minority controlling interest being acquired. MTN argues that indeed significant influence is likely and it would be contrary to the facts of this case to ignore the possibility and import of such influence.

677. While we accept the argument that the transaction does not present a full integration of the mobile and downstream business of Vodacom with that of Maziv, we find that the position of minority shareholding, and the strategic documents of CIVH and Vodacom support a view that there is likely to be an alignment at a strategic level between Maziv and Vodacom and their commercial interests. This is precisely at the heart of the concerns raised by MTN and Rain because of the likely alignment of interest of the large fibre infrastructure provider capabilities of DFA and FNO position of Vumatel, to the detriment of MNOs. As Hodge puts it, "*Maziv may not hold an interest in Vodacom, but it has a vested interest in its success and Vodacom exerts co-control over Maziv*".[726]

678. In the context of this case one should do a comprehensive assessment of the ways in which the firms might choose to associate or align their strategies, noting incentives are not binary and certainly cannot only be assessed as being about differences, in this case, in upstream wholesale margins which are said to be larger than downstream retail margins. This would be to obscure the full picture that has emerged from our inquisitorial process and in particular our assessment of submissions by witnesses as well as particularly the strategic documents of the merger parties.

679. Ultimately, the documentary and other evidence suggests that Maziv does not see itself as simply receiving a financial injection from Vodacom akin to that which would be made by an investment bank with unrelated business activities, a general shareholder in a large, listed firm, or a minority rights shareholder with limited interest or powers. Our analysis of the vertical theories of harm departs from this understanding.

[726] Hodge EWB p 134 para 211.

680. In what follows, we evaluate the three vertical theories of harm based on the vertical overlaps arising as put forward by the Commission, namely: i) foreclosure of metro backhaul to MNOs; ii) foreclosure of metro backhaul and dark FTTB used by FNOs; and iii) foreclosure of access to wholesale FTTH/B used by retail ISPs and for business.

VERTICAL OVERLAP 1: FTTS AND FORECLOSURE OF METRO BACKHAUL TO MNOS

681. We begin with an assessment of the theory of harm put forward by the Commission (and Mr Hodge), MTN and Rain that the merged entity would have the ability and incentive to foreclose MNO rivals of Vodacom of access to FTTS infrastructure. This theory of harm arises due to the vertical overlap that the merger would create in the provision (upstream) of metro dark fibre on the one hand, and retail mobile products and services typically offered by MNOs downstream on the other.

682. The input foreclosure theory of harm pertains to DFA's market power in the upstream market for the supply of dark fibre access to various MNOs including Vodacom. As noted earlier, MNOs utilise and depend on access to DFA's FTTS infrastructure to facilitate interconnections between cell towers to support the provision of primary mobile communications services (mobile voice and data, and FWA etc.) to their customers. In particular, DFA provides its dark fibre products, primarily Titan, to MNOs such as Vodacom, Rain and MTN, that procure Titan links to provide mobile telephony tower connections referred to as FTTS. It is the alleged dependence of MNOs on DFA for Titan access primarily that gives rise to the claim that the merged entity would have the ability to foreclose.

683. Titan is categorised as wholesale metropolitan fibre backhaul. It is a dark fibre product, meaning that the product does not transmit data. Customers need to "light" the fibre using their own equipment to enable data transmission.[727]

[727] Mare FWB p 434 para 16.

684. In terms of the incentive to foreclose, the concerns of rival MNOs and the Commission can be distilled as follows. Pre-merger, DFA has no incentive to favour Vodacom over other MNOs in the provision of access to Titan and other dark fibre infrastructure. The proposed merger alters this position. Post-merger an MNO will have a significant shareholding and co-control in Maziv, and DFA will have an incentive to advantage Vodacom over its rivals through price and non-price mechanisms.

685. The concern therefore is that the merger leads to a change in incentives such that Vodacom may cause DFA to engage in input foreclosure of MNO competitors primarily through the provision of services to Vodacom on preferential terms.[728] The alignment of interests and operations of DFA as a fibre infrastructure provider and Vodacom as an MNO creates a risk of substantial price and non-price discrimination or self-preferencing in favour of Vodacom.[729]

686. In terms of non-price factors, the concern relates to preferencing such as on the timing of fibre network rollout, coverage, capacity, speed and quality, or inferior terms in the repair of faults.[730] It is also alleged that DFA would have the incentive to prioritise Vodacom in terms of the rolling out of fibre infrastructure to areas preferred or required by Vodacom rather than where its competitors need infrastructure.[731] It might also 'sunset' or reduce access to products that are important for rivals in favour of those relied upon by the merger parties or lit products, for example.

687. In terms of prices, Mr Smith and the Commission raise that the proposed merger will reduce the risk of Maziv's largest mobile backhaul customer (Vodacom) switching away. In terms of prices charged by Maziv to MNOs post-merger, Mr Smith's view is that the reduced risk of Maziv's largest mobile backhaul customer

[728] Rain HOA p 5 para 8.1.
[729] MTN HOA p 65 para 82.
[730] MTN HOA p 65 para 82; Rain HOA p 7 para 14.
[731] Rain HOA p 8 para 14.4.

switching away is likely to incentivise Maziv to increase the prices it charges for Titan to MNOs. While Maziv may lose some Titan profits in the event that rival MNOs reduce their demand for Titan, the proposed transaction, and the resulting alignment of Maziv and Vodacom's incentives are likely to make (even market wide) price increases more attractive and more likely. This is for two key reasons:

687.1. Maziv is likely to perceive a reduced risk of Vodacom – its largest customer and substantial shareholder – switching away. Vodacom is the [redacted] customer of DFA's [redacted] product. A reduced risk of its largest customer switching away (or self-building) is likely to result in Maziv becoming more confident to increase prices. His Figure 14 shows the breakdown of DFA's revenue derived from Titan sales over FY2023. According to the figure, Vodacom accounts for [redacted]% of DFA's Titan revenues, with Cell C, Rain and MTN accounting for [redacted]%, [redacted]% and [redacted]% of DFA's Titan revenue, respectively.

687.2. Moreover, Vodacom's self-built mobile backhaul (which currently constitutes [redacted]% of its mobile backhaul) would be transferred to DFA post-merger. This would not only increase Vodacom's reliance on DFA to around [redacted]% but would also increase Vodacom's importance as a customer of DFA. This is likely to reinforce the merged entity's incentive to increase prices to MNOs (even on a market wide basis).

688. Rain[732] and MTN argue that a partial rather than full input foreclosure strategy may arise as a result of the merger, with significant anti-competitive effects on (competition between) MNOs. It is unlikely that the merger parties would seek to totally foreclose third-party MNO customers due to the revenues derived from those sales and Maziv's open access model. In this regard, Mr Hodge notes as follows regarding the theories of harm presented by the Commission:

> "*As Maziv operates open access networks, earning revenue from a broad set of customers, foreclosure is less likely to take the form of a*

[732] Rain HOA p 8 para 15.3.

complete refusal to supply as against all customers, and more likely to take the form of preferential treatment of Vodacom as MNO / ISP and its own expanded network and selective refusal to supply. One means would be through prioritisation of Vodacom (MNO and ISP) requirements, enabling them to secure new opportunities first, and delaying services requested by rivals where they overlap. Preferential pricing is another means, using discounts notionally justified by volumes or bespoke arrangements where rivals would not even be aware. Selective refusal to supply could be targeted at a single customer, such as MTN as the closest rival, or at locations where the parties seek a first-mover advantage, such as the land grab or 5G coverage. Lastly there is a foreclosure to dark fibre involving a shift to lit fibre".[733]

689. Mr Hodge accepts[734] that differential pricing is unlikely to affect competition downstream given that the costs of FTTS metro fibre access constitute a small proportion of total MNO costs of provision.

690. In relation to this theory of harm, both MTN and Rain are unequivocal in their assertions that if the merger was approved without effective remedies it is likely to result in a substantial prevention or lessening of competition. These parties believe that the concerns can be remedied through the conditions proposed by the merger parties, while the Commission believes that the concerns cannot be addressed by the conditions.

691. Lastly, an additional concern arises in relation to information sharing and the business plans of Maziv, and the ability of Vodacom to view information of its competitors and to shape investment and strategy decisions of Maziv. This is related to the information exchange concern expressed by *inter alia* Rain, in arguing that Vodacom would have access to its commercially sensitive information.[735] This is on the basis that Rain and other MNOs share highly sensitive information with DFA in the ordinary course, including network rollout

[733] Hodge EWB p 133 – 134 para 211.
[734] Transcript p 4047 lines 4 – 5.
[735] Rain HOA p 9 para 16.

plans six to eight months in advance, so that DFA can set up requisite infrastructure. In the hands of a competitor, Vodacom, such information could be used by it to gain a first-mover advantage by offering services in those areas first.

692. Relatedly, Mr Hodge contends that Vodacom would need to share information regarding its fibre requirements with Maziv to be incorporated into Maziv's business plan. The nature of the information would be such that Vodacom could deduce from Maziv's business plan, as a member of its Board, the requirements and expansion plans of its MNO rivals and could shape Maziv's capex decisions accordingly.

693. The merger parties do not strongly contest the concern regarding the potential flow of competitively sensitive information post-merger. They hold that the proposed conditions would be sufficient to address the concern. We agree that such a concern exists and that it is significant from a competition perspective. As it is not contested, we do not deal with it in the analysis to follow although we will consider the matter in our evaluation of the proposed conditions further below.

Ability to foreclose rival MNOs

Change in market structure

694. As we have indicated, DFA is dominant in the upstream market for the supply of dark fibre, with approximately [80-90]% national dark fibre market share (by 2021 revenues) in the provision of metro dark fibre.[736] Only three players offer dark fibre on an open access basis (DFA, Link Africa with approximately [0-10]% market share, and Liquid Telecom with approximately [0-10]% share). We have above found that dark and lit fibre constitute separate relevant product markets and note that MNOs rely predominantly on dark fibre infrastructure access for FTTS connectivity.

[736] MTN HOA p 64 para 81; Rain HOA p 6 para 11.1; Commission Report p 431.

695. Prof Theron states, based on an internal document of Maziv, that the shares of Maziv for the provision of mobile backhaul/FTTS are only approximately [30-40]% as at the end of 2022. The related approximation of Vodacom's share is approximately [0-10]% based on the number of links.[737] In this estimation, Telkom is said to have the largest share of the market at around 59%.[738] However, we note that Prof Theron recognises that in the narrower, dark fibre-only FTTS market, DFA's shares are very high and in the region of [80-90]%, with her main argument being that the merger does not lead to a significant change in this market and that regard must be had to any change in incentive post-merger.[739] Our analysis uses this estimate of DFA's market share throughout.

696. Prof Theron explained in the hearing that Openserve (affiliated with Telkom) has a larger network but does not provide dark fibre access.[740] However, her argument is that Openserve "can switch immediately" to provide dark fibre access, given there are no *technical* constraints as confirmed by Telkom/Openserve[741]. We identified concerns with this approach.

697. We understand that while Openserve has a large dark fibre network measured in links or kilometres, in reality its network is not presently available to other MNOs for mobile backhaul because *commercially* it is Telkom/Openserve's business model to offer lit rather than dark fibre access to different third-party customers, just as it was DFA's to offer dark fibre products until recently.

698. Openserve does not extensively provide dark fibre for mobile backhaul access, at least not to some other MNOs competing with Telkom downstream (for example, MTN does not procure a significant proportion of dark fibre Titan or

737 Theron EWB p 393 para 367.
738 BMIT estimate, Theron EWB p 394 para 367.
739 Transcript p 3774 lines 1 – 9.
740 Exhibit BQ Theron's Slide 8.
741 Part B of the Record p 5324 para 14.2.

Titan-like products from Openserve[742]).[743] The fact that Vodacom has some dark fibre infrastructure but has chosen for its own commercial reasons not to provide access to this infrastructure to third parties (other than in limited [redacted])[744], and that third parties "can't go and contract with Vodacom"[745] for this access as cited by Prof Theron, is analogous.

699. The proposed merger does not enhance DFA's market share of [80-90]% in the provision of metro fibre used by MNOs.[746] This is because Vodacom does not provide dark fibre access in the market, as noted above. However, we note, as accepted by the various experts, that a merger need not give rise to a change in both the ability and incentive to foreclose, and according to the theory it is sufficient for assessment that a merger may only change the incentive of the merger parties to foreclose rivals if it would be profitable for them to do so. We return to the issue of profitability and incentive below.

700. DFA's dominance in the provision of dark fibre is alleged to give rise to the ability of the merged entity to foreclose downstream rivals of Vodacom. In this regard, we consider various factors in drawing our conclusion that DFA has the ability to foreclose MNO rivals of Vodacom.

Overbuilding or self-build not viable

701. The evidence before us points to the fact that this infrastructure is relatively difficult to replicate, and that MNOs have few alternatives that provide FTTS particularly in critical high density metro markets. Mr Otty for Vodacom explained that leasing fibre from third-party providers where it is available is affordable because the infrastructure is shared by multiple parties.[747] In this regard, witnesses for both MTN and Vodacom confirmed that for MNOs, self-building

[742] Hodge EWB p 135 Figure 61. See also Nunes Transcript p 636 lines 5 – 8.
[743] EWB p 53 para 36.3.
[744] Exhibit BQ Theron's Slide 14.
[745] Exhibit BQ Theron's Slide 14, citing Van der Merwe Transcript p 77 line 21.
[746] Theron and Smith agree in the Joint Expert Minute (para 3.4.1) that they are not aware of Vodacom routinely providing dark fibre services for metropolitan connectivity or mobile backhaul to third parties.
[747] Otty FWB p 360 para 18.

the infrastructure is approximately [[redacted]%][748] more or [[redacted]"][749] the cost of leasing from DFA. It is thus generally accepted to be uneconomical to self-build when the option to lease the infrastructure through long-term agreements is available, which Mr Reynolds admits in the case of Vodacom.[750]

MNOs have varying but significant degrees of dependence on DFA

702. To varying degrees, MNOs have significant dependency on DFA's dark fibre infrastructure either in terms of reliance on DFA altogether[751], in key areas where alternative infrastructure is not available (where DFA is a monopolist)[752], and given the fact that overbuild or self-provision is considered to be largely not commercially viable relative to the significant investments that DFA has already made in dark fibre infrastructure throughout South Africa[753].

703. Rain's concern stems from the fact that it is highly dependent (as to [redacted]%) on DFA for the provision of dark fibre services.[754] It argues that DFA is so dominant in this market that it would be 'near impossible' for clients such as Rain to find an alternative service provider or to self-build a dark fibre network. Rain's network has been built with a high level of integration and linkages with DFA's infrastructure, and the evidence is that it would be difficult for Rain to uncouple itself from DFA. This evidence is not seriously contested, and it is acknowledged in Prof Theron's report for the merger parties that Rain is "*the only MNO truly reliant on DFA for its mobile backhaul needs*".[755] No further evidence was led to refute that Rain is likely to be harmed were it to be foreclosed access to dark fibre for FTTS and this concern alone weighs heavily in our assessment.

[748] Mdlalose FWB p 392 para 29.
[749] Smith EWB p 270 para 224; Hodge EWB p 137 Figure 62.
[750] Exhibit BR1: Reynolds's Slide 6; Transcript p 3566 lines 1 – 12.
[751] Rain HOA p 6.
[752] MTN HOA p 64 para 81.
[753] MTN HOA p 64 para 81.
[754] Rain HOA p 6 para 12.
[755] Theron EWB p 396 para 378.

704. MTN, on the other hand, has a lower degree of dependence on DFA's Titan links. It relies on DFA for approximately [redacted]% of its sites, whereas approximately [redacted]% of its sites rely on self-built connections. We understand that MTN has a higher proportion of self-built infrastructure due to legacy infrastructure it deployed before DFA was well-established.[756] Presently, it uses a combination of leasing and self-build depending on costs and availability of existing infrastructure.

705. It is worth noting that Cell C until 2023 was also 100% dependent on DFA for Titan links, that is until its strategic decision to sell its site infrastructure and to transition to providing mobile services solely through roaming agreements in future and thus to cease procuring links directly from DFA.[757] That is, at least at the time that the proposed transaction was contemplated in 2021, Cell C could have been understood to be dependent on DFA just as with Rain. It is not clear from the record whether the acquirer of Cell C's site infrastructure would similarly be reliant on the existing DFA links and arrangements for a large proportion of its network, although this appears to be likely at least in the short- to medium-term given DFA's large footprint relative to its rivals in the provision of dark fibre. As such, we cannot dismiss this dependency linked to the existing network infrastructure that was being used by Cell C.

706. For its part, Vodacom's reliance on DFA for Titan or Titan-like products for mobile backhaul is significant. Only [redacted]% of its mobile backhaul infrastructure is self-built, compared to [redacted]% that is leased from DFA and [redacted]% that is leased from other providers.[758]

707. There can be no dispute that [redacted]% dependence on DFA Titan links (as with Rain, and previously with Cell C) establishes the existence of an ability to foreclose these firms. Vodacom is dependent on DFA pre-merger for most of the links that it uses.

[756] Smith EWB p 271 para 227; Nunes FWB p 158 para 6.22.
[757] Hodge EWB p 138 para 225.
[758] Smith EWB p 271 Table 1. Maduray FWB p 417 Table 4. Nunes FWB p 182 annexure RN1.

708. MTN has no alternative to DFA in numerous areas.[759] In instances where those Titan links relate to a particular geographic area where no other providers are present, then some interruption, decrease in quality or partial foreclosure of access can be significantly detrimental to MTN, and perhaps most importantly its retail consumers in those areas.

709. Importantly, while a large proportion of MTN's dark fibre network is self-built, its annual operational expenditure on third-party providers for FTTS is dominated by DFA at approximately [redacted]% which is significant. Notably, MTN relies on third-party provision of these links to a non-negligible degree in all main regions of the country (for example, approximately [redacted]% in Johannesburg and Tshwane in Gauteng, and approximately [redacted]% in KwaZulu-Natal and the Western Cape).[760] Indeed, MTN believes that it is very reliant on DFA[761], and no evidence was presented by the merging parties to dismiss the substantive dependence of MTN on DFA even as it has a high proportion of self-built infrastructure.

710. Importantly, any future new MNO entrant in the market is likely to be reliant on DFA given the fact that overbuild or self-provision is considered to be largely not commercially viable.

Access to DFA aggregation nodes is restricted

711. High dependency on DFA infrastructure is exacerbated by the manner in which DFA governs access to its aggregation nodes. Aggregation nodes are the physical connection points or joints at which different fibre lines connect with the core DFA network.[762]

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[759] Smith EWB p 271 para 227. Nunes FWB p 158 para 6.22.
[760] Exhibit BQ Theron's Slide 33. Theron EWB p 85 Table 9.
[761] Transcript p 634 line 21.
[762] Hodge EWB p 135 para 214: "*Aggregation nodes are central points in the network where multiple connections converge. Aggregation nodes aggregate or collect traffic from multiple sources and distributes it efficiently across the network. They also serve as critical hubs for routing data to and from different destinations*".

712. DFA does not allow third parties, including the MNOs, to aggregate connections at its aggregation nodes. As such, any party that chooses to self-build site connections needs to build fibre infrastructure that would terminate at its own or the nearest non-DFA aggregation node[763] particularly in geographic areas where DFA is the primary or only provider of dark fibre infrastructure. Again, the implication of this is that it is generally more cost effective to lease access to links from DFA (or another provider) where it is present[764], relative to the costs of self-build or the use of third-party infrastructure, which enhances the reliance on DFA's infrastructure. Overbuilding of metro dark fibre is therefore uncommon.

713. The large footprint of DFA and restricted access to its aggregation nodes goes to the limitations of any argument that DFA does not have the ability to foreclose. In reality, there appear to be few alternatives available to MNOs. On a static basis, those alternatives only account for 14% of the available dark fibre infrastructure used to connect sites. Any competing network is unlikely to have connections and nodes in all areas where these are required by MNOs in the short- to medium-term.[765]

714. In a dynamic sense, switching to a self-build strategy is costly and would take considerable time to replicate the required infrastructure, and switching to the network of another dark fibre infrastructure provider would take time[766] and significant resources even if only in areas where alternative providers are present, and more so where they are not at present[767]. DFA's own internal documents indicate that it views its infrastructure more generally as [redacted] which creates [redacted]".[768]

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[763] Or alternatively to use microwave links as Rain would have had to do in some instances where the costs of building its own fibre lines to connect with a third-party node were considered to be prohibitive due to the significant distances.
[764] Smith EWB p 250 para 50.
[765] For example, [redacted] only provides dark fibre in Gauteng and KwaZulu-Natal (see Smith EWB p 250 para 163). The only other significant provider of fibre for mobile backhaul is Liquid Telecom.
[766] Smith EWB p 255 para 175.
[767] Mdlalose FWB p 392 paras 28 – 29.
[768] Smith EWB p 255 para 175 footnote 260. Van der Merwe FWB Annexure 3 p 55 (or p 9 of subsection titled "Corporate Profile").

715. Prof Theron notes that in areas where the merger parties are the only providers of FTTS infrastructure, there would be a loss of a competitor.

Alternatives and switching

716. A key consideration is that MNOs such as MTN would also have to incur significant costs in un-plumbing themselves from DFA's network and reconnecting sites that already have fibre connections were they to switch away from procuring from DFA.[769] Exiting current contractual arrangements would imply certain costs and time, let alone the costs of building or connecting with new infrastructure if at all possible.

717. The significance of DFA in this market is not dissimilar to the role played by other critical infrastructure, such as electricity, relied upon by businesses. That is, while electricity in some cases accounts for a relatively small proportion of total operating costs of a firm, the absence of electricity or interruptions in service even for a small period of time can result in significant disruption in the operations of a firm (in the absence of alternative sources of power). In our understanding, the same appears to be true of core fibre infrastructure connectivity for MNOs – that is, in key areas where a user such as MTN relies on DFA links, a degradation or interruption of service will be harmful to its operations and to its customers. This risk would be even more stark in the case of Vodacom, Rain and Cell C given their relatively higher level of exposure to DFA as discussed above.

718. Our assessment is that there is an all-or-nothing aspect to metro dark fibre access networks – if DFA is present, it makes sense to connect with its network and aggregation nodes. Indeed, this is precisely the nature of the service that DFA set out to provide to MNOs since its establishment so that they could focus on their core activities – that is, to connect their sites with fibre infrastructure and

[769] Hodge EWB p 138 para 223, citing MTN's response to the Commission's RFI dated 08 November 2022, Part B of the Record, Part 1 – Competitors [redacted]) (2201 – 6118) p 3850 para 13.2.

generate scale efficiencies in these networks by aggregating connections and creating a shared infrastructure platform.

719. We therefore conclude that Maziv through DFA has an ability to foreclose MNO rivals of Vodacom of access to critical dark fibre inputs for FTTS connectivity or mobile backhaul.

Incentive to foreclose rival MNOs

720. In competition theory and practice, the incentive to foreclose relates to whether it would be profitable for a firm to foreclose a customer or supplier. In the case of input foreclosure, it relates to the ability to deny downstream users, buyers or customers access to a good or service or to raise their costs or degrade their terms of access to an important input. The issue at hand is to assess, if an ability to foreclose exists, *why* a profit maximising upstream firm would choose to foreclose the downstream customer, particularly in this case, where there are elements of vertical integration through the upstream and downstream.

Key concerns arising from a change of incentives

721. By way of context, the Commission and Mr Hodge raise several factors that point to the fact that the interests of Vodacom and Maziv will be aligned in foreclosing rival MNOs access to a critical input.

722. First, Vodacom has an interest in ensuring that its need to fiberise its network for 4G, FWA and 5G rollout is met and to seek any advantage over its rivals in the process where it can.[770] To ensure that its requirements are prioritised, so goes the argument, it sought co-control over Maziv otherwise its post-merger fulfilment of its fibre needs was to be no better off than pre-merger wherein it contests with others for DFA capex and priority.

[770] Hodge EWB p 139 para 228.

723. Second, Mr Hodge argues that from Maziv's perspective, it has committed to an expansion strategy through its post-merger partnership with Vodacom so as not to lose its [redacted] customer, and so it has a vested interest in Vodacom's growth and expansion secured through a ROFR commitment as part of the proposed transaction[771]. That is, it has made sure that it secured the custom of Vodacom going forward (in a growing market), unlike with other MNOs, consistent with CIVH's key rationale for this merger to retain Vodacom's business[772].

724. Third, Mr Hodge adds that it is unlikely that Maziv would not prioritise the requirements of its largest shareholder that relies on it for a key input, particularly in circumstances where that shareholder has veto rights to hold it to account or at least affect its decisions at the Board level, to remove the CEO and CFO, and to veto budgets and business plans if it was dissatisfied with Maziv's performance.

725. Fourth, it is argued that Maziv is reliant on Vodacom's goodwill to seize expansion opportunities in other African countries, which could be withheld by Vodacom if it thought Maziv was not prioritising its needs.[773] As such, it would not matter whether Vodacom had control of the day-to-day operations of Maziv for its needs to be prioritised.

726. Fifth, Mr Hodge argues that DFA could further advantage Vodacom by providing discounts against its standard pricing parameters (rate card, which includes term, volume, upfront payment or monthly components, and build distance parameters). It is able to agree non-standard pricing terms with clients where some of the fixed parameters are altered; or where customer specific or bespoke product sets are provided allowing for technical deviations from standard rate card pricing; or applying its discretion in offering customer specific discounts in response to competitor pricing (secured under the ROFR terms) or discounts for volume and monthly revenue commitments.[774] The above all goes to suggest

[771] Part A of the Record p 785 – 789 clause 19.
[772] Part A of the Record p 1223 CIVH Board Pack 27 October 2021.
[773] Hodge EWB p 139 para 230.
[774] Commission Report p 293 – 300.

that DFA, post-merger, would be in a position to ostensibly justify providing Vodacom with better, differentiated pricing compared to its MNO rivals, with DFA effectively negotiating with its largest shareholder that has sight of its costs, margins and plans.

727. The merger parties argue that it would not make sense for Maziv to preference Vodacom, particularly in overbuilt areas, because MNO customers could switch to alternatives or self-build infrastructure if Maziv raised prices or sought to preference Vodacom. In areas where there is no overbuild and Maziv is already present, the merger parties argue that the proposed merger does not change Maziv’s incentives.

Alignment with Vodacom, preferencing and profitability

728. The economic experts agree that Maziv can be assumed to be profit maximising, pre-merger. Mr Hodge (and Mr Smith[775]) nonetheless argue that there are partial foreclosure strategies that could be feasible for Maziv to pursue post-merger, pertaining to the partial foreclosure of rivals of Vodacom.[776] That is, even though Maziv operates an open access business model which is premised on multi-tenancy to share infrastructure costs, a selective refusal to supply (such as through prioritising Vodacom-linked rollout to give it first-mover advantage) is still ‘incentive-compatible’ in that it implies limited cost to Maziv but can still have a material impact in the market.

729. Ultimately, because Vodacom would have a significant economic interest in Maziv post-merger, it can, it is argued by the Commission and MTN[777], treat its DFA purchases differently internally in that it will receive a return from Maziv against its own purchases of DFA metro backhaul and those of Vodacom’s rivals. That is, even if Maziv were to put through increases in prices across all

[775] Hodge EWB p 141 para 236.
[776] Hodge EWB p 140 – 141 paras 234 – 236.
[777] Smith EWB p 272 para 229.

MNO customers, the effective cost to Vodacom is less because it benefits from the offsetting effect of its (30-40%) share of profits in Maziv.[778]

730. Mr Smith argues that in the event of a targeted or market-wide price increase, Maziv is likely to perceive a reduced risk of its largest customer[779] of Titan and substantial shareholder, Vodacom, switching away or self-building, whereas Vodacom has some bargaining power vis-à-vis Maziv pre-merger.[780]

731. Prof Theron contends that post-transaction, if Maziv cannot provide services on competitive terms to Vodacom, it will move its business to other suppliers, thereby maintaining its role in influencing Maziv's pricing. This in our view ignores all of the corporate dynamics and incentives, as per our analysis in paragraphs 140 to 198 above. We concur with Mr Smith that Vodacom, as a significant shareholder, would benefit from Maziv's increased profits and recoup a significant proportion of increased Titan prices through its shareholding. Competitors of Vodacom will be subject to the same higher price but will however not be able to recoup anything and will have to pass on the price increases to their customers.

732. The benefit from future investment by Vodacom in a dynamic market, as well as the significance of the Transfer Assets, and also the impact on concentration/competition is already evident from the fact that Vodacom will add to the Transfer Assets the investments it has made in fibre since concluding this deal. This in itself is significant.

733. The dependence of Vodacom on DFA for mobile backhaul, and thus the strategic alignment of Vodacom and Maziv, would be enhanced post-merger as we show below:

733.1. Pre-merger Vodacom accounts for [redacted]% of DFA's Titan revenues, while Cell C, Rain and MTN account for [redacted]%, [redacted]% and [redacted]%, respectively. Notably, if Vodacom's mobile backhaul were to transfer to DFA post-

[778] Smith EWB p 273 para 229.
[779] See Smith EWB p 272 Figure 14.
[780] Smith EWB p 272 para 229.

merger, "*the number of Vodacom's mobile sites connected using* [redacted] *procured from* [redacted]*. Vodacom currently has* [redacted] *sites, so this would mean that Vodacom would* [redacted]*% of its mobile backhaul*".[781] As such, the increment in the number of links is significant in the FTTS landscape as they represent approximately a quarter of Vodacom's demand for FTTS links, and a significant increase in DFA's total supply of links in the market.

733.2. DFA's metro fibre network is estimated at around 14,000 – 15,000 km.[782] The addition of [redacted] km[783] of metro fibre translates to about a [redacted]% expansion of DFA's metro backhaul network in a short period of time.

733.3. In addition, all of Vodacom's future demand for FTTS, will now be supplied by DFA post-merger as the transaction agreements give DFA the ROFR regarding Vodacom's demand for backhaul connectivity. While the full extent of Vodacom's future demand is not clear, as part of its plans to fulfil the spectrum obligations, Vodacom plans to deploy a minimum of [redacted] 5G sites per year for the five years leading to 2027/8. This will result in the addition of [redacted] new sites, requiring an additional [redacted] new FTTS links. Absent the merger, DFA would have to compete for this increased demand from Vodacom, but with the merger, this demand will support the expansion of DFA.

734. The above marks a significant increase in links – by comparison and to illustrate the significance of this change, we note that MTN procures [redacted] links from DFA (of Titan and Peregrine)[784]. Mr Smith also notes that as this dependence increases over time, say to a level where Vodacom procured 100% of its requirements from DFA, other providers of mobile backhaul currently serving DFA could be foreclosed.

735. The effect of the above would be to increase Vodacom's importance to DFA as a customer. In turn, we consider that Vodacom, acting in the Board of Maziv,

[781] See Smith EWB p 273, footnote 325; Maduray FWB p 417 Table 4.
[782] Bundle M p 12981: BMIT SA Wholesale Telecoms Report 2023, Slide 81.
[783] 1,110 Titan links plus 1,326 km Peregrine links.
[784] Commission Report p 278 Table 46.

would have a significant incentive to shape the decisions of Maziv in a manner that suits its interests as an MNO and important player in the affected market. Vodacom would be in a position to *inter alia* influence and have the right to approve the budget and expansion plans linked with the business plans of Maziv. Furthermore, Vodacom would be able to influence decisions to prioritise rollout that suited its own plans such as in relation to site builds for 5G given new spectrum that needs to be utilised, either in terms of:

735.1. rollout (timing, order and quantum) that suited Vodacom's specific needs over those of other MNOs which could still be calculated to be profitable or non-loss making for Maziv or DFA; and

735.2. rollout (timing, order and quantum) which prioritised mobile backhaul activities over other investments such as in FTTB or FTTH-related infrastructure where Vodacom has less of an interest or presence even if this would lead to benefits for consumers and customers in those markets.

736. In addition, Vodacom would also have an interest in the profitability of Maziv (as confirmed by Mr Joosub), which includes alignment with strategies that raise revenues at Maziv[785] such as a price increase for MNO's paying for Titan access. These are critical concerns in our view which go to the heart of the vertical concerns under this theory of harm.

737. As we have already explained, Vodacom stands to benefit from increases in Maziv's profits. Post-merger, Vodacom will become a substantial shareholder in Maziv and will benefit from increases in Maziv's profits (in proportion to its significant shareholding). As a result, post-merger, Vodacom would regain a substantial portion of any higher prices for Titan through its shareholding in Maziv.

738. Even if the merged entity charged Vodacom the same high(er) prices for Titan as it charged Vodacom's rivals, the increased costs would, as a result of this shareholding, likely disproportionately affect rival MNOs compared to Vodacom. We concur with Mr Smith's view that whilst Vodacom could stand to benefit from

[785] Joosub FWB p 326 para 19.

higher prices for Titan from its significant shareholding in Maziv, rival MNOs would see no such benefit.[786] An increased price for Titan would increase rival MNOs' costs and dampen their competitiveness against Vodacom.

739. Nonetheless, the merger parties argue that it would not make sense for Maziv to preference Vodacom, particularly in overbuilt areas. Here, it is argued, MNO customers could switch to alternatives if Maziv raised prices.

740. In this regard, we find that the merger parties' assessment ignores the *substantive* availability of adequate alternatives – as Mr Smith puts it, it is irrelevant for competition and evaluation of alternatives in Gauteng whether a rival of DFA has dark fibre infrastructure in Cape Town.[787] That is, it matters whether claimed alternatives are accessible or present in reality (especially in the context of an [80-90]% market share for DFA) – we have no evidence to countenance MTN's and Rain's view that switching to other dark fibre networks would not be relatively easy and timely within reasonable cost; or that switching to lit fibre is indeed practicable in a short period of time to avoid network disruptions if lit fibre were considered to be an alternative as the merger parties have argued; or whether claimed alternatives in a particular area are sufficient, albeit imperfect substitutes.

741. Our view is that there is a conflation of regional and metro market shares to imply that partial presence of alternatives equates to complete ability to service the demand and requirements of MNOs facing a significant price increase. There is no evidence of realistic alternatives to which customers could "simply switch" as Prof Theron has put it.

742. In areas where there is no overbuild and Maziv is present and likely dominant pre-merger, the merger parties argue that there is no reason to expect that the merger changes Maziv's incentives. We find that this is a relatively static view of the proposed transaction, based primarily on changes in market share, and

[786] Smith EWB p 273 para 230.
[787] See Transcript p 3688 line 17.

largely understating how the strategic vertical alignment created by the proposed transaction could shape how Maziv relates to other MNO rivals of Vodacom as discussed above. This is especially so when considering that the merger parties need not resort to total foreclosure of rivals, as agreed by the economic experts, and that other forms of preferencing through non-price means to give Vodacom advantages or prioritise its needs can also hamper rivals.

Non-price mechanisms of foreclosure

743. The merger parties do not deal substantively with the non-price aspects of partial foreclosure, despite these issues being central to the claims and concerns of Vodacom's rivals[788]. For example, Prof Theron notes only that the conditions tendered seek to ensure that "*Maziv shall provide metropolitan backhaul connectivity services on terms and conditions, including prices, that are non-discriminatory and that it will offer standard rate card prices to its third party customers and to itself and Vodacom for equivalent services, and shall offer itself and Vodacom SA Group no advantage in respect of pricing, requisite quality, and timeliness and security of delivery for the supply of wholesale metropolitan fibre services*"[789]. In essence, the main argument is that the parties most likely to be adversely affected by a non-price foreclosure strategy have indicated that they are satisfied with the proposed behavioural remedies.[790]

744. Rain has argued that there are evident differences across MNOs in DFA's mean time to repair (MTTR) faults, as a means of demonstrating that it is possible, despite there being SLAs in place with DFA, for DFA to provide a different level of service and quality across MNOs.[791] This to us is compelling real-world

[788] Theron confirms that there has been limited discussion on this aspect – see Transcript p 3729 line 16 to p 3730 line 9.
[789] Theron EWB p 401 para 404.
[790] Transcript p 950 line 14 to p 965 line 8. Merger Parties HOA p 128 – 129 paras 256 – 257. See Exhibits AY and BD.
[791] Rain HOA p 7 – 8 para 14.3, referring to Rain Founding Affidavit para 74 in its Intervention Application. Rain notes that DFA's MTTR in respect of Rain has been increasing (reflecting a declining service quality) while the MTTR across DFA's network as a whole has been decreasing (reflecting an improving service quality). Also see Transcript p 962 – 964.

evidence of the nature of non-price differentiation (and in this context, foreclosure) that can arise post-merger.

745. Importantly, Rain attests that it was only through information revealed to it by DFA that it became aware that it was receiving less favourable service on MTTRs than its rivals[792], what Mr Schoeman terms "*a proper own goal from their side to show us a slide showing that*"[793]. That is, it would be very difficult for an MNO rival of Vodacom to detect that it was being discriminated against, which speaks to the monitorability and likely efficacy of the proposed conditions.

746. Regarding the MTTR evidence, it could be argued that the [redacted] MTTR performance of DFA pre-exists the merger. However, this in our view can be taken as evidence of the reality that time to repair faults can technically and operationally be differentiated significantly across MNOs and customers of DFA (that is, an ability exists); that such differentiation is difficult for customers to detect (as Rain explains[794]); that the service provider could provide a range of plausible 'operational' reasons for the differences that would be hard to refute or test even in the presence of an objective monitoring function; and that it does not appear a sufficient deterrent of any differentiation or indeed possible discrimination that the MTTRs are generally set in the terms and conditions of the SLAs agreed between DFA and its customers.

747. The main point is that it is possible to have very different MTTRs across customers even as the terms of the underlying SLAs and DFA commitments are understood to be substantively similar across MNOs/customers as Mr Mare asserts. The merging parties only cite Mr Mare in stating that "*Mare expressly confirmed that there is simply no scope for preferencing conduct in Maziv's operational system*".[795] Mr Mare states that Maziv's network operating centre (NOC) is its "*central collation and prioritisation point for incidents with standard*

[792] Transcript p 962 lines 1 – 21; Exhibit BD: MTTR (Dark) Average Down.
[793] Transcript p 963 lines 1 – 2.
[794] Rain HOA p 7 – 8 para 14.3, referring to Rain Founding Affidavit para 74 in its Intervention Application.
[795] Merger Parties HOA p 128 paras 256 – 257; and Transcript p 2566 and 2567.

operating procedures"[796] and that the MNOs typically have SLA MTTR commitments of 4 hours built into the contracts with DFA.[797] However, it is not clear to us how it then arises that there are significant and at times persistent differences in the MTTRs of different operators.

748. The available information on MTTRs for dark fibre shows that there have been periods (between August and December 2023) where MTN, for example, almost always had higher MTTRs and the highest MTTRs (downtime or interruptions) of any of the other MNOs and approximately double in some cases.[798] Vodacom, on the other hand, generally does not experience comparatively high or the highest MTTRs (other than in January 2024). That is, differences in MTTRs exist and can be sustained and are significant despite any controls in place within DFA's NOC operational system, which calls into question any behavioural conditions that could be proposed to remedy perceived or actual differences in quality of supply from DFA.

Contract duration and terms do not prevent potential foreclosure

749. The merger parties argue that increases in price are not likely to be achievable in the short term because prices are fixed in the terms of existing long-term contracts between DFA and MNO customers. The weighted average remaining term on existing DFA Titan-related contracts is [redacted] years.[799] Typically, Titan contracts are agreed for a [redacted]ear duration, many of which commenced from around 2010 when DFA first went to market with these products for FTTS.

750. In this regard, the Commission argues that it is incorrect to only take a static view of existing contracts. Many of the existing contracts are legacy [redacted] contracts that are therefore up for renegotiation and renewal in or about [redacted], aligning with the post-merger period. The Commission further notes that demand for new contracts continues and the changes to the market likely to arise due to the

796 Merger Parties HOA p 128 para 256.
797 Transcript p 2733 line 1.
798 Exhibit BD: p 1 MTTR (Dark). DFA data presented in the figure represents average monthly downtime in days for dark fibre for the period January 2023 to May 2024.
799 Theron EWB p 399 para 388.

rollout of 5G will drive demand for new links.[800] This follows from the recent and expected release of new spectrum by the government in South Africa.

751. We agree with the Commission's assessment in this regard. While the average remaining duration on contracts is a [redacted] years, in reality there are many contracts being renewed/agreed with customers on an ongoing basis. That contracts have lengthy durations is simply a function of the nature of contracting in this industry, but it cannot be taken to mean that the merging parties would not have an interest in adjusting the terms of contracts with current and new clients along revised terms to suit the objectives of a combined merged entity post-merger. We further note that the vertical effects of the proposed transaction will endure for as long as Vodacom has a 30-40% shareholding in Maziv.

Vertical arithmetic and margins analysis are not dispositive of concerns regarding the incentive to foreclose

752. The experts debated the argument advanced by Prof Theron – that the vertical arithmetic (in essence comparison of profit margins at different levels of the value chain to assess relative profitability of a strategy and thus the incentive to foreclose[801]) does not support a view that it would be profitable for the merged entity to seek to foreclose MNO rivals of Vodacom. This is because, as argued, upstream margins in fibre infrastructure provision are considerably higher than those downstream in the mobile market where MNOs operate. The evidence on the actual margins calculated is not disputed (the Commission and merging parties arrived at similar estimations), while the interpretation and consideration of likely changes post-merger are.

[800] Commission Report p 276 para 821.
[801] See ICN (2018) definition available at: https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/10/MWG_SurveyreportVerticalMergers2018.pdf (accessed 25 March 2025). Vertical arithmetic is used to compare the likely costs and the potential benefits of foreclosure for the merging parties, considering the relative margins of the merging firms, the magnitude of lost upstream sales resulting from the foreclosure, and the likely increase in the downstream merger partner's sales due to the foreclosure strategy. See also: Zenger, H. 'Analyzing Vertical Mergers'; CPI Antitrust Chronicle (October 2020), available at: https://www.competitionpolicyinternational.com/wp-content/uploads/2020/10/4-Analyzing-Vertical-Mergers-By-Hans-Zenger.pdf (accessed 25 March 2025).

753. High upstream margins can be an indication of market power and the ability to foreclose. However, we were not presented with comparative evidence of how Maziv upstream margins compared with any benchmark (and particularly whether they reflect significant market power). The theory is clear however that high upstream margins (which Prof Theron presents to illustrate that Maziv would not choose to forego those margins by foreclosing rival MNOs downstream), are also illustrative of upstream market power and inelastic demand for the upstream input which contradicts the evidence of the merger parties that serious upstream alternatives are available to rivals of Vodacom. As stated by Hans Zenger of the European Commission's Chief Economist Team (Directorate-General for Competition):

> "*From an error-cost perspective,* <u>*a greater ability to foreclose therefore affects the standard of evidence against which foreclosure risks should be assessed*</u>*.* <u>*Since a greater economic dependency involves larger competitive risks, the evidence required to dismiss vertical concerns should arguably be more demanding when the merged entity controls a dominant input*</u>*. Indeed,* <u>*the social costs of false acquittals are particularly large in that case*</u> *…*
>
> *… Finally, a frequently misunderstood interaction in vertical mergers is the relationship between profit margins and diversion ratios. As the Guidelines correctly observe, "Other things constant, the lower the margins upstream, the lower the loss from restricting input sales." In other words, if the merging upstream firm is not very profitable, then losing some input sales from the foreclosure of rivals will not be too damaging for the merged entity.* <u>*Merging parties sometimes (conveniently) interpret this passage as suggesting that the overall foreclosure risk must be low if the merging upstream firm has significant margins*</u>*. However, as indicated by the qualifier "other things constant," the opportunity cost of lost sales is not the only parameter that matters for foreclosure incentives. Instead, high upstream margins also suggest that demand for the foreclosed input is inelastic (i.e. that it faces limited competition).* <u>*Higher upstream margins therefore indicate that it is easier*</u>

for the merged entity to divert sales to its downstream unit, as purchasers cannot easily replace the critical input. On balance, problematic vertical mergers thus tend to involve non-negligible upstream margins. This reflects the fact that foreclosure requires some upstream market power that can be leveraged into the downstream market.”.[802] (Own emphasis)

754. In addition, Prof Theron ultimately agreed with Mr Hodge's assertion that vertical arithmetic approaches are not necessarily appropriate for analysing partial foreclosure. This is consistent with the understanding in the literature regarding vertical arithmetic (VA) approaches as:

“*the simplest form of quantitative analysis in vertical mergers…considers whether total foreclosure of rivals would be profitable given the margins earned by the merging firms and the expected diversion ratio from foreclosed rivals to the merged entity…The great benefit of VA is that it is easy to apply. But, unfortunately it also has significant limitations. In particular, VA only considers total foreclosure, although it is typically more profitable for a merged firm to engage in partial foreclosure. Moreover, VA takes price levels as given, although vertical mergers may change equilibrium prices considerably (e.g. due to EDM*) [Elimination of Double Marginalisation]. *As a result, VA can only provide indicative evidence about foreclosure incentives*”.[803] (Own emphasis)

755. The implication is that VA typically underestimates partial foreclosure incentives. Importantly, alternative models can help to identify drivers of post-merger pricing incentives, and more directly incorporate measures that account for pro-competitive incentives arising from the theoretical efficiencies of vertical mergers including the elimination of double marginalisation.

[802] Zenger (2020) p 5.
[803] Zenger (2020) p 6.

756. These models were not presented in these proceedings, nor was any significant evidence on merger efficiencies (but for the increase in the rate of fibre rollout for FTTH, which we assess under the public interest assessment). The latter is especially important as there is a relationship between the effect of raising rivals' costs and the efficiencies, such that in some scenarios it can be shown that "*a vertical merger may not only increase the upstream prices charged to rivals but may also raise the merged entity's downstream prices*".[804]

757. Mr Hodge further argued that diversion ratios are a critical part of the assessment and that margins are not assessed in and of themselves. Specifically, the expectation is that raising upstream prices and margins would not be profitable if the vertically integrated firm would lose a large share of customers downstream. However, if in reality competing MNOs such as MTN or Rain would not in fact choose to switch purchases to an upstream rival of DFA, then the strategy to increase prices upstream is likely to be a profitable one. Importantly, this needs to be considered in light of the other evidence that switching will likely not be feasible in this market as the available alternatives notionally exist, but are not effective alternatives to DFA upstream. This outcome is reinforced if one accepts as we do above that self-build is not a feasible alternative for rival MNOs.

758. The literature also guides that when conducting these forms of assessment, one cannot ignore that margins may change post-merger. For example, it is significant in our view that in the pre-merger scenario DFA is concerned about losing Vodacom's custom such as if Vodacom were to embark on its own FibreCo strategy, as discussed above. The documentary evidence from Maziv that clearly shows its defensive reasons for the proposed transaction means that DFA would set pre-merger prices in relation to Vodacom and/or other MNOs with the recognition that it needs to do what is necessary to retain Vodacom as a client, which would have the effect of disciplining upstream prices and margins. This will be lost post-merger.

[804] Zenger (2020) p 4.

759. DFA's relationship with Vodacom changes materially in the post-merger scenario. Recall, Vodacom is also secured as a client post-merger, meaning that DFA's largest downstream customer could no longer seek alternative options or split its purchases to access the upstream input. The key difference is the evidence that there is a post-merger ROFR meaning that DFA will have the option (to be entrenched in the proposed conditions) to counter-offer should Vodacom find an alternative quotation for FTTS access that is price-competitive or cheaper than DFA.

760. CIVH's strategic documents recognise this ability to prevent the loss of a key downstream customer in Vodacom as a compelling advantage of the proposed transaction. We cannot ignore this evidence that Maziv considered this potential outcome favourably – that is, it is not only a theorised theory of harm, but recognised in fact by CIVH itself. In addition, the transfer assets agreement which gives rise to the ROFR entrenches that Vodacom is committed to purchasing from Maziv (in a growing market).

761. Critically, in response to questions from the Tribunal, Prof Theron acknowledges that, other things being equal (leaving aside the proposed behavioural conditions), it would ordinarily be in DFA's commercial interest to differentiate its effective pricing to different customers and to treat customers differently such as on technical specifications of a particular link or effective prices of a build project[805]:

> *PROF VILAKAZI: … the other side of that is that it would otherwise be in Maziv's interest not to have a standard rate card… their previous behaviour would be to discount to different clients, drive volume buying, et cetera… So, maybe to simplify the question, are we to understand that it would otherwise be in Maziv's interests to have differentiated pricing, et cetera, however the conditions provide for the standard rate card which prevents any of that from happening. Is that the correct understanding of your version?*

[805] Transcript p 3974 line 2 to p 3975 line 6.

PROF THERON: So, maybe I can just explain briefly. The way I understand it is that DFA's business has evolved obviously over time, so yes, it would be in their interests, absolutely. So, that's why you know one client would come along and say I can pay something upfront, which is the non-recurring costs and then there's a reduction in the monthly recurring costs or a customer comes along and say I need a link between Sandton and Joburg CBD, there's on comparable one and these are the technical specifications, you know, that hasn't been given to anybody else and then that would be a customer specific solution. So, that would make sense in terms of your commercial imperatives. This is how the pricing evolved over time. You know, that's just responding to the market. But what DFA has said and Vuma they are able to do is they are able to reduce those now to standard rate cards…" (Own emphasis)

762. The above makes sense because, as per the theory on vertical arrangements, the upstream firm with market power would seek to price discriminate and offer different options to potential downstream buyers in order to optimise upstream purchases and profits.

763. Taken together, the evidence leads us to conclude that the merger parties will have an incentive to foreclose MNO rivals of Vodacom post-merger.

Effects in the provision of FTTS for MNOs

764. Prof Theron presents a limited argument on the likelihood of anti-competitive effects arising through the proposed transaction in relation to this theory of harm. In essence, it is argued that because their assessment does not identify an ability or incentive to foreclose, the merger cannot harm competition as it relates to MNO customers of Maziv.[806] Not much more is said in the expert report, or the heads of argument for the merger parties.

[806] Theron EWB p 89 paras 399 – 401.

765. Our assessment above identifies both an ability and an incentive to foreclose. The MNOs all are to varying degrees dependent on Maziv.

766. As indicated, there are limited alternatives available for access to dark fibre for FTTS, with DFA as the dominant firm in this regard and MNOs being reliant on it. There is furthermore no cogent evidence of the ability of MNOs affected by the proposed transaction to easily and in a timely manner switch to realistic alternatives.

767. While the costs of procuring FTTS are relatively small as a proportion of the total operational costs of MNOs, any differentiation through preferencing of Vodacom on price and non-price terms would likely make a significant difference in the relative competitiveness of different MNOs. This is also in circumstances where MNOs such as Rain have taken a leading position in the market in terms of data-related offerings (including FWA, which points to the link between the horizontal and vertical theories of harm), and Vodacom may view it as important to catch-up.

768. Mr Hodge also points out that demand to 'fiberise' mobile networks is significant and will continue to grow in light of developments in terms of new spectrum allocations, 5G growth, and capacity to support 4G/LTE demand.[807] We agree with this assessment, noting that it is important for MNOs to gain first-mover advantages such that any prioritisation of Vodacom's needs in this regard, would weaken rivals and strengthen Vodacom's downstream position as the leading MNO over time. Harm to MTN as Vodacom's main rival with national coverage could be especially problematic for competition downstream with lasting effects on the market – as noted above, its dependence on DFA for a fifth of its network is significant in our assessment. In addition, Rain's dependence on DFA is not contested, noting that its customers that would be affected are predominantly people in the middle- to lower-income brackets, many of whom are in outlying

[807] Hodge EWB p 110 para 237.

areas or townships which are typically underserved in terms of access to data by its competitors.[808]

769. The merger raises concerns about the potential for the merged entity to increase prices for FTTS services despite being a limited proportion of operational costs for MNOs, which would then be passed on to customers and consumers, exacerbating affordability concerns for broadband access.

Conclusion

770. First, there is sufficient doubt regarding the vertical arithmetic to conclude that this evidence is not dispositive of a theory of harm that the merged entity would seek to raise upstream prices.

771. Second, the MNO rivals to Vodacom express serious concerns about the transaction.

772. Third, MNO customers indicate that they are reliant on DFA and it is not evident that notionally available alternatives are indeed viable alternatives, especially in areas where there are no alternatives. Openserve, for its part, provides lit services and does not offer dark fibre – for it to be a credible alternative, it would need to be shown that switching (to lit backhaul or otherwise) would be feasible and timely for MNOs, in addition to the evidence of Telkom that it was technically feasible. As we have indicated under the market delineation section, dark and lit fibre, for many reasons, are in separate relevant product markets and are not seen by customers as substitutable. This issue is critical as arguments put forward by the merger parties hinge on the existence of alternatives to which the MNO rivals of Vodacom could turn in the event of a price increase upstream or non-price foreclosure.

773. The merger parties do not present evidence that refutes the core concern of customers such as Rain and MTN that they could be foreclosed through non-

[808] Rain HOA p 3 para 4.

price mechanisms such as the degradation of quality of services, or prioritisation or preferencing of Vodacom over other MNOs in the rollout and timing choices of DFA in building infrastructure etc.

774. We find that the merged entity will have the ability and incentive to foreclose rival MNOs through price and non-price mechanisms in terms of their access to metro dark fibre for FTTS connectivity or mobile backhaul, with the effect of undermining competition in the downstream market.

VERTICAL OVERLAP 2: FORECLOSURE IN METRO CONNECTIVITY AND DARK WHOLESALE FTTB USED BY FNOS

775. The Commission and Mr Hodge[809] put forward an input foreclosure theory of harm relating to the provision of dark fibre connectivity to FNOs that provide lit FTTB services. The FNOs typically 'light' fibre to reticulate connections into business premises.

776. FNOs such as Frogfoot, Netstream, Bitco and MFN have expressed concerns regarding the proposed transaction premised on the fact that they depend on DFA as the leading provider of wholesale dark fibre for metro connectivity/backhaul and there are few alternatives.[810] The concern, as Mr Hodge puts it, is that post-merger the merger parties can employ a range of strategies to foreclose including "*…favouring Vodacom Business in access to its dark FTTB links through timing or price and/or refusing to supply dark fibre or making it commercially uncompetitive relative to the price to Vodacom Business or its own lit service*"[811]. The latter stems from the fact that DFA has evolved over time from initially being a provider of dark fibre (primarily Helios) to providing

[809] Hodge EWB p 121 and following.
[810] See for example: MFN submission dated 15 March 2022, Part B of the Record, p 2562 para 20.1, p 2612 para 166.4.2, p 2613 para 166.5; [redacted] (which procures from DFA via [redacted]) submission dated 27 March 2022, Part B of the Record, p 4430; RSAWeb submission dated 4 April 2022, Part B of the Record, p 4567; Netstream (which focuses on FTTH) submission dated 2 March 2022, Part B of the Record, p 4295 – 4297; Frogfoot submission dated 04 May 2022, Part B of the Record, p 1034 – 1037.
[811] Hodge EWB p 124 para 273.

lit links (Magellan product primarily) for FTTB and offerings such as the lit Business Broadband product, to which we return below.

777. Therefore, the concern is about input foreclosure in terms of access to metropolitan backhaul and wholesale FTTB dark fibre products used by FNOs to provide wholesale FTTB lit services.

Ability to foreclose wholesale FTTB dark fibre provided to FNOs

778. The ability of Maziv (DFA) to foreclose FNOs that lease FTTB dark fibre links from DFA to provide wholesale FTTB services derives from DFA's position as the largest provider of dark fibre. As indicated, DFA provides dark fibre products that link to its aggregation nodes and does not permit third parties (FNOs) to use its aggregation nodes to terminate their own fibre.

779. While there was some debate about whether FNOs such as Frogfoot are simply resellers of access to DFA's fibre infrastructure[812], it is relatively clear for our purposes that the FNOs connect their own network infrastructure and equipment and 'light' the fibre so as to reticulate FTTB connections for office parks and industrial areas directly; or to enable access for ISPs of lit services that they can sell at a retail level. FNOs therefore rely on FTTB dark fibre providers such as DFA to provide FTTB services.

780. Maziv does not have a retail business service, but DFA has evolved to provide lit FTTB services in competition with FNOs to which it supplies dark FTTB services for connecting business customers. Historically, DFA relied on supplying only dark FTTB products (such as Helios) to downstream customers but has evolved to providing lit FTTB links (Magellan product and Calypte) or offering the lit Business Broadband product. The latter means that it competes with FNOs for supplying ISPs with lit products geared for FTTB. In other words, Maziv is in competition with the FNOs that it supplies dark FTTB links to that the FNOs use to supply FTTB connectivity to ostensibly the same ISPs.

[812] Uys FWB p 494 – 495 paras 84 – 87; Transcript p 118 line 5 – 8; p 246 line 8 – 9.

781. The structural change that would be brought about by the proposed merger is that Vodacom Business is present in the FTTB business. Vodacom Business provides connectivity to clients as well, but it does not provide wholesale FTTB services (either lit or dark) on an open access basis to third parties. Vodacom is also active as an FNO although much of its activity involves using metro fibre, NLD and last mile fibre infrastructure access to supply its own requirements downstream as an ISP at the retail level.

782. The presence of Vodacom at the retail ISP level is relevant insofar as it has the capabilities, it is alleged, to drive FTTB sales downstream in a manner that DFA has been unable to do pre-merger owing to its lack of a retail presence for FTTB downstream. We return to this issue in the discussion of incentives to foreclose below.

Market structure and changes brought about by the merger

783. As context, DFA is noted above as having the largest national share in the provision of dark fibre, at approximately [80-90]%. As such, it is expected that it has corresponding large shares in the majority of provincial or sub-national regions in South Africa. There is also limited overbuild (18%[813]) of this infrastructure in the majority of areas nationally, such that DFA has the leading position or is the only provider in most areas.

784. However, when wholesale FTTB market shares are considered, DFA has significant but lower market shares. The Commission and Mr Hodge had estimated market shares based on businesses passed of approximately [60-70]% for the merging parties, including approximately 8% for Vodacom.[814] As noted earlier, there was a dispute regarding the data relied upon and we saw no reason not to accept the figures initially provided to the Commission.

[813] Nunes FWB p 156 para 6.11.
[814] Exhibit BQ Theron's Slide 24.

785. We note that Prof Theron's own estimation based on an adjusted number of businesses passed by Vodacom and inclusion of data for Liquid Telecom (not for businesses passed but "stands/erfs") show that the merging parties would still have a national market share of [40-50]%, which includes a (lower) 1% share for Vodacom, and shares of approximately [40-50]%, [0-10]% and [0-10]% for DFA, Vumatel and SADV, respectively. We note that for purposes of the vertical analysis, even on Prof Theron's own figures (which, as we explain above, underestimate the merger parties' market shares due to the problems with the Liquid Telecom data), Maziv will still have a post-merger market share of [40-50]%.

786. Prof Theron asserts that a measure of businesses connected provides better insights on competition in the market. We find that this may be true for assessing current market positions, however in a market characterised by a race to pass businesses and homes (with a view to connecting a majority of them later), we are of the view that a non-static approach is appropriate since merger analysis is forward looking. Shares of businesses passed are a good indicator of the built capacity of the firms in the market and the potential to own a greater share of market revenues over time where built capacity is presently greater than the number of businesses actually connected. In this sense, competition going forward, which is part of what we need to consider in merger analysis, would be shaped by the competitive strategies of firms to get business customers to buy their offering, including competition on price and quality of service.

787. It is also important to note that the market shares provided by Prof Theron above are inclusive of both wholesale dark fibre for FTTB and lit FTTB. Data was not available to disaggregate these shares any further into separate categories for dark and lit FTTB. This presents a significant limitation of the analysis provided because it assumes that dark and lit FTTB form part of the same relevant market, which is a position that we disagree with in our earlier analysis. While Prof Theron left the issue open in defining relevant markets, she argues that there is demand- and supply-side substitutability in the context of FTTB such that dark and lit fibre form part of the same antitrust market. That is, in a separate dark

FTTB market, the merger would not change anything structurally in the market as Vodacom only self-supplies FTTB and there is no loss to the market as a result of the merger; and that in a combined dark and lit FTTB market, the shares of the merging parties do not imply an ability to foreclose nor is there a significant accretion in market shares through the proposed transaction.

788. However, this distinction is critical for the analysis and conclusions that can be drawn. In a broader market, for example, the entirety of the large number of businesses passed that is attributable to Telkom/Openserve is included (with the effect of diluting the shares of the merging parties and others), whereas it would be more appropriate in our view to be able to distinguish the contribution of dark and lit FTTB in the overall estimation. This is not least because of the information available that Telkom/Openserve largely only offers lit fibre services to the market (compared to DFA that began and largely still provides dark fibre access in the main).

789. In any event, even if we adopt Prof Theron's adjusted calculation of 2022 market shares based on businesses passed (including both dark and lit FTTB), the merger parties still account for nearly [redacted] market post-merger, whereas the second largest player is Liquid Telecom with a share of approximately [20-30]% followed by Telkom/Openserve which only accounts for approximately [10-20]% of the market. That is, while rivals exist, it can be shown that they are considerably smaller than DFA and Maziv overall (each less than half the size of the merger parties), in circumstances where they are also not each present in all of the sub-national markets where DFA is present and are likely to be concentrated in certain areas.

790. We note, for completeness, that the proposed merger in effect places the merger parties in a dominant position in terms of section 7 of the Act. These shares are also prior to the inclusion of Herotel where, as indicated above, Vumatel currently has a [redacted]% shareholding in Herotel.

791. In addition, the evidence on the potential substitutability of dark and lit FTTB infrastructure is not in support of a conclusion that a broader (dark and lit) market exists. Our understanding from the evidence of FNOs is that a number of these firms have built their businesses on the basis of procuring dark fibre for FTTB from DFA.[815] That is, their systems, technology platforms and business models rely on access to dark rather than lit fibre, not least because it is cheaper and enables control and flexibility in network design.[816] The merger parties require us to accept that switching between these two categories should be relatively easy for these businesses. However, Mr Van der Merwe states that FNOs such as Frogfoot add value to the dark fibre procured from DFA and others, by addition of their own equipment and systems to enable the provision of lit FTTB/fibre products to clients. Mr Uys comes to admit this in his evidence.[817] DFA itself recognises this distinction in its own historical practice, having gone from providing only dark fibre products to the market to enable different buyers/users such as FNOs and MNOs to use the fibre as they saw fit and to innovate with different lit offerings, to providing its own lit fibre products which entailed different technological connections, different price points and different customer groups being targeted.

792. Taken together, the above factors point to a conclusion that in a dark-only FTTB market, DFA is in a dominant position in the market with over 80% of the market share[818]. Vodacom does not have a presence in this layer as a provider of dark fibre. On the other hand, if there was a broader market that includes both dark and lit FTTB, the merger parties account for a significant share of just less than half the market[819] and the related evidence on dependency of its customers and presence across the country (in kilometres and businesses passed) suggests a position of market power. Vodacom's internal assessments considered above confirm Maziv's strong position.

[815] Hodge EWB p 52 para 34.3.
[816] Hodge EWB p 73 – 74 para 84. Part B of the Record p 1604.
[817] Uys FWB p 495 para 87.
[818] Hodge EWB p 43 Figure 22.
[819] On Prof Theron's estimates of businesses passed that underestimate the market position of the merger parties, as explained above.

Dependency of FNOs on the merger parties

793. During the Commission's investigation, FNOs submit that in areas where they use DFA's services there is a very low likelihood of finding an alternative provider, and that if DFA were not present in those areas, the FNOs would not be able to provide services to their customers.[820] Others note that even for FNO competitors of Maziv that have built parts of their own networks, portions of their networks are built with reliance on DFA.[821]

794. The Commission's investigation gathered information on dependency ratios of two FNOs that were able to submit information. For these lit FTTB providers dependency on DFA for dark fibre with which they can in turn provide lit FTTB services is also significant (at [redacted]% for Frogfoot, and [redacted]% for Link Africa)[822]. While the available information is limited, we find these dependency ratios to be significant.

795. The merger parties argue that Link Africa's dependence is not a problem from a competition perspective because the firm has a high proportion of self-provision ([redacted]%) and so it has the capabilities and expertise to self-supply. We consider the proportion of supply for which Link Africa relies on DFA to be significant and there is no evidence presented by the merger parties as to why 20% of an FNOs network is not an important or significant part of its network, akin to the earlier discussion of MTN at the MNO level. In any event, there is the evidence of the concerns of various FNOs regarding the transaction and their continued access to products and services that they currently procure from DFA, and the terms of such access, as noted above. DFA has approximately [redacted][823] metropolitan connectivity customers, including FNOs involved in FTTB which we can assume

[820] See Hodge EWB p 152 para 269. See MFN letter dated 15 March 2022, Part B(1) of the Record, p 2613 – 2614 para 169.3 - 169.4; Netstream letter dated 15 March 2022, Part B(1) of the Record, p 4295 – 429 para 133.3. Frogfoot letter dated 11 February 2022, Part B(1) of the Record, p 1029 para 10.1.
[821] Bitco letter dated 14 November 2021, Part B(2) of the Record, p 6169 para 12.4.1; Liquid Telecom submission, Part B of the Record p 2416 para 98.3.
[822] See Hodge EWB p 124 Figure 72. Frogfoot's dependency ratio is understood to have decreased to approximately 80% most recently (See Exhibit BQ Theron's Slide 40). As noted above, other FNOs also confirm reliance on DFA and their concerns with the proposed transaction.
[823] Commission Report p 298 para 874.7.1.

are in a similar position, whether they are only partially or largely dependent on DFA. There is no evidence to the contrary.

796. Were it to adopt a (partial) input foreclosure strategy, DFA's network certainly has the [redacted] any customers that switch to it, which in terms of the theory is an important requirement to assess when considering the mechanism and feasibility of a foreclosure strategy. Its network for servicing enterprises/business clients will also grow due to the transfer of Vodacom's infrastructure as part of the proposed transaction (as indicated, Vodacom has a share of 8% in terms of businesses passed on Mr Hodge's version (which excludes the data of Liquid Telecom)).

797. Given the above, we conclude that an ability to foreclose exists in relation to this theory of harm. DFA's strong market position, even on its own estimation, in the provision of wholesale dark FTTB, the varying degrees of dependency of its clients on its services, the concerns raised by these market participants, and the limitations on customers potentially switching to using lit fibre products having built their networks on access to dark fibre support a conclusion that an ability to foreclose exists.

798. We note that in the case of a narrow market for dark FTTB, DFA is a leader in the market (whereas Telkom/Openserve has strengths in lit services). In a broader lit FTTB market, there are additional players in the form of Telkom/Openserve and others, however the market share estimates demonstrate that DFA and Maziv generally maintain a strong position in the market accounting for nearly half of businesses passed.

Incentive to foreclose wholesale FTTB FNOs

799. The merger parties argue that when considering a separate market for dark fibre, the proposed transaction does not impact Maziv's ability to foreclose existing customers' access to FTTB dark fibre links or metro backhaul for FTTH/B (we

deal with FTTH in the following sections).[824] This is because Vodacom does not provide wholesale access to its FTTB infrastructure whether on a lit or dark basis, and its infrastructure is limited. As set out above, lit FTTB providers are not dependent on Vodacom.

800. The merger parties stated that any incentive on the part of Maziv to foreclose FNOs downstream predates the merger. In addition, Maziv will not acquire any control over Vodacom's ISP and FNO operations and so it would not benefit from foreclosure of competing FTTB FNOs downstream in favour of Vodacom Business or its own FNO and ISP operations. Even if it could benefit, it is argued, Vodacom has (considering current market shares) a limited market position in the FTTB space, and the merger does not confer any additional market power on the merger parties, its FTTB network has not been available on an open access basis to third-party users pre-merger and so there is no loss in competition arising, and that the proposed merger does not lead to a significant change in market structure.

801. In addition, Prof Theron argues that there are various FTTB infrastructure providers available in the market to which business customers could switch as noted in the Tribunal's decision in the CIVH/Vumatel merger of 2019.[825] The merger parties claim that the evidence from market participants is that business clients can switch and possess some degree of countervailing power (as large enterprises and customers).

802. Furthermore, the merger parties argue that they would have no incentive to foreclose lit FTTB providers that are merely resellers of its products. In this regard, the merger parties refer to Frogfoot, which has raised concerns with the proposed transaction, as a 'reseller' of DFA's dark FTTB services in that it

[824] Theron EWB p 91 paras 408 – 409.
[825] Transcript p 3860 line 10 to p 3869 line 22. Theron EWB p 378 paras 292 – 300. In *CIVH/Vumatel* the Tribunal highlighted the Commission's finding that "*although the merger may result in the removal of potential competition [for wholesale FTTB], the prevalence of alternative sources of competitive constraints in the form of other players in the FTTB market as well as the greater degree of countervailing power that FTTB clients may possess mitigates the potential harm of such removal.*"

purportedly only procures these services in bulk and resells smaller portions as wholesale, lit or managed services to ISPs.

803. We deal with these contentions in turn below.

FNO concerns reveal mechanisms and rationale for foreclosure

804. To begin with, we deal with the merger parties' framing of this theory of harm as effectively being only about Frogfoot's concerns. This view ignores that there are other current and future customers in this market consuming dark FTTB from DFA. It is a practical matter that only Frogfoot and Link Africa submitted [redacted] ratio information during the Commission's investigation (and as [redacted] has a high proportion of self-built infrastructure, Prof Theron argued that it effectively could not have concerns). There is no information to suggest that these concerns are not more widespread with potential effects on several players in the wholesale FTTB market.

805. In relation to both FTTB and FTTH markets, firms such as MFN, Netstream and Bitco explained that they were reliant on DFA and would not be able to switch easily to alternative providers. Frogfoot also listed various issues that have arisen in the market in terms of DFA's conduct that have allegedly undermined downstream FNOs, including Internet Solutions, Conduct, AfricaINX, EOH, Cybersmart, eNetworks, Hymax, and Macrolan.[826] A confirmatory affidavit from Mr Johann Eduard du Plessis of EOH Network Solutions[827] regarding Mr Van der Merwe's allegations of foreclosure of FNOs through the introduction of DFA's lit fibre offering was submitted in these proceedings.

[826] Van der Merwe FWB p 43 – 45. Mr Uys contests Frogfoot's allegations in various respects, including that no evidence is provided in support of the claims. See Uys FWB p 502 – 507.
[827] Du Plessis FWB p 541. Du Plessis (previously a founder at Africa INX which was acquired by EOH) confirms Frogfoot's allegations that when DFA launched its managed services, Magellan, at lower price points than any of its dark fibre services, it had the effect of foreclosing EOH as a dark fibre customer with 15-year agreements. EOH was a customer of DFA's dark fibre products Peregrine and Helios (see p 542 – 543 paras 6 – 7).

806. Frogfoot has alleged that DFA has engaged in practices that have undermined FNOs[828], particularly after becoming a dominant player in the market. Its concerns include –

806.1. competing directly with its customers by offering managed services at lower prices than those charged for dark fibre services;[829]

806.2. DFA engaging in foreclosure strategies that disadvantage its competitors, including delaying service delivery to FNOs to give itself an advantage in acquiring customers;[830]

806.3. imposing limitations on the use of certain services and restricting volume incentives to specific products, which can disadvantage smaller players like Frogfoot;[831]

806.4. DFA's introduction of new products, like the Business Broadband service, was priced lower than existing dark fibre offerings, which negatively impacted FNO's ability to compete;[832]

806.5. DFA's refusal to allow third-party suppliers to connect to its aggregation nodes limiting FNOs' ability to compete effectively, as these nodes are critical for routing data;[833]

806.6. Frogfoot, has pointed out that its reliance on DFA for metropolitan and backhaul connectivity makes it vulnerable, as there are often no viable alternatives for dark fibre services;[834]

806.7. FNOs have long-term contracts with DFA that limit their flexibility in negotiating better terms or seeking alternative suppliers, raising concerns about the potential for price increases once contracts expire;[835]

806.8. There is a concern that a merged entity involving DFA would have strong incentives to prefer its own services over those of competitors, potentially leading to discriminatory pricing.[836]

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828 Frogfoot submission dated 04 May 2022, Part B of the Record, p 1034 – 1037.
829 Van der Merwe FWB p 43 paras 45 – 46.
830 Van der Merwe FWB p 49 para 48.
831 Van der Merwe FWB p 46 para 46.10.
832 Van der Merwe FWB p 47 para 47.1.
833 Van der Merwe FWB p 159 para 6.25.
834 Van der Merwe FWB p 41 – 42 para 38. See also Frogfoot's submission to the Commission dated 04 May 2022, Part B of the Record p 1723, paras 178.3.1. – 178.3.2; p 1725 paras 179.1 – 179.3.
835 Van der Merwe FWB p 41 para 42.
836 Van der Merwe FWB p 57 para 75.

807. The merger parties argued that nonetheless Frogfoot, which has raised these concerns, is a very small player in the FTTB market, with approximately [0-10]% market share[837], such that it is not a significant player and therefore not a significant competitive constraint. Mr Uys refers to Frogfoot as a “super ISP” when describing its activities as a ‘reseller’.[838] However, Vodacom in its Project [redacted] assessment of the FTTB market recognises [redacted] player within the ‘DFA competitive landscape’.[839] In reality, it is a sophisticated and reputable business in its own right with interest in both the wholesale and ISP level of the market (through affiliated firm Vox). From a foreclosure perspective, we should be concerned with the potential foreclosure of smaller players in a market affecting their future ability to grow and expand in the market to become effective competitors (to the merger parties).

808. The Act enjoins us to consider the concerns raised by all players including (and arguably especially) those that may be relatively small in the market. We find that Frogfoot’s evidence is helpful in that while it relates to some pre-existing concerns as Hodge also accepts[840], it elucidates the nature of relations between DFA as a supplier and its downstream users/buyers, which speaks to its incentives and strategies in the market. It is illustrative that Frogfoot’s concerns broadly coincide with a period when DFA started to enter the downstream market through the provision of lit services. In our view, the issues of Frogfoot and the concerns raised under this theory of harm are more about the evolution of services provided by DFA, its interest in growing its share in downstream levels of the market, and the evidence of its past conduct that suggests the existence of mechanisms and rationales to foreclose downstream rivals in support of its own ambitions.

809. The evidence before us is that DFA has in the past delayed supply of links in order to give itself an advantage[841]. It has also been competing directly with downstream wholesale FTTB providers such as Frogfoot by offering its lit

[837] Exhibit BQ Theron’s Slide 40.
[838] Uys FWB p 495 para 87.
[839] Hodge EWB p 48 Figure 28. Part A of the Record p 4995.
[840] Transcript p 3773 lines 3 – 19.
[841] Van der Merwe FWB p 45 para 46.8.

services at prices that were lower than its dark fibre services which, it is alleged, has resulted in foreclosure or even the exit of several of its fibre customers.[842] In this regard, Mr Smith posits that a foreclosure strategy is likely to include a margin squeeze mechanism through which FNOs were charged relatively higher prices for access.[843]

810. Therefore, the concern is not only about disintermediation as Prof Theron has argued.[844] FNOs such as [redacted] and others play a role in packaging solutions for enterprise and business clients leveraging their equipment, networks, bulk access to dark fibre, and know-how to add value, often targeting solutions in response to customer orders or requests rather than building out large network infrastructure of their own.[845] This is further evidenced by the fact that at the heart of the historical dispute between [redacted] is an issue about the development of the [redacted] lit FTTB services, wherein it was [redacted] that identified an opportunity in the market to convert old ADSL premises to fibre and approached DFA in 2017.[846] It innovated around a potential solution that could be built on [redacted], working with DFA for a bulk arrangement and technology solution to seize the opportunity. That is, FNOs present a competitive alternative to the merger parties in servicing business clients as well as ISPs, using a different model to DFA and others.

811. As such, we take the view that there would be a loss to the market from a competition perspective if the merger parties' strategy post-merger evolved to seek to bypass wholesale FTTB FNOs in the market. Conversely, there is a very realistic concern that the merger parties post-merger could have an incentive to capture the space in the market occupied by these operators, as they attempt to grow their offerings to FTTB customers. That is, as we discuss below, there is a

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842 Van der Merwe FWB p 45 para 46.6: "*DFA then launched the Magellan services, a managed service. DFA offered this managed service at lower price points than any of their dark fibre services and started competing directly with its customers. This foreclosed most of its dark fibre customers. Many of its largest dark fibre customers such as Internet Solutions, EOH, Cybersmart, eNetworks, Hymax, Macrolan and others were halted in their tracks and ultimately stopped building their own Layer 2 networks using DFA infrastructure and exited this market segment entirely (or became insignificant)*."
843 Smith EWB p 282 para 275.
844 Exhibit BQ Theron's Slide 40.
845 Hodge EWB p 50 para 98; Part B of the Record p 2605 para 149.1.
846 Uys FWB p 495 para 88.

merger-specific rationale for seeking to undermine these FNOs that arises through the alignment of Maziv's business with Vodacom, which has an active presence in the downstream FTTB markets.

The merger parties stand to benefit

812. A key shift that arises through the proposed transaction is the likely alignment of incentives of Vodacom as a well-established ISP and retail business selling to FTTH and FTTB customers, and DFA's dark fibre and FNO operations. This alignment did not exist before the merger.

813. Post-merger, Vodacom will continue to provide connectivity services to businesses, using the FTTB networks of FNOs available in the market. The concern raised by Frogfoot, Mr Smith and the Commission is that in a post-merger world, Vodacom will have an incentive to prefer and procure services provided by a firm in which it has a significant interest, being Maziv and specifically DFA for FTTB (and Vumatel for FTTH, discussed further below). In order to strengthen its own downstream business serving enterprise customers, it may also have an incentive to exert influence to hamper third-party FNO access.[847]

814. It is illustrative to consider how DFA evolved to provide services downstream, such as Business Broadband (introduced in 2019). DFA states that it evolved to providing lit services to ISPs in response to market demand from ISPs requiring such a service and competing offerings from Telkom/Openserve.[848] Prof Theron argues that DFA has nonetheless continued to supply both dark and lit products to multiple customers in the market and that the firm is focused on ensuring that it caters to as many market segments as possible and growing in all its services.[849] The latter is perhaps central to the concerns raised by Frogfoot and the Commission.

[847] Smith EWB p 282 paras 272 and 276.
[848] Uys FWB p 480 paras 94 – 95, p 503 para 112.
[849] Exhibit BQ Theron's Slide 40.

815. DFA's shift into providing managed or lit services to downstream FTTB customers, including ISPs, has meant that it competes with FNOs such as Frogfoot that rely on dark fibre access to provide their FTTB services. This situation predates the merger in that DFA's lit FTTB services and its Business Broadband offering were developed prior to the contemplation of the proposed merger. However, the proposed merger may lead to a change of incentives on the part of the merger parties insofar as it introduces a stronger downstream FTTB (and FTTH) retail presence in the form of Vodacom's business.

816. DFA's revenues from lit services have [redacted] in recent years as we discuss below, and the nature of lit FTTB products is that the provider can gain volume in terms of sales of managed services that more customers can use (such as ISPs, rather than dark fibre products that require buyers to have certain sophisticated capabilities to 'light', such as FNOs). Its strategy documents, and those of Vodacom, indicate that DFA has [redacted][850]

817. DFA's budget documents indicate that at the time of the transaction it had planned to shift its focus towards the rollout of its FTTB services. Tellingly, it planned that it would [redacted] service revenue from approximately [redacted]% of revenue in 2020, to approximately [redacted]% by 2024[851]. This is a significant shift by any measure, and reveals an incentive on the part of the business to evolve its sources of revenue by shaping its strategy towards achieving a greater presence in the lit FTTB (and FTTH) markets (there is no evidence to the contrary) – placing DFA in direct competition with downstream FNOs and ISPs.

818. There was some debate as to whether DFA would profit from undermining customers of its dark FTTB products such as Helios, in exchange for driving growth of its own lit FTTB offering. However, such growth need not be at the expense of its dark fibre business or to harm the Maziv business overall. For example, we understand that customers such as [redacted] recently migrated from

[850] Hodge EWB p 156 para 274; Part A of the Record, p 4912.
[851] Hodge EWB p 156 para 274; Bundle M p 3501: Vodacom's Project [redacted] Discussion Material dated September 2020.

procuring DFA [redacted] (dark FTTB) links, to DFA's lit [redacted] product.[852] That is, contrary to Mr Mare's claim that customers to the value of R[redacted] per month have left DFA to join other providers[853], this customer only switched between DFA products in reality. In effect, DFA does not lose the customer in this scenario.

819. Prof Theron suggests that in general DFA is not seeking to transition from dark to lit FTTB services (implying that the incident involving [redacted] is more of an exception). However, the point is that it *can* do so should it wish to, especially as the revenues from these lit services continue to grow. Rightfully, DFA is able to choose how it allocates its investments and marketing efforts, which products it sells, and to whom, and the relative strategic emphasis on dark and lit offerings. It can change its price, availability or terms of access on dark FTTB products in order to transition customers to lit offerings – the [redacted] example is useful insofar as it illustrates that there is demand for lit services and at least some customers would choose to make such a switch. The concern raised is about DFA foreclosing rival FNOs of the merger parties downstream in order to raise future lit FTTB revenues.

820. Notably, Magellan, the main DFA lit FTTB product, is already a significant component of revenues pre-merger, but of real significance is that these revenues are growing whereas those of Helios, the dark FTTB offering, appear to be stagnant, as we assess below.

821. Vodacom recognised that DFA has an intention to grow its position in lit services. In its Project [redacted] document evaluating the proposed transaction, it notes that "*DFA is transitioning from traditional dark fibre services to lit fibre services like Magellan and Calypte, which targets* [redacted]*bandwidth customers. The aim is to* [redacted] *lit fibre customers,* [redacted] *dark fibre customers*"[854]. Vodacom, based its assessments

[852] Transcript p 2922 lines 17 – 20, p 2924 line 17 to p 2925 line 19.
[853] Mare FWB p 443 – 447 paras 54 and 69; Theron EWB p 387 para 331.
[854] Bundle M p 3501 Vodacom's Project Lindt Discussion Material dated September 2020 Part A of the record, p 4912. / Annexure 212.8.14 of the letter from CDH dated 25 April 2022 (RFI1) titled "(September 2020) 20200924_[redacted] Document_vF", p 9. Part A of the Record p 4914.

on due diligence information received from Maziv.[855] However, Prof Theron argues that this statement should not be taken to mean that DFA is looking to grow lit FTTB services at the expense of dark FTTB services, but rather that DFA is looking to grow both its dark and lit offerings.[856] She cites the same Vodacom document which states that the "*plan from management is to invest incremental capex to rollout Magellan and Helios*"[857]. Our reading is that investing incremental capex to maintain the two main lit and dark FTTB products, does not mean that DFA will not at the same time seek to grow the presence of its lit products more in future.

Revenue growth in lit FTTB makes foreclosure likely

822. The important point to note from the above is that DFA at the very least has an intention to grow its lit FTTB business through [redacted] which is the main lit FTTB offering (along with [redacted]), even as it continues to maintain its [redacted] product which is historically DFA's most [redacted] dark FTTB product in terms of revenue.

823. [redacted] FTTB) earns high revenues compared to all other products other than [redacted] and grew steadily in the period observed in Prof Theron's analysis to almost match (in absolute Rand terms) [redacted] (dark FTTB) revenues by September 2023. Therefore, it could be viewed as being at least as important as DFA's main dark FTTB product in terms of its contribution.[858]

824. Notably, in the figure presented by Prof Theron on DFA's revenues for dark and lit FTTB products (January 2020 – October 2023), there appears to be positive albeit modest revenue growth in [redacted] FTTB). There is significant and rapid growth in [redacted] FTTB) albeit from a low (zero) base in

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[855] Reynolds EWB p 455 – 456 paras 3.8 – 3.10.
[856] Theron EWB p 99 paras 441 – 442.
[857] Theron EWB p 99 para 442.
[858] Theron EWB p 100 Figure 16.

2020 to exceed monthly revenues derived from DFA's other dark FTTB products with the exception of [redacted] and the bespoke [redacted] product) by September 2023. By comparison, there is relatively flat growth in revenues in [redacted] the main dark FTTB product.[859] The other dark FTTB products [redacted]) also show modest positive growth. [The shift in [redacted] and [redacted] revenues around mid-2023 is understood to be due in part to [redacted] transition from dark to lit services.]

825. The above shows that there is a strong case for sustaining growth in lit FTTB products, as they contribute (more than other products it seems) to revenue growth in DFA despite being lower priced. Sustaining this growth need not be at the expense of its dark FTTB offering if those clients are already tied into Helios and other dark FTTB link contracts so as not to affect revenues, while DFA pursues ISP and new customers of lit products including those currently with FTTB FNOs as demand grows for those services as well.

826. For its part, Vodacom intends to continue to [redacted] and [redacted] business [redacted] post-merger, despite the fact that its FTTB infrastructure would be transferred to Maziv post-merger.[860]

827. Our view is that such a transition by DFA would naturally and increasingly place Vodacom (Business) and DFA in competition in downstream markets for FTTB customers. It appears unlikely that, in a post-merger world, the merger parties would not seek opportunities to align their shared direction in these markets if they became affiliated firms (or at least tacitly working not to harm one another's business), or attempt to leverage each other's strengths in grabbing a larger share of the downstream market in circumstances where:

827.1. DFA has a very large market position in the dark fibre input/infrastructure layer, as discussed above;

[859] Theron EWB p 100 Figure 16.
[860] Hodge EWB p 147 para 254.

827.2. DFA lacks a comparable strong position in the downstream FNO or ISP levels particularly for FTTB[861];

827.3. Vodacom is foregoing its infrastructure in exchange for dependence on upstream suppliers such as DFA to support its downstream fibre-related operations such as the supply of FTTB to estates and enterprises where it has developed a strong presence and brand;

827.4. Vodacom has a strong brand and retail presence downstream including in the provision of fibre services, with an intention to strengthen its position and returns in a growing fibre economy[862];

827.5. Vodacom will, post-merger, hold a substantial equity stake in an upstream firm providing key fibre inputs for both its retail mobile and fibre activities downstream with potential for larger volume discounts and benefits through the alignment; and

827.6. Both firms stand to benefit from consolidation and reduction in competition in downstream markets for FTTB (and FTTH)[863], to which partial or full foreclosure of rivals would contribute positively.

828. We find that the evidence from strategic documents that Maziv and CIVH identified an opportunity to grow the downstream business especially compelling. Unlike many transactions where concerned parties might speculate using economic logic and supposition on the likelihood, nature and intent of a potential foreclosure strategy, the documentary evidence of CIVH and Vodacom removes such speculation about the ambition and normative strategic direction of the firms in question. As we have indicated, we give weight to strategic documents since their probative value is higher than statements produced for these proceedings.

829. The question then becomes whether such a strategy would be profitable and/or loss making. In this regard, we take into account Mr Smith and Mr Hodge's

[861] Part A of the Record p 1280 – 1282, p 1408. See also CIVH Board Pack dated 27 October 2021 Part A of the Record p 136.
[862] Joosub FWB p 336 – 337 para 34; Otty FWB p 362 – 363 para 25.
[863] Bundle M p 12858: Vodacom [redacted] document dated August 2023.

arguments that under a partial foreclosure strategy, a strategy to foreclose or raise the costs of rival FNOs in FTTB would not necessarily be loss making.

830. First, the infrastructure capacity of DFA (including the additional fibre assets to be transferred from Vodacom) is [redacted] which supports the ability to absorb customers that shift from rivals to the Maziv network (the same is true of the Vodacom Transfer Assets[864]). DFA's own documents state that its network is [redacted]", with approximately [redacted]% spare capacity[865].

831. Second, DFA is able to price value-added lit services for FTTB (such as Business Broadband) in a manner that makes its offering comparable with even its own dark fibre FTTB products that its customers (and would-be downstream competitors) procure as inputs from it.[866] Mr Uys confirmed that DFA had initially developed these products including reduced bandwidth lit offerings that were designed to be more affordable for ISPs than paying for a full unlimited dark fibre product, ultimately leading to the introduction of Business Broadband in 2019 to match Telkom's low tariff offering.[867] This would present a compelling offering to downstream customers of FNOs, to the disadvantage of these rivals, particularly as Maziv seeks to accelerate FTTB revenue growth as noted above.

832. Third, we note Prof Theron's evidence that wholesale FTTH/B EBITDA margins for FY2023 are approximately [redacted] to those further upstream at the metropolitan connectivity/infrastructure and FTTS level at approximately [redacted]%-[redacted]%[868]. This tells us that, other things being equal, DFA or the merged entity might not lose significantly on an EBITDA basis from focusing on activities further downstream from the metro to the wholesale level.

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[864] Scheffer FWB p 16 para 25.
[865] Van der Merwe FWB p 59 Annexure 3.
[866] Commission Report p 303 para 878.2 and Table 57 where a general comparison is shown, which is contested in terms of comparability by Mr Uys. Van der Merwe Transcript p 260 – 264. Van der Merwe FWB p 47 para 47.2. Uys FWB p 494 para 85, p 499 para 98 – p 501 para 104.
[867] Uys FWB p 472 para 23, p 503 – 504 para 112.
[868] Theron EWB p 368 para 253: "*It is clear from the table that metropolitan services earn the highest margin ([redacted]% on a weighted average basis), followed by wholesale FTTH/B ([redacted]%), with retail ISP services exhibiting notably lower margins ([redacted]%)*".

833. Fourth, the rollout plans of Maziv to meet its ambition in FTTB are critical and it would likely enjoy significant first-mover advantages in capturing key market segments or clients. For example, Frogfoot has alleged that DFA has done this in relation to a key customer, wherein it advised such a customer that it would be able to complete its requested rollout of a fibre service faster than Frogfoot could do (in circumstances where Frogfoot was proposing to procure such infrastructure from DFA)[869].

834. The main issue in this regard is that investment and rollout plans of rivals can be of significant strategic value to Maziv and Vodacom as a market participant that has the advantage, post-merger, of being a large shareholder and board member of the critical infrastructure provider. This is akin to the information exchange concern raised by Rain and supported by MTN. If such information were to become available to Vodacom or DFA respectively it would be a significant competitive advantage. There is evidence on record in these proceedings that it has occurred in the CIVH Board that information that was expressly requested to be excluded by Mr Uys regarding Herotel from CIVH board packs was nonetheless “erroneously” included for consideration by CIVH and Maziv representatives.[870] It is therefore not speculative to consider the risk of such competitively sensitive information flowing through the Board even in the presence of information exchange controls as proposed in the behavioural conditions. This repeated “mistake” according to Mr Uys, illustrates that any proposed behavioural conditions in this regard would likely not be effective in practice, and could not be effectively monitored by the Commission.

835. Furthermore, as we have indicated in the horizontal analysis, Frogfoot’s evidence is that pre-merger, Vodacom serves as a competitive counterweight directly and indirectly to DFA in downstream markets. This constraint is likely to diminish post-merger.

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[869] Part B of the Record p 1035 para. 20.3.4.1: Frogfoot submission in response to the Commission’s RFI dated 11 February 2020.

[870] Transcript p 1255 line 9 – 10; p 1257 line 5 – 16. Bundle M p 11354 to 11442, Maziv budget presentation for FY 2025.

Effects in dark FTTB

836. DFA has considered that its pricing of lit FTTB products can affect the ability of FNOs to compete in the market. In particular, it notes that the prices of its Business Broadband offering and lit managed services (Magellan) are highly competitive and that these prices could impact its dark fibre customers.[871]

837. Mr Hodge compares DFA's Business Broadband prices with the dark fibre inputs from DFA that FNOs use (using data submitted by [redacted]). This analysis shows 2021 Business Broadband prices that are significantly below [redacted] monthly costs and [redacted] monthly costs incurred by FNOs in the 10Mbps and 20Mbps categories. By comparison, Business Broadband is significantly [redacted] for the higher speeds (50 and 100Mbps).

838. While the above is not a systematic analysis of the costs of FNOs relative to DFA's own pricing, it does reveal the potential for pricing strategies to significantly affect customers of DFA.

839. The costs of FNOs can be significantly affected by input price increases given they account for a relatively large proportion of FNO operational costs. In this regard, Mr Hodge presents indicative analysis of metro connectivity costs (including from DFA, third parties, and self-supplied) as a proportion of Vumatel's own operational costs and those of Vodacom.[872] This assessment shows metro connectivity costs were approximately between [redacted]%-[redacted]% of Vumatel's operational costs in the provision of FTTH, and [redacted]%-[redacted]% for Vodacom FTTH (including self-supply costs for Vodacom[873]). While these costs relate to metro connectivity and FTTH, they are indicative of the broad significance of input costs for downstream operators at the FNO level and are likely to be more significant for smaller FNOs that are not able to benefit as much

[871] See Hodge EWB p 128 para 301 and Figure 78. Bundle M p 5089.
[872] Hodge EWB p 129 – 130 Figures 79 and 80.
[873] The large proportion attributable to self-supply (which some FNOs also do along with purchasing from suppliers like DFA) also goes to demonstrate that self-supply is significantly costly in general.

from the scale of bulk purchase discounts from DFA that Vumatel is able to obtain.

840. The dependency of FNOs on DFA means that non-price strategies such as delays in the provision of services or links to undermine these rivals can dampen competition in wholesale FTTB and in turn adversely affect the services provided to businesses in terms of availability, quality and price.

841. As it relates to FNOs (and ISPs), we also take into account that harmful effects may be more acute in narrower, localised markets, such as a small town, where one might expect that there are i) fewer alternative providers of fibre inputs; ii) a smaller number of customer-facing FNOs and ISPs such that if a handful of those firms are undermined through a foreclosure strategy (such as facing significantly higher operational costs), few alternatives would remain in those markets to which consumers or buyers could turn. This is a significant concern in our view.

Conclusion

842. Given the analysis above, we conclude that there exists both an ability and incentive to foreclose in relation to the provision of metro connectivity and wholesale dark FTTB, with a likelihood of significant anti-competitive effects on FNOs that rely on this input to compete, and ultimately their customers.

VERTICAL OVERLAP 3: FORECLOSURE OF ACCESS TO WHOLESALE FTTH AND FTTB

843. FNOs can build out the last mile infrastructure to connect entire neighbourhoods or businesses on the back of metro backhaul connectivity provider networks. The FNOs rely on metro fibre providers to supply the backhaul to their core sites and/or datacentres, and for transfer between core sites.[874] The FNOs in turn provide wholesale access and services to retail ISPs that service households

[874] Hodge EWB p 152 para 268.

and businesses.

844. Post-merger, Vodacom would effectively stop operating as an FNO following the transfer of its FTTH infrastructure assets and wholesale business (including contracts with ISPs, fixed assets and software), and all its FTTB assets to Maziv. It will only continue to operate as an ISP, Vodacom ISP, further downstream and lease infrastructure assets from Maziv and others going forward, and Vodacom Business would continue providing retail FTTB.

845. This theory of harm has two strands: (i) foreclosure in the provision of wholesale FTTH as an input to retail FTTH; and (ii) foreclosure in the provision of wholesale FTTB as an input to retail FTTB services. We consider them separately below, beginning with an assessment of the FTTB market.

Ability to foreclose in relation to wholesale FTTB

846. This theory of harm relates to DFA's ability to foreclose leveraging its position in the upstream market, to favour Vodacom's or its own operations that deal with businesses and enterprise customers (and Vumatel as an FNO in FTTH, dealt with further below).

847. ISPs have confirmed the importance of DFA as a supplier in FTTB, with DFA passing many more businesses than Openserve. The operators note that where DFA is not present in an area, they would in effect not be able to service their clients. The proposed transaction would lead to an increase in the FTTB infrastructure network of DFA as Vodacom would transfer its infrastructure to DFA. The merger parties emphasise, however, that this would be pro-competitive as Vodacom's network for servicing businesses would become open access.

848. The Commission notes that the ability to foreclose is enhanced through the proposed transaction because, pre-merger, Maziv has a limited retail presence at the ISP level which would change post-merger as Vodacom has a significant presence downstream.

849. The Commission further notes that while the conditions in the CIVH/Vumatel merger provided that DFA may not refuse access to its metro backhaul to third parties that are FTTH providers if it is objectively and reasonably capable of providing such access, these conditions did not apply to supplying third-party FTTB providers. That is, Mr Hodge argues, those conditions do not presently constrain DFA as it relates to its FTTB customers.

850. The merger parties relying on an assessment of current market shares are of the view that the proposed merger does not give rise to a change in the ability of the merger parties to foreclose in relation to FTTB, regardless of whether the market is defined as comprising only dark fibre, or both dark and lit fibre.

Market structure and changes brought about by the proposed transaction

851. We have dealt with concentration levels in the horizontal section on FTTB, which we summarize again here. Mr Smith highlights that at a national level based on businesses passed, DFA holds [50-60]% of the market and Vodacom 8% in wholesale FTTB (with [0-10]% for Vumatel and SADV, and [0-10]% for Herotel[875]) and approximately [60-70]% combined for the merger parties post-merger.[876] The Commission's estimate is [60-70]% for 2021 based on businesses passed (accounting for Vodacom, DFA, Vumatel and SADV).[877] (As we have noted, this excludes the data of Liquid Telecom that relates to "stands/erfs" and not businesses passed.) We noted above that even on Prof Theron's adjusted estimation of national shares for wholesale FTTB based on business passed (2022), the merger parties would account for just less than half

[875] We discussed issues relating to Herotel in previous sections.
[876] Exhibit BP Smith's Slide 26.
[877] Commission Report p 47 Figure 27.

the market ([40-50]%) making them the largest provider by some margin with more than double the share of any rival.[878]

852. The Commission also presented regional market shares of businesses *passed* (rather than *connected*) in metros and by province for 2021. In Gauteng, the Western Cape and KwaZulu-Natal the merger parties held shares of between [redacted]% and [redacted]% in 2021.[879] At a metro level, for City of Johannesburg, eThekwini and Cape Town, the shares of the merger parties ranged between [redacted]% and [redacted]%.

853. The merger parties in their assessment rely on market shares for business connected. However, we find as we did in the previous section that a measure of businesses passed is a stronger indicator of future competitive dynamics in an evolving market since the capex has been spent to roll out the infrastructure and the infrastructure is present to compete with. Furthermore, a measure of businesses passed represents the capacity of different players and potential to compete in the short- to medium-term. In addition, in terms of the theory, for a foreclosure strategy to succeed, a key consideration is that there is sufficient capacity to absorb additional customers derived from undermining rivals, such that an assessment of available capacity in this market matters. Lastly, it is evident to us that in considering the prospects for future competition in a market following a proposed merger, as we are required to do in merger control processes, considering the future capacity and capabilities of different parties to compete is appropriate in a market such as this where there is also a race to pass customer premises for future gain.

854. As indicated, the merger parties argue that there is a higher degree of overbuild in relation to FTTB than FTTH. We have dealt with this aspect under the horizontal assessment. We note that although Openserve is a significant player in the market, Maziv, as shown above, has a very strong market position and ISPs confirm that in many cases it is the only provider in an area.

[878] See Exhibit BQ Theron's Slide 24.
[879] Commission Report p 169 Table 17.

855. Relatedly, Vodacom's own internal assessment of the market and DFA's competitive landscape shows DFA as the market leader on both businesses connected and passed, despite having a considerably [redacted] in terms of kilometres of fibre infrastructure.[880] This same assessment notes that DFA is looking to [redacted] and an opportunity for it to connect [redacted] that are within reach of its network.

856. We observed above that DFA was likely less focused on lit FTTB in the past whereas Telkom/Openserve has been building its model on providing lit services. However, DFA's documents indicate ambitions to grow its business in this segment of the market with lit services in particular. As such, we cannot dismiss that DFA sees itself growing its FTTB business in future, not least because of the significant market position (dominance in most cases) that it holds in terms of business passed. DFA's strategy in the past may have been to service a wide array of clients on an open access basis, with FNOs and large ISPs dealing more directly with enterprises. This is likely to change post-merger with the addition of Vodacom's assets to Maziv and Vodacom as an affiliated firm, as we discuss below.

857. Maziv already has the infrastructure capacity and market position to potentially foreclose rivals. Furthermore, as noted above, both Maziv's and Vodacom's FTTB infrastructure has [redacted] capacity for expansion to absorb customers diverted to the merger parties following a foreclosure strategy. This ability is likely to be enhanced through the proposed merger, taking into account the additional FTTB fibre assets that would be transferred to be under Maziv's control through the proposed merger and the wholesale business of Vodacom.

Ability to raise rivals' costs through increased prices

[880] Hodge EWB p 79; Bundle M p 3552 Figure 28 20200924_[redacted] Document (Annexure to CDH RFI 1 response).

858. We considered the discussion regarding the costs of ISPs and in particular what share of their costs the procurement of wholesale FTTB access comprised.[881] Although focused on wholesale FTTH, as we discussed further below, the analysis showed that in 2021 and 2022 Vodacom's wholesale FTTH costs are [redacted] and range up to [redacted]% in 2022 of overall business costs for providing retail FTTH. The high share of costs, in our view, speaks to the significant exposure of ISPs to the pricing strategies of Maziv, and particularly increases in prices that could arise post-merger. Furthermore, ISPs typically operate in a low margin business and so could be significantly affected by changes in prices given their dependence on Maziv particularly in localised markets.

859. Little further evidence was presented on this score in relation to FTTB, but we take the estimate above into account, particularly as a number of ISPs provide both FTTH and FTTB.

860. Lastly, we note that it is not self-evident that the notional alternatives that are said to be available in the market are, in substance, meaningful alternatives that cover the range of regional and local markets in which ISPs operate. For example, we were presented a graphic of the metro connectivity of two rival suppliers (DFA and Liquid Telecom) in Bloemfontein which[882], rather than showing that there are two providers with relatively equivalent capabilities in the area, seemed to evidence a reality that DFA had a far greater and denser network reach and presence in Bloemfontein than the rival. That is, in substance a customer could not in our view compete effectively in that market without some access to DFA's products and network if it wished to have wider coverage to serve businesses.[883] The lack of granular data restricted the analysis that the experts could provide on this score, however this does not support a conclusion that there are adequate alternatives available in localised markets.

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[881] Hodge EWB p 151 para 264 and Figure 69. Bundle M p 5655 – 5658.

[882] Hodge EWB p 49 – 50 Figure 29 and para 97. The diagram reflects that while Liquid Telecom can be said to be present in Bloemfontein, its network only covers a narrow section of the CBD whereas DFA covers a significantly larger territory and is therefore likely to pass more businesses.

[883] [redacted] notes in its submission that [redacted] *has coverage in most parts of South Africa but the coverage is* [redacted] *(eg. they may* [redacted] *coverage between* [redacted] *in certain areas but may* [redacted] *throughout the whole area)*"; [redacted], Part B of the Record p 2613.

861. In addition, we considered that in the short term, it seems less likely that customers could switch easily and feasibly in a timely manner, which is the test, particularly where additional build or reinvestment in infrastructure to connect business clients to alternatives is required. The possibility of switching could also be undermined or slowed by the commercial risk of overbuild for providers (albeit lower in FTTB), and / or regulatory constraints such as single-trench policies in some areas, and Homeowner Association and commercial complex rules, preferences and restrictions regarding the presence of multiple fibre providers at a premises.[884] The market dynamics of switching behaviour and real-world practicalities, particularly in localised markets, were not comprehensively analysed.

862. It is sufficient for our purposes to note that an ability to foreclose is present.

863. Taking the above factors into consideration, we therefore conclude that the merger parties have an ability to foreclose rivals in wholesale FTTB post-merger.

Incentive to foreclose in the provision of wholesale FTTB

864. The merger parties argue that because Maziv is profit maximising pre-merger, it would face no incentive post-merger to raise rivals' costs in the downstream market in order to divert sales to its or Vodacom's downstream operations. This is given that Maziv already has a presence in the FTTH and FTTB markets, including as an ISP through SADV. If it sought to strengthen its own position downstream at the expense of rival FNOs and ISPs, it would have done so in the past. The argument therefore is that DFA in particular has a pre-existing ability and incentive to foreclose, but has chosen not to foreclose but to sell as much as possible through ISPs.[885]

865. In our view, it was overemphasised how effective SADV has been as a market participant in the downstream FTTB (or FTTH) market. We understand that it

[884] Smith EWB p 248 para 159; and Commission Report p 233 – 234 paras 680 – 684.
[885] Transcript p 3776 line 15 to p 3777 line 17.

has maintained a very low market share downstream with a focus on specific localised markets (including townships). It ultimately exited wholesale FTTB in 2022 after transferring its network to DFA, and migrated its FTTH network to Vumatel and stopped operating as a standalone FTTH operator since 2022.[886] It has [redacted] since June 2020.[887] Additionally, SADV's business has been [redacted] in recent financial years, which is symbolic of challenges in scaling its operations and competing effectively against larger players. Its downstream margins for FY2023 are [redacted]%) and [redacted] than Vodacom's ([redacted]%)[888] and industry level of around 20-30%. As such, the argument that Maziv could have grown downstream in FTTB (or FTTH for that matter) pre-merger does not square with the evidence, and it is clear that Vodacom is a considerably stronger player and brand downstream.

866. Post-merger, Vodacom Business would continue to operate as a retail entity serving business and enterprise customers, in effect as an ISP without its own FTTH or FTTB fibre infrastructure.

Profitability and vertical arithmetic

867. The issues discussed above regarding foreclosure in the provision of FTTB dark fibre to FNOs are apposite. Prof Theron acknowledges that while Vodacom's FTTB business is relatively small, it will seek to keep selling FTTB products post-merger as an ISP. Its share would grow as a result of a foreclosure strategy, but from a very low base at the ISP level, even as it would not continue to provide wholesale FTTH and FTTB services post-transaction.

868. The EBITDA margins at the ISP level of the market, the merger parties argue, are small relative to upstream margins of Maziv and so Maziv would face no incentive to benefit Vodacom at the ISP level in circumstances where it does not have an ownership stake in Vodacom. Furthermore, Prof Theron finds that Maziv

886 Commission Report p 49 para 95; Part A of the Record p 7029 para 2.62 c, p 7119 para 1.
887 Part A of the Record p 7029 para 2.62 c.
888 Exhibit BQ Theron's Slide 43.

would be unlikely to execute a multi-step strategy of this nature simply to favour a 'very small ISP with an 8% market share'[889].

869. On the other hand, Mr Hodge argues that the Vodacom ISP business is sizeable, even at 8% share in FTTB, and it has a stated ambition to grow this business (as we deal with in the horizontal section above). It has an established reputation as an ISP and FNO for businesses with long-term contracts established with DFA pre-merger to support these activities as confirmed by Mr Joosub.[890]

870. The concern in this regard is that post-merger, Vodacom would have an incentive to favour the FNO activities in which it has an interest (Maziv), rather than procure services from 'any' FNO as Mr Uys has claimed.[891] The ROFR provision locks this arrangement in. We understand that this is partly a customer foreclosure concern on Mr Smith's version[892] although not assessed further in the proceedings. However, the main concern is that Vodacom would be able to influence DFA to prefer it; and DFA would itself have an incentive to preference Vodacom's and its own activities downstream particularly given the ambition and strategies of both entities to grow in the FTTB business.

871. On the latter, Prof Theron questioned how Vodacom would exert influence on Maziv to implement a strategy that would not be in its favour, and why Maziv would allow this. She states as follows in this regard (albeit in relation to metro connectivity which is related): " …*really where are you going to recoup this revenue, what is your strategy, how are you going to compensate DFA who is now supposed to increase the cost of metro connectivity where they already face competition for instance from Openserve and the money that they lose there they're going to have to somehow recoup, it's not even vertically integrated, so we are back to Mr Smith's compensation mechanisms, the influence or the money that somehow will have to be paid to Maziv*"[893].

[889] Transcript p 3755 lines 17 – 18.
[890] Smith EWB p 281 para 272; Joosub FWB p 336 para 34.2.
[891] Uys FWB p 484 para 53.
[892] Smith EWB p 73.
[893] Transcript p 3756 lines 1 – 8.

872. The reference to compensation mechanisms is to the mechanisms that the merged entity could use to compensate Maziv for any profit sacrifice incurred from foreclosing downstream rivals (through price or non-price mechanisms) and potentially losing third party clients in favour of Vodacom, in circumstances where it does not have an ownership stake to benefit from the subsequent profitability of Vodacom downstream. Examples of these compensation mechanisms that were canvassed include potential lucrative contracts and partnerships gained by CIVH in Vodacom projects in other African countries; and commitments to future investment in Maziv which Prof Theron considers could be plausible[894]. Mr Smith goes further to argue that Vodacom could influence Maziv to favour its retail activities even if such conduct might not be perfectly profit maximising for Maziv, on a standalone basis, in the short term.[895]

873. We considered Prof Theron's assessment of the problems with this theory in terms of the profit maximising incentives of Maziv. In the first instance, it is well established that upstream margins at the infrastructure level are generally [redacted] times) higher than those in downstream retail activities. Wholesale margins (c[redacted]%) are also considerably higher than retail ISP margins (c.[redacted]%).[896] Prof Theron therefore argues that Maziv would not have an incentive to forego or undermine stronger upstream profits.

874. However, we do not agree that the vertical arithmetic is dispositive of a concern that Maziv would seek to advantage itself or Vodacom in the downstream market vis-à-vis third party FNOs or ISPs competing for FTTB customers – the stated

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[894] Transcript p 3422 lines 8 – 22, p 3423 line 1 – 21. Prof Theron notes that a mechanism linked to commitment to future investment from Vodacom to Maziv could be plausible and potentially positive for Maziv. However, she notes that one must also evaluate if that outcome would necessarily be anti-competitive and consider that it could also be pro-competitive and potentially benefit the whole market if those assets become open access, for example. On future investment Prof Theron notes: "*But the only way that that can be anticompetitive is either if the price is increased to everyone, or if the supply is reduced, so, the type of foreclosure arguments that we hear about. So, Maziv simply, knowing that they're going to get money down the road from Vodacom, I think, that is positive. So, that's just security of investment that will benefit the whole market if it's available on open access*" (Transcript p 3423 lines 1 – 9).

[895] Smith EWB p 282 para 276.

[896] Theron EWB p 387 para 336.

strategies of both these firms clearly indicate an ambition to [redacted] and [redacted] in this area.[897]

875. Recall that a simple vertical arithmetic (VA) approach typically only considers total foreclosure, as we have noted above. However, it is "*typically more profitable for a merged firm to engage in partial foreclosure. Moreover, VA takes price levels as given,* although *vertical mergers may change equilibrium prices considerably*"[898] such as when the elimination of double margins (efficiencies) through the value/supply chain is taken into account.[899] A VA approach, which is often presented in such cases, cannot therefore dispose of foreclosure concerns with vertical mergers, otherwise the regulatory evaluation of vertical mergers would be a very straightforward exercise based on a static analysis. More sophisticated and dynamic techniques and measures are available to account for changes in pricing incentives, however these were not applied in this case.

876. Maziv does not seek to simply sit back and enjoy upstream profits (akin to the Single Monopoly Profit theory's logic), nor does Vodacom intend to continue to play a small role in downstream fibre markets for FTTB (and FTTH) for that matter. It is evidently part of why Vodacom has chosen to retain this business. We are also not evaluating a total foreclosure strategy in this regard. This must mean that even though the comparative profits downstream are smaller, they may be attractive for different reasons, including that there are opportunities to pursue volume growth in these markets (that is, potentially lower margins but of an increasing and larger retail revenue base).

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[897] Bundle M p 1267, Bundle M p 1384: CIVH Group - Special Board Meeting – Project Lindt-27/10/21, Bundle M p 1915: Vodacom South Africa VSA budget / LRP Pack March 2021.
[898] Zenger (2020) p 6.
[899] It is peculiar that the nature of the proposed conditions in this transaction is such that many of the potential efficiencies of vertical integration, which could benefit customers, are effectively removed through the various provisions on price parity, vertical separation of strategic decision-making at Vodacom and Maziv board and management levels, and standardisation of price and product offers versus price discrimination and bespoke offers. As noted above, Prof Theron confirms that, other things being equal, Maziv would want to be able to distinguish pricing and offers for different customers, groups of buyers or product offerings as it has been able to do in the past, in response to innovation and project demands of different customers. In any event, the merger parties did not present strong claims on potential merger efficiencies in the proceedings as we discuss further below. See Transcript p 3974 line 2 to p 3975 line 6.

877. We also find no reason to find that the market will not evolve to grow revenues downstream at least in absolute terms – it is common cause that fibre demand of businesses and homes is expected to grow, as the merger parties and others emphasised throughout the proceedings. Industry analysis confirms that operators are seeking to grow connections.[900] DFA and other players recognise that while the first wave was to pass homes and businesses at scale (the first land grab), the key issues in the next phase will be both the second land grab and the connection of businesses and homes already passed in the first wave to grow EBITDA returns on aggregate. Growing [redacted] has been a concern and objective of Maziv particularly to balance out [redacted] ratios.[901]

878. The merger parties raise the point that there are more players in the downstream retail markets, such that Maziv, in seeking to preference Vodacom, would not necessarily be able to guarantee that customers diverted from ISPs/FNOs would be redirected to its own or Vodacom's downstream businesses. On the other hand, the Commission contends that the merger introduces to the fold Vodacom's powerful brand and sales engine, and the stated ambition of both parties to pursue growth in FTTB and downstream. One possibility is for Vodacom to increase its reliance on wholesale inputs from DFA (from which it effectively benefits additionally through its ownership stake and likely further volume discounts), and to also cross-sell Maziv access and products downstream over other available alternatives.

879. Over time, such a shift could be expected to grow the downstream presence of the merger parties directly and indirectly. We find this to be a credible interpretation, as it is supported by the documentary evidence of the parties in assessing the potential benefits of the transaction.[902] For example, Maziv identifies as part of the pros of the proposed transaction, that the "*Vodacom* [redacted] *products*"[903].

[900] Theron EWB p 374 paras 281 – 282. Hodge EWB p 132 para 207.
[901] Uys FWB p 487 para 61.
[902] See Hodge EWB p 48 para 26. Bundle M p 1256 – 1257: CIVH Board Pack of 27 October 2021.
[903] Bundle M p 1257: CIVH Board Meeting 27 October 2021, slide 'Key Transaction Considerations (DFA)'.

Operational costs and profitability

880. Another critical aspect of the evidence concerns the significance of the costs of metro connectivity as an input and what post-merger changes could mean for customers. This evidence is relevant when considering the possibility and profitability of a 'multi-step' strategy in that DFA also provides a key input for rival FNOs that compete with Maziv to supply wholesale access (both FTTB and FTTH) and insofar as those connectivity costs ultimately pass through to the costs and prices of ISPs further downstream.

881. The merger parties and Mr Hodge showed the price of metro connectivity services as a proportion of the operational costs of providing wholesale FTTH to be below [redacted]% for Vumatel (as a proxy for FNOs with no self-supply costs in general but is affiliated with DFA) and [redacted]% for Vodacom which supplies some of its own inputs but is not affiliated with Maziv pre-merger like most other operators.[904] It is assumed that the same or similar would apply for FTTB.

882. Importantly, these costs are very large for Vodacom in providing wholesale FTTH (and presumably passed through to its downstream retail ISP operations) at around a third of operational costs. This is because Vodacom's costs include those of self-supply of metro connectivity at the FNO level, comprising 76% of Vodacom operational costs to provide wholesale FTTH in 2020, and in fact rising to over [redacted]% in 2021.[905] The significance of this evidence is that it will be highly beneficial and profitable for Vodacom to offload these costs of self-supply to Maziv post-merger, and rely on securing significant volume discounts for access to this infrastructure from Maziv (or others) whilst also benefiting from its share in Maziv profits overall which, in effect, enhances its relative profitability downstream. This would likely benefit Vodacom in terms of its cost competitiveness relative to other ISP operators downstream and thus help to improve the economics of its downstream retail business. Maziv, in turn, would

[904] Theron EWB p 387 paras 332 – 333; Hodge EWB p 160 – 161.
[905] Hodge EWB p 161 Figure 80.

likely benefit from the significantly increased purchases of Vodacom and the commercial use of the infrastructure transfer by Vodacom including customer contracts.

883. Other competitors would simply not enjoy the same benefits. Specifically, other FNOs would not benefit from Vodacom's purchases; and other ISPs would not enjoy the same volume discounts at scale or the relative profitability of Vodacom ISP in circumstances where it also retains a share of the profits from the purchases from Maziv of all other ISPs it competes with. Regarding discounts, while the same discount schedules or levels may notionally be available to all other ISPs in terms of the proposed conditions, Vodacom is in amongst the top five large ISPs and few others (of the more than 200 in the market) could in reality apply for the higher tier discounts.

884. In the short term, Vodacom could therefore compete more aggressively downstream which it is seeking to do (although the merger parties do not evidence these potential benefits), and this may be to the benefit of consumers in the short term; however, it is critical to bear in mind that its ultimate cost advantage downstream derives also from its share in Maziv's profits in the post-merger world (which is at the heart of the competition problem that arises). On the latter, the proposed transaction is not one in which Vodacom has simply sought to sell off its infrastructure assets and wholesale business which is perhaps more common in these transactions; rather, it is also retaining a controlling interest in Maziv as its purported future supplier which is a key difference from a competition perspective.

885. We also take into account that the costs of metropolitan connectivity as a proportion of the operational costs of providing wholesale FTTH may constitute a higher share of operational costs for relatively smaller FNOs operating in volume-driven wholesale business or for related downstream retail[906]. Similarly, pass through of those costs will differ for different ISPs (which was not assessed

[906] Hodge EWB p 160 – 161, Figures 79 and 80. Bundle M p 5760 – 5761: Compass Lexecon response dated 15 March 2023.

in detail despite the concerns of ISPs) and may have a significant adverse direct or indirect impact on them.

Non-price mechanisms of foreclosure in FTTB

886. Non-price mechanisms include the incentive to undermine third-party ISPs (and FNOs) in terms of preference, timing, delays and rollout in new areas. The merger parties argue that it is not possible to discriminate against customers as the terms of supply and quality of service are tied in with strict SLAs.[907]

887. It was further argued (in general, across market levels) that customers have other options, and so they are not locked into these contracts with Maziv/DFA, explained by Prof Theron as follows: " … *the evidence from Mr Mare as well on faults and repair time and the SLAs which I think are really important, because these services are contracted on a SLA basis which is really very strict…people do have other options, so they're not locked into these contracts. If they are unhappy with the SLAs or the delay or the rollout, then they have other options in this metro market that I was referring to, but I guess we will also speak to that when we get to the conditions, but I don't see large non-price issues arising from this, because one has to go through the same thing, the incentives, the lack of vertical integration … that framework is still valid whether you talk about price or non-price issues*".[908]

888. As such, the merger parties rely on the fact that SLAs are in place, but more pertinently that there is no ability or incentive to foreclose.

889. However, the evidence which we have already canvassed above contradicts that Maziv is altogether not able to differentiate between customers in the terms and quality of access. In a post-merger environment in which Maziv has a link to a downstream counterpart in Vodacom and shared incentives, it is likely that it will face even stronger incentives to preference Vodacom or weaken competition

[907] Transcript p 3758.
[908] Transcript p 3758 lines 10 – 21.

with downstream rivals, as it stands to benefit from Vodacom's purchases and investment.

890. Taking the various factors discussed above into account, we find that the merged entity would have an ability and incentive to foreclose in relation to wholesale FTTB.

Ability to foreclose in wholesale FTTH

891. FNOs use access to DFA's metro dark fibre products, such as Peregrine, to deploy wholesale last mile FTTH i.e. to pass homes. Last mile access is used by ISPs to provide retail fibre connectivity to homes.

892. Relevant to the FTTH aspect of the theory of harm is that Vumatel is an FNO involved with providing wholesale access to last mile FTTH infrastructure. It competes with other FNOs (and certain ISPs) in providing wholesale access to retailers downstream, ISPs primarily, who sell fibre connectivity to customers, being homes and end-users.

893. ISPs use last mile connectivity to provide retail FTTH/B services. The reference to wholesale homes passed relates to the primary infrastructure network provider in an area, typically an FNO, whereas ISPs will procure access to this infrastructure and provide services to connect homes in an area.

Structure of wholesale and retail FTTH markets

894. As mentioned earlier, Maziv (mainly Vumatel) is by far the largest wholesale FTTH provider in South Africa based on homes passed, with approximately 1,948,532 homes passed as at June 2023 ([30-40]%), followed by Openserve with [redacted] homes passed [20-30]%) and Vodacom's network accounting for [redacted] wholesale homes passed ([0-10]%).[909]

[909] Reynolds EWB p 442 Table 1. Includes negligible DFA homes passed [redacted]) and SADV ([redacted]) but excludes Herotel's closed network [redacted] homes passed – see Reynolds Table 22).

895. The number of homes passed by Maziv has grown the most amongst wholesale FTTH operators at [30-40]% between June 2021 and June 2023, followed by Openserve ([redacted]%, to [redacted] homes passed).[910] By June 2023, the total number of homes passed in South Africa was 5.18 million, having increased significantly and rapidly from 2.76 million in June 2021.[911]

896. As we have indicated, homes passed is a better indicator of future competition. For completeness we mention that Maziv is also the leading player in terms of the number of homes connected ([30-40]% share in June 2023), followed by Openserve ([20-30]%) and Frogfoot ([0-10]%). Vodacom accounts for approximately 3% of wholesale FTTH.

897. What is important, as discussed before, is penetration. The total number of homes connected in South Africa was almost doubled between June 2021 and June 2023, to 1,907,274. Yet this represents approximately 37% of total homes passed that are connected, which we have indicated is a relatively low average penetration rate.

898. Given Vumatel's vast network as an FNO, and as a function of the fact that it is in most cases the only provider in a particular area, ISPs indicate that they require access to Vumatel's network to compete in providing services to households (and in some cases small businesses that are passed by the infrastructure).

899. The merger parties estimated their combined share of wholesale FTTH to be approximately [40-50]% of homes passed at a national level.[912] Mr Smith argues that the share of the merger parties in narrower localised markets or sub-nationally is likely to be higher in some areas, given that the [40-50]% national share represents an average market share.[913]

[910] Reynolds EWB p 442 Table 1.
[911] Reynolds EWB p 441 – 442 Table 1.
[912] Smith EWB p 254 para 172; Part A of the Record p 354 – p 355: Compass Lexecon report dated 10 December 2021, Tables 8 and 9. There were approximately 82 FNOs active in South Africa in 2021.
[913] Smith EWB p 275 para 241.

900. In retail FTTH, the market shares of the largest ISP players are set out below. [redacted] is the largest ISP with approximately [10-20]% share of homes connected in June 2023 followed by [redacted] ([10-20]%).[914] Vodacom has a share of 8% ([redacted]% in June 2021) and ranks as the 5th largest ISP by homes connected (SADV has less than [0-10]% share, and ranks 10th).

There is limited overbuild in wholesale FTTH

901. As we have indicated, the evidence is that there is limited overbuild of wholesale FTTH infrastructure in the market – estimated by MTN to be only 18% of the total number of homes passed by FNOs. This means that there is likely to be local market power in areas where there is no alternative provider of wholesale FTTH. Mr Reynolds shows FTTH network overbuild of Vumatel's coverage area by other FNOs including Vodacom of [redacted]% as at April 2024, and [redacted]% excluding Vodacom.[915]

902. The implication of the above is that for approximately 80% of homes passed nationally, there is a local monopoly provider. This is not in dispute, with Mr Reynolds confirming that Maziv would likely remain a wholesale FTTH monopoly in areas where it has not been overbuilt, although arguing that the merger does not materially change the pre-merger picture.[916] Reynolds then argues that any further competition risk is mitigated by the proposal of the merger parties to divest FTTH assets in areas where their networks overlap; plus the advantages of the open access and non-discrimination provisions being extended to FTTH assets of Vodacom being transferred to Maziv as proposed.

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[914] Reynolds EWB p 444 Table 3.
[915] Reynolds EWB p 584 Table 21. Reynolds provides detailed notes regarding the estimations, sources of data, and assumptions made which are not generally in dispute, and which we do not repeat here. Important to note is the assumption that competitors' homes overbuilding Vumatel 'sit on top of each other', thus potentially understating the number of competitors' homes overlapping with Vumatel's. We did not understand this assumption to imply a material change in the analysis.
[916] Reynolds EWB p 520 para 6.6.

903. The above confirms that there is limited overbuild in the market generally, as well as between the merger parties. We have in the horizontal analysis dealt with the overlap in FTTH networks between the merger parties relating to [redacted] homes passed by Vodacom in areas where Vumatel is also present.[917]

Dependency on the merger parties for wholesale FTTH to provide retail FTTH services

904. Information submitted by ISPs indicated varying but significant degrees of reliance on the merger parties for connectivity in relation to FTTH.

905. In many cases, for FTTH there is significant dependency based on the number of customers served on the network of each FNO and the merger parties.[918] Taking a simple average that excludes RSAWeb (affiliated with an upstream infrastructure provider Octotel, only approximately [redacted]% dependency) and Telkom (affiliated with Openserve which provides infrastructure to it, [redacted]% dependency), we find that the dependency ratio across five third-party ISPs that made submissions during the Commission's investigation is approximately 46% when including only Vumatel (range: 33-63%), and 48% (range 36-63%) considering the merger parties' firms together (Vumatel, Vodacom, SADV).

906. Although the dependency is on Vumatel (rather than Vodacom) the proposed transaction does expand the scope of the merger parties' FTTH network with the addition of Vodacom's existing infrastructure (which the merger parties argue is a pro-competitive outcome as this infrastructure would be offered to third parties on an open access basis as prescribed in the tendered conditions). As such, the question of how the incentives of the merger parties change post-merger in relation to these markets becomes especially important, as we assess further below.

[917] Reynolds EWB p 524 para 6.26.
[918] Hodge EWB p 144 Figure 63.

907. [redacted] and [redacted] amongst others, all indicate that Vumatel is often the only network FNO available in an area and that in general, while other FNOs exist around the country, access to Vumatel's network is critical for sustaining their operations.[919]

908. We consider there to be high levels of dependency on the merger parties, which forms the basis for our conclusion that an ability to foreclose exists.

Open access and competition

909. Mr Reynolds argues that the major wholesale FTTH FNOs, including Vumatel, have chosen to operate on an open access and non-discriminatory basis, despite operating as local monopolies in many areas and/or being integrated with an ISP in the downstream retail market (e.g. Telkom/Openserve; Frogfoot/Vox; Octotel/RSAWeb; MFN; Vodacom). That is, despite having downstream affiliates, these operators generally do not foreclose ISPs' access to their networks because of the economics of needing to share and recoup the costs of the network with many customers.

910. We considered the submission that a number of operators apply open access models, as confirmed by the industry association for ISPs, Internet Service Providers' Association (ISPA), which advocates for open access principles to be retained through this proposed transaction[920]. However, it is important to make clear that open access is not the same as non-discrimination in terms of its economic implications. In this regard, it is not clear from the evidence that the open access principle has precluded those FNOs which are vertically integrated or with downstream affiliates from preferencing their affiliated ISP in certain ways

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[919] See Hodge EWB p 143 citing third party submissions. Part B of the Record, p 6272 paras 6119 – 6341.

[920] Internet Service Providers' Association (ISPA). 'ISPA seeks commitment to open access' (Press Release, 29 April 2022), available: https://ispa.org.za/press_releases/ispa-seeks-commitment-to-open-access/ (accessed 25 March 2025). Mr Reynolds refers to the same article in his report at footnote 448. ISPA describes itself as a South African non-profit company, and recognised internet industry representative body. Formed in 1996, ISPA has historically served as an active industry body, facilitating exchange between the different independent internet service providers, ICASA and other government structures, operators and other service providers in South Africa.

such as through favourable pricing or non-price preferencing. Specifically, it may be possible to operate on an open access basis, whilst still applying aspects of discrimination across customers. DFA does the same.

911. The economics of these networks means that open access makes commercial sense especially to recoup the costs of new FTTH network builds (which is why total foreclosure theories have largely been abandoned in any of the vertical theories of harm), but the same is not necessarily true for non-discrimination. To maximise the uptake of its network products, an FNO or infrastructure provider may seek to offer different price points, discounting and terms to various individual and groupings of customers. Indeed, it is often the case that these forms of price discrimination are efficiency-enhancing, although we scrutinise closely arrangements where there is also an element of vertical integration. Notionally, these welfare advantages would be lost through the merger if the proposed conditions were taken into account. More importantly however, is the concern that discrimination across customers (even within an open access regime in place) can also be competitively harmful if the provider of the infrastructure input has an ability and incentive to favour its own or affiliated firms downstream over others.

912. The evidence before us is that Maziv applies these forms of [redacted] pricing, [redacted] and [redacted] for many of its customers.[921] Therefore, in practical terms, it has the ability to foreclose by setting its pricing arrangements in a manner that favours Vodacom ISP over its rivals. For example, Mr Hodge and the Commission present an assessment of the complexity of pricing offered by Maziv to different customers, whether [redacted] [redacted] or against standard terms such as through varying [redacted] offered and [redacted] and commitments etc.[922] From this, we see that although there are limitations in how prices and terms of different products can be directly compared, there can be [redacted] in the [redacted] offered to Vumatel versus, say, [redacted] or [redacted][923]

[921] Commission Report p 293 – 300.
[922] See Hodge EWB p 187 – 192.
[923] Hodge EWB p 190 Figure 93.

913. Importantly, as noted above (paragraph 761), Prof Theron confirms in response to questions from the Tribunal that, other things being equal, DFA/Maziv would choose from a commercial perspective to offer [redacted] pricing and terms in the market. It is in their commercial interests to do so and that, pre-merger, it can do so.

914. We return to discuss the incentive to foreclose below, but note at this point that ability to foreclose through partial foreclosure including discrimination strategies pre-exists the proposed merger, but also is not removed post-merger if the merger conditions are not taken into account. Vodacom ISP (or SADV for that matter) could possibly be offered similar or larger significant discounts based on specifications of each contract, terms and significant volumes and upfront payments.

915. It is striking, as Mr Hodge notes, that some of the [redacted] offered to customers have arisen despite open access provisions being in place to regulate the conduct of Vumatel and DFA (arising from the Tribunal's findings in the 2019 CIVH/Vumatel transaction). This goes to the likely effectiveness of proposed behavioural conditions in the present transaction, and their monitorability.

916. Taking the above into account, we find that an ability to foreclose exists in relation to wholesale FTTH. Dependency on the merger parties is objectively high, the merger parties will retain a large footprint and share of the market post-merger, and would have the ability to restrict access or differentiate across downstream customers. We discuss effects further below.

Incentive to foreclose in wholesale FTTH

917. The Commission focused on a partial foreclosure concern primarily through raising rivals' costs. A total foreclosure strategy is not plausible as the Vodacom ISP is not a part of this transaction, such that full foreclosure of rivals

downstream by Maziv would not likely be compensated for by an increase in revenues at that level of the market. The Commission therefore considered that Maziv would have an incentive to raise the costs of rivals through price increases that would disproportionately affect third-party ISPs, and that even if Vodacom ISP incurred the same price increases for inputs, it would nonetheless benefit as a significant shareholder in Maziv with a share in its profits (so as to offset some of the losses incurred through the price increase) and from ISP rivals being weakened. It would also benefit from a share of the profits derived from Maziv sales to all other ISPs as well.

918. Maziv would seek to foreclose access to wholesale FTTH if it determined that its business would benefit either at the upstream and/or wholesale level vis-à-vis other FNOs, or in downstream retail in its commercial and competitive position vis-à-vis other ISPs downstream. The latter, Mr Smith and Mr Hodge argue, could also be strengthened by any fixed-mobile bundles that the merger parties could create.

919. The fixed-mobile bundling concern is stated as follows by Mr Smith: "*However, I understand from MTN's witness statement that the opportunities for the bundling of fibre and mobile services are particularly likely as regards the expansion of fibre infrastructure into regions where there currently is no such infrastructure. For instance, Vodacom could use its substantial mobile customer base as a means of identifying homes that do not yet have fibre connectivity but are interested in obtaining it and communicate this to Maziv (or even influence Maziv's fibre expansion plans to prioritise these areas). While Maziv plans, installs, and launches fibre in this area, Vodacom could offer 5G FWA as an interim solution, and bundle this with the fibre connectivity ultimately provided by Vodacom's ISP business using Maziv's infrastructure. Moreover, Vodacom has extensive coverage and provides 5G coverage to almost* [redacted]*% of the population so it would be well placed to do this in many areas*".[924] We have dealt with the bundling concern above an the vertical dynamics are related.

[924] Smith EWB p 278 para 253.

920. The merger parties argue that Maziv would be taking serious risks to its business were it to seek to favour Vodacom's ISP over others in the market. We address the main factors raised[925] below.

921. First, in areas where Maziv is a monopoly provider of wholesale FTTH pre-merger, Mr Reynolds argues that Maziv would not benefit from preferring Vodacom ISP over rivals with the hopes of growing the business of only one of its ISP customers, Vodacom ISP.[926] This is based on the strong assumption that Maziv has set its prices to maximise profits pre-merger, such that a post-merger price increase would lead to less take-up of its products by ISPs and render the price increase unprofitable. In addition, in monopoly areas, there is no threat of Vodacom ISP going to another provider that would have constrained Maziv's prices, whether before or after the proposed transaction.

922. Second, in overbuilt areas, customers would switch to other FNOs in response to price increases, rendering the price increases unprofitable for Maziv. In addition, even if Vodacom were to attract additional customers, it is a relatively small ISP and these sales would likely be small relative to the sales lost by Maziv.

923. Further, in relation to overbuilt areas, even if higher prices would harm Vodacom ISP less than other ISPs (as it could recoup a part through returns from its shareholding in Maziv), Mr Reynolds argues that Vodacom's ability to compete with other ISPs that are customers of other FNOs would be reduced as customers of those FNOs would not be affected by the Maziv price increase. This is true in relative terms, however Mr Reynolds does not present extensive evidence to demonstrate the comparative pre-merger prices of Maziv and different FNOs providing FTTH[927], and how Maziv's price levels following such an increase would compare with those of FNO rivals.

[925] Reynolds EWB p 525 – 526.
[926] Reynolds EWB p 525 para 6.34.
[927] Hodge EWB p 149 para 260. Bundle Q p 1161 Figure 67.

924. Mr Reynolds accepts that some customers would switch to Vodacom ISP if the effective price increase to Vodacom is less than to its rivals, however he notes that Maziv does not earn a share of the profits of Vodacom ISP that would compensate it for loss in upstream wholesale FTTH margins for Maziv arising from lost sales.[928] This is argued without further reference to evidence as to the extent of switching that is likely, which raises a concern in our view. Furthermore, it could benefit Vodacom ISP without necessarily harming Maziv to the extent that those customers would have switched from a third-party ISP to an affiliated ISP (Vodacom ISP), presumably continuing their purchases of ISP FTTH services. As Mr Smith and Mr Hodge have argued, it is plausible that the first step of such a foreclosure strategy is not necessarily loss-making for Maziv.

925. In addition, if Vodacom ISP were able to maintain or grow purchases of wholesale FTTH from Maziv/Vumatel post-merger, this would be of benefit to Maziv such that any loss it may suffer could be limited. In this regard, we cannot ignore the very strong brand, reputation and customer base of Vodacom in downstream retail markets, such that it could, post-merger, drive increased sales (and thus increased returns for Maziv on wholesale FTTH infrastructure at Vumatel) and take-up, which we understand from Maziv is critical for its FTTH business. Pre-merger, Maziv does not have a strong downstream presence, despite its attempts with SADV (only [0-10]% market share), and so its ability and incentive to foreclose would have been limited.

926. The merger parties argue that Vumatel relies on open access and having large ISPs connecting homes using its network, and that "*There is no factual or economic evidence that Maziv would be able to foreclose these large ISPs without losing the benefits of FTTH wholesale margins achieved through the connections they make*"[929]. However, in our view, there is also no evidence to the contrary, indicating that Maziv could not overcome a loss of many or just some ISP customers through increased wholesale FTTH custom from Vodacom ISP, in a manner that SADV could not achieve.

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[928] Reynolds EWB p 526 para 6.37a.
[929] Merger Parties HOA p 142 para 301.

Overbuilt areas and customer switching in localised markets

927. A more detailed, dynamic analysis of the likely scenarios post-merger was required. We were not provided with more detailed analysis of how the various factors above will likely interact in reality, such as how much switching could take place, the strength of Vodacom as an ISP and potential for growth, and precisely the limit points at which a particular pricing strategy would harm/benefit Maziv. Furthermore, we are not shown how market dynamics would change in narrower or localised geographic markets. National and provincial shares mask the fact that in ~80% of the markets there is only Vumatel at the FNO level. For the 24% proportion of the wholesale FTTH market where there is overbuild by FNOs, what is required is a detailed understanding of the dynamics and strength of competition rather than an assumption that the mere presence of a rival FNO is sufficient to discipline the merger parties post-merger.

928. Switching by end-customers is not as common, and may be less so in narrower or local markets where there may be fewer ISP alternatives available to customers. Some large ISPs state that customers do not generally switch, but will do so if there is an attractive price offer, quality of service concern, or for relocation. Mr Reynolds refers to the submission by [redacted] which states that it would encourage existing customers to switch FNOs if it could no longer sell wholesale FTTH services of a particular FNO. However, it is telling that [redacted] also states that monthly customer churn for an ISP can be less than 2% driven by relocation and price[930] – although there are no useful benchmarks against which we can test this churn rate, it does not seem to be significant competitive attrition in the market in circumstances where the merger parties have argued that the market is highly competitive.

929. Switching by ISPs between FNOs in overbuilt areas is another way in which a price increase put through by the merger parties post-merger could be rendered unprofitable. Mr Reynolds has argued that the risk of switching is a real

[930] Part B of the Record p 617 para 27: [redacted] submission dated 17 March 2022.

constraint, citing Mr Mare who notes that Maziv would lose customers if it increased prices.[931] In addition, the merger parties argue that the potential to lose customers in overbuilt areas (24% of the national market) would serve as a constraint and that "*the presence of a rival FNO constrains the prices that Maziv can charge because higher prices risk ISPs and end-customers switching to the rival FNO*"[932] making it unlikely that Maziv would attempt to foreclose.

930. In our view, there are a range of issues with the merger parties' claims. Mr Mare's claim that customers would leave Maziv in response to price increases is not strongly supported. Specifically, for overbuilt areas there is not significant evidence of the dynamics and practicalities of switching in practice for ISPs, noting that no ISPs were called as witnesses in these proceedings. Mr Reynolds cites [redacted] which says that in overbuilt areas it typically offers ISP services using both FNOs although it usually promotes one FNO over another based on which offers greater value. In our view, this speaks to the importance of understanding the substance of competition in a particular market wherein quality of services and other forms of differentiation between players have an effect.

931. The Commission presented evidence that Vodacom's prices are [redacted], or at least there are [redacted] its standard rate cards, in areas where their last mile wholesale FNO network is overbuilt by other networks.[933] Vodacom states that it "*has a* [redacted]*card on self-supplied services in areas where other networks are also present. This* [redacted] *reflects the need to maintain* [redacted] *prices. The level of* [redacted] *also depends on the pricing offered by competitors on the other network in that location*".[934] Our interpretation of this evidence is that maintaining competition between wholesale FTTH providers and in turn ISPs is critical for the market and ultimately consumers, such that weakening of rivals would likely harm competition in localised markets in particular.

931 Reynolds EWB p 529 para 6.51; Mare FWB p 445 para 63.
932 Reynolds EWB p 529 para 6.51.
933 Commission Report p 191 – 192.
934 Part A of the Record p 7004 para 3.4: Vodacom's submission (CL letter) dated 21 April 2022 in response to RFI1.

932. The issues at the ISP and FNO level are interlinked, and a strategy to foreclose under this theory of harm necessarily considers both these levels of the market. Mr Reynolds goes on to argue that what matters for CIVH is the wholesale profits it can earn post-merger, and a price increase at the wholesale level would be passed through by ISPs to end-customers, leading to customer switching. However, we find that this would depend on the extent of competition at the ISP level in a localised market, noting that Mr Reynolds agrees with the Commission that "*supply of wholesale FTTH is highly localised*"[935]. For example, in a town where few ISPs were present one would expect significant pass-through of cost increases (owing to localised market power) compared to a scenario where there was intense competition in a local area such that some ISPs may choose not to pass on the full increase to end-customers. This is in a context where many ISPs do not operate nationally, or at least focus on specific areas.[936]

933. Nonetheless, although some customers might switch to the Vodacom ISP if it raised its prices by less, the merger parties argue that it has a market share of at most 8%, and most customers would be expected to switch to ISPs on the networks of rival FNOs given these would be relatively cheaper following the change in prices.

934. In this regard, we considered that while Vodacom ISP only has a market share of 8% pre-merger, it has a clear incentive to grow its presence in the ISP market in both FTTH and FTTB. There are many players active at the ISP level (the association ISPA lists over 200 members), and it is considered to be a fragmented and largely competitive market. However, it is evident from Mr Reynolds' assessment of market shares that Vodacom is at least an important player in the market (in June 2021 it was the [redacted] largest player with a share of [10-20]%).[937] As context, the largest player is [redacted] with just more than [redacted] the number of homes passed by Vodacom, and a market share of [10-20]% in

[935] Reynolds EWB p 467 para 4.29.
[936] Reynolds EWB p 529 para 6.51.
[937] Reynolds EWB p 444 Table 3.

June 2021. It appears therefore, that there is a subset of main, larger players and a relatively large competitive fringe.

935. Importantly, as noted above, Vodacom seeks to grow its presence in fibre markets. Post-merger, it would likely see it as an advantage to have a significant shareholding in Maziv as a provider of the requisite fibre infrastructure and connectivity inputs. To ignore this (fact) would be to posit a rationale for the transaction that completely disregards any commercial potential identified by the parties to the transaction, and to reduce the proposed transaction to simply a financial investment akin to that which might be made by a bank or development finance institution. We have dealt with this under our assessment of the true rationale of the proposed transaction and changed incentives.

Monopoly areas and alignment of incentives

936. The key question is whether the link created between Vumatel's and Vodacom's downstream ISP services might create incentives to foreclose rivals that did not exist pre-merger.

937. Mr Reynolds' argument in relation to monopoly areas relies primarily on the assumption that Maziv/Vumatel is profit maximising across the board such that pricing is optimised in monopoly areas. However, we also understand that take-up is critical to drive Maziv revenues, and that homes connected in most areas significantly lag the number of homes passed by FNOs such as Vumatel, despite the presence of ISPs purportedly driving sales with customers. This raises the question of whether Vumatel would benefit more from having an affiliated Vodacom ISP in the market driving take-up leveraging its strong brand, with the assurance that it would be more likely to direct users onto the Maziv network over those of other FNOs.

938. Similarly to Vodacom, Maziv seeks to grow its wholesale revenues which requires take-up downstream (either through competition of ISPs downstream driving FTTH uptake; or a committed partner downstream that can drive sales

and thus wholesale purchases over time). DFA also recognises the strength of Vodacom's sales capabilities as an advantage, noting "*Vodacom* [redacted] *products*"[938] (and most likely [redacted] products as well), even with the knowledge that Maziv/DFA would not be acquiring a stake in the Vodacom ISP business.

939. The merger parties argue that partial foreclosure of ISPs would result in less ISPs competing to attract end-customers to Maziv's network.[939] However, it is not clear the extent to which Maziv would lose in this scenario. Vodacom has considered consolidation and less fragmentation in the ISP market, and so a reduction in ISP players is not necessarily misaligned with its own incentives.[940]

940. In its [redacted] documents, Vodacom notes that "*there are several opportunities to take* [redacted] *market*", and makes reference to an objective to "*improve the* [redacted] *business*" with a strategic imperative being to "[redacted] *markets*", using an initiative to have "[redacted]"[941]. These statements point clearly to Vodacom's intention [redacted] in the fibre and ISP market, to [redacted] and to [redacted] supply to achieve these outcomes.

941. For its part, Maziv recognises the potential benefits to it of a transaction with Vodacom, even if it would not own a share of the Vodacom ISP. Maziv, and specifically Vumatel, considered advantages of the proposed transaction to include "*Additional* [redacted] *to drive home additional product and* [redacted] *opportunities*"; "[redacted] *FNO*"; [redacted] *in the market (Other* [redacted]

[938] Part A of the Record p 1267: CIVH Group Board Meeting dated 27 October 2021.
[939] Merger Parties HOA p 142 para 302.2.
[940] Hodge EWB p 147 para 254.
[941] Hodge EWB p 147 Figure 65; Bundle M p 12858: Vodacom [redacted] document dated August 2023, p 15.

[redacted] "[redacted].[942]

942. The above tells us that Maziv does not consider the size of Vodacom to be negligible and that it sees [redacted] through a strategic partnership with the Vodacom ISP business, even as Vumatel recognises risks in terms of negative perceptions in the market amongst large ISPs of an ISP partnering with Vodacom. Vumatel recognises that it would need to maintain open access and continue to create opportunities for all ISPs. However, this is not to say that the partnership opportunities, what Mr Hodge and Mr Nunes refer to as an alignment of incentives, would not be explored as long as appropriate mitigation strategies were in place.

943. We find that the evidence points to the existence of an incentive to foreclose on the part of the merger parties in relation to wholesale FTTH.

Effects in FTTH

944. In relation to both FTTH and FTTB, it is significant that the costs of wholesale FTTH/B access are a very large proportion of the costs of ISPs in particular. Any price-related strategy to foreclose rivals through raising their costs could be very harmful to downstream market participants.

945. Mr Hodge presents evidence based on Vodacom's own costs of procuring wholesale FTTH as a proportion of the overall costs of providing retail FTTH services.[943] The analysis showed that in 2021 and 2022 Vodacom's FTTH costs are [redacted] and range from [redacted]% to [redacted]% of overall business costs for providing retail FTTH, with Vumatel alone accounting for a large share of this at [redacted]%.

946. The implication is that a significant change in the prices offered to ISPs could lead to significant adverse effects on their businesses, noting that these are low-

[942] Hodge EWB p 107 Figure 44; Bundle M p 1280.
[943] Hodge EWB p 151 para 264 and Figure 69. Bundle M p 5655 – 5658.

margin businesses (approximately 20-30%) with high dependency on infrastructure suppliers. In localised markets where there are few ISP alternatives able to remain as effective rivals, foreclosure strategies could lead to negative outcomes for consumers at a time when demand for fibre is growing.

947. Customers of FTTH may tend to be loyal, however they are willing to switch on the basis of price or poor service as noted by ISPs, which can be a function of higher prices or poor services provided at the wholesale level. It seems likely that they would switch if Vodacom ISP had a significant advantage in terms of the effective price it was able to offer in the market and a high comparative level of service based on any preferencing by Maziv.

948. The wider concern is that if there is systemic weakening of ISP rivals through foreclosure strategies canvassed above, there is likely to be a significant dampening of competition throughout this level of the market. This is at the heart of the issues raised by ISPA, which represents more than 200 firms, in a recent press release regarding the proposed transaction to which Mr Reynolds refers.[944] These comments, although not canvassed in the hearing, reflect a broad concern with how the merger might lead to a change in the market practices of Maziv in light of the post-merger association with Vodacom.

Conclusion

949. In the case of both FTTH and FTTB, the merger parties are shown to have the ability to foreclose rivals of access to important inputs. This is especially the case when localised markets are considered, wherein the evidence suggests that Vumatel is a market leader and in many cases the only provider as an FNO in FTTH and that DFA has a strong market position in the provision of access for FTTB. Our assessment is that in both segments of the market, the merger parties will have an incentive to foreclose rivals which is enhanced by the proposed merger with Vodacom in the downstream market with a strong retail

[944] ISPA (2022); Part B of the Record p 6927 6989 para 22 – 26: Letter from ISPA dated 23 March 2022.

presence as well, and the ambition of both firms to drive growth and strengthen their positions in downstream FTTB and FTTH.

950. We find in the result that rival FNOs in FTTB, and rival FNOs and (directly and indirectly) ISPs in FTTH are likely to be significantly harmed primarily through input foreclose mechanisms, including both price and non-price mechanisms and especially in localised geographic markets.

951. We therefore conclude on the evidence before us that the proposed transaction is likely to lead to a substantial prevention or lessening of competition in the provision of access to wholesale FTTH and FTTB used by FNOs and to retail ISPs and businesses.

Conclusion on vertical effects

952. As set out above, the proposed transaction raises significant price and non-price vertical foreclosure effects at several levels, which will lead to a substantial lessening of competition in the affected markets.

953. Regarding MNOs that rely on DFA for access to metro dark fibre for FTTS connectivity or mobile backhaul to provide retail mobile products and services, we find that the merged entity will have the ability and incentive to foreclose rival MNOs through price and non-price mechanisms, with the effect of undermining their ability to compete with Vodacom in the downstream market.

954. We also find that merged entity will have both an ability and incentive to foreclose in relation to the provision of metro connectivity and wholesale dark FTTB to FNOs, with a likelihood of substantial anti-competitive effects in terms of the ability of FNOs that rely on the inputs to compete downstream to service business / enterprise and ISP customers, particularly in localised markets.

955. Lastly, in relation to the provision of both wholesale FTTH and FTTB, we find that the merged entity will have both an ability and incentive to foreclose, through

price and non-price mechanisms, rival FNOs in the case of FTTB, and rival FNOs and (directly and indirectly) ISPs in FTTH, which will substantially prevent or lessen competition in both wholesale and retail markets downstream to the detriment of rivals and consumers.

956. We assess the effectiveness of the proposed behavioural conditions and their monitoring and enforcement in the remedies section.

Conclusion on competition effects

957. We find that while the analysis in these proceedings has for practical reasons focused on competitive strategies and effects at the level of specific relevant economic markets, the reality of the markets under evaluation is that they are interrelated and dynamically connected. This necessitates that we have regard to the cumulative structural and strategic competitive effects of the proposed transaction.

958. The analysis of horizontal and vertical aspects of the transaction shows a range of mechanisms through which competition will be undermined as a result of the proposed merger. The interrelated nature of the markets for FTTH and FTTB, dark and lit fibre, and strategies for vertical control through the wider fibre supply chain necessitate a broader consideration of the likely effects of the proposed transaction. That there is market power on the part of the merged entity at key levels of the fibre ecosystem warrants a consideration of the significant structural shift brought about by the proposed merger that will give rise to effects on prices, innovation and market development for the foreseeable future. The competitive effects of strategies in one part of the ecosystem will ultimately shape competitive outcomes and consumers/buyers in another.

959. Key factors that will drive the structural and dynamic impact of the proposed transaction include:

959.1. Interlinked boards and individuals will shape decision making that affects strategies within and across relevant markets to maximise overall returns of the merged entity;

959.2. Investment decisions relating to any one layer or segment of the market, such as FTTH/B/S, are tied with investment choices taking place in another segment if one assumes fixed capital resources that are available within the merged entity;

959.3. Key agents/actors within the merged entity have a role to play across relevant markets, such as the manner in which Vodacom would remain active in the downstream retail of both FTTH and FTTB, or that DFA plays a role in shaping backbone infrastructure, pricing, products and growth strategy across all the relevant segments (FTTH/B/S) and will likely make commercial and competitive decisions that take each of the different segments into account to maximise overall returns and the market position of the merged entity;

959.4. Expected growth in market demand is significant and taking place across FTTH, FTTB and FTTS, retail mobile and fixed, and in aggregate, such that strategies will likely evolve to capture the largest share of market growth across the fibre and data ecosystem as a whole, rather than in isolation with focus on a particular segment, say, FTTB;

959.5. Firms within the merged entity group will share common and related targets, brand associations, group business plans (for Maziv, for example), knowledge of market developments and opportunities, and a common interest in maximising returns at Maziv and the merged entity at large, with infrastructure and retail capabilities ultimately unmatched by any other operator/s in the market.

959.6. Customers and consumers are likely to be offered compelling combined offerings consistent with the ‘own the home’ strategy of operators, in a manner that is likely to render such combinations irreparable by rivals to the detriment of competition over time.

959.7. Products and services and therefore business models and commercial strategies will co-evolve over time. As such, new strategies to win the market are emerging including how fibre offerings interact with existing alternatives such as FWA. The merged entity will have strong market positions and market information in relation to the most important alternatives for consumers, in a manner that spans across static markets delineated for competition analysis purposes.

960. The implication of the above, which is a non-exhaustive list of factors, is that the authorities ought to also consider the combined effects of the proposed transaction on the fibre and data markets as a whole. That there is growth in demand and evolving use cases for data in South Africa, as various factual witnesses have attested, also means that what one might assess as likely competitive strategies and outcomes today and in the short term, will likely evolve considerably in the medium and long term and the authorities ought to weigh heavily the available information about the future risks to market competition and dynamism particularly in a highly concentrated and unequal developing economy context, as we have done.

961. In terms of the specific markets, it is important to note that the proposed merger would be permanent. It removes Vodacom as a future larger competitor in metro fibre, FTTB and FTTH in rapidly growing markets. Collectively the harm in each market will furthermore likely entrench Maziv as the leading dark fibre and FTTH provider going forward, and the harm to competition (together with the foreclosure effects that cannot effectively be remedied) will grow over time. The proposed transaction enables both the merger parties to strengthen their market positions and reinforce and grow existing concentration in the telecommunications sector as a whole. Key findings include:

961.1. For a very large part of the Vumatel FTTH areas, there is no overbuild and hence the only competition can come from FWA for home broadband services. Given this competitive interaction between FWA and FTTH, the strategies of Vumatel and Vodacom will likely be coordinated so as to reduce competition between them, and to establish strong positions in both FWA and FTTH. Linked with the vertical theories of harm, to achieve this, strategies can post-merger be coordinated to raise the costs of rivals providing wholesale FTTH which we have found to be likely, and to strengthen Vodacom through preferential treatment in the downstream retail markets so as to gain a stronger share of the fixed broadband markets.

961.2. In local markets where Vodacom and Vumatel's activities overlap in the provision of FTTH since they have overbuilt each other, the removal of Vodacom as a competitor will result in a loss of choice and loss of competition in both price and non-price factors such as marketing and service.

961.3. Once Maziv deploys fibre in townships there will be no incentive for other FNOs including Frogfoot to enter those townships with low FTTH pricing because they tend not to overbuild because of the economics. This will sterilize a large portion of the market for competitor FNOs and entrench Maziv's leading market position. Importantly, it will chill competition in those areas and shape pricing, innovation and consumer choice in these markets for the medium- to long-term, most likely irreversibly.

961.4. In order to strengthen Vodacom's position in mobile, FWA and vis-à-vis rival MNOs in general, the merger parties will be able to leverage DFA's predominant position in dark fibre to shape terms of access for rival MNOs, all of whom have raised concerns with the proposed transaction. The same is true of DFA's strategy to grow in lit FTTB services and Vodacom's intent to continue to build its competitive position in retail and wholesale FTTH/B over time, such that vertical strategies to preference DFA's or Vumatel's own downstream operations or to preference those of Vodacom (and in turn Vodacom preferring to source from Maziv) will undermine rivals and competition at multiple levels of the market including competing FNOs and ISPs. Ultimately, rival FNOs in FTTB, and rivals FNOs and (directly and indirectly) ISPs in FTTH are likely to be significantly harmed primarily through input foreclose mechanisms, including both price and non-price mechanisms and especially in localised geographic markets.

961.5. The loss of Vodacom as a competitive threat in metro fibre, FTTB and FTTH in rapidly growing markets, as well as its role as a discipling factor on Maziv as its largest customer, will lead to adverse competitive outcomes across these market levels, with long-term, irreversible effects.

962. The combined horizontal and vertical competition effects that cannot effectively be remedied, and effectively monitored and enforced, means that the proposed transaction substantially lessens competition.

EFFICIENCIES

963. The merger parties' economic experts make two claims labelled as "efficiency" claims:[945] (i) accelerated fibre deployment through improved access to funding and reduced demand risk; and (ii) better access to, and use of, Vodacom's fibre infrastructure. These two claims are also reflected in the joint expert minute.[946] We however note that the first issue of fibre deployment is not an efficiency but a public interest issue that we shall assess in the public interest section.

964. Following its investigation, the Commission found no basis for the merger parties' efficiency claims. Aetha finds that the majority of the efficiencies claimed by the merging parties are not real, but pecuniary in nature. Those efficiencies which could be argued to be real economic efficiencies, have not been quantified and are likely insignificant in any event.

965. Mr Reynold's in relation to efficiencies of the proposed transaction testifies: "*I think the primary, the most important benefit, is this access to fibre*".[947] On questioning by the Tribunal, Mr Reynolds confirms that any benefit from additional access to Vodacom's closed fibre infrastructure would likely not reach the thresholds for consideration for efficiencies in mergers.[948] We therefore do not need to deal with this any further as an efficiency. As indicated, Mr Reynolds identifies the accelerated fibre deployment as the primary consideration that the Tribunal could focus on.[949] The latter will be assessed under the public interest.

[945] Reynolds EWB p 565 – 566.
[946] Joint Expert Minute p 3 para 1.3.2.
[947] Transcript p 3441 lines 2 – 3.
[948] Transcript p 3441 lines 2 – 12; p 3442 lines 10 – 16.
[949] Transcript p 3442 lines 10 – 16.

966. Furthermore, in response to questions from the Tribunal, the merger parties' factual witnesses were not able to identify any other efficiencies that have been quantified by them and would meet the threshold for merger-specific efficiencies. Dr Scheffer of Vodacom referred to certain alleged efficiencies but on questioning from the Tribunal conceded that no quantification of these efficiencies had been done.[950] Dr Van den Bergh was also not able to point to any compelling efficiency arguments, and in any event has performed no quantification of any alleged efficiencies.[951] Lastly, the merger parties have not demonstrated any pass though benefits to end customers of any efficiencies. Again, the issue of fibre deployment will be assessed under the public interest.

967. We conclude that there are no efficiencies and/or pro-competitive gains that outweigh the anti-competitive effects of the proposed merger.

968. The merger parties' public interest commitments are dealt with under the public interest assessment that follows.

COMPETITION REMEDIES

CONDITIONS THAT WERE TENDERED TO REMEDY THE IDENTIFIED COMPETITION CONCERNS

969. Given our finding that the proposed transaction raises both horizontal and vertical competition concerns and ultimately negatively affects South African consumers, we now turn to the remedies that were tendered by the merger parties.

[950] Transcript p 2552 line 17 to p 2555 line 3.
[951] Transcript p 2356 line 15 to p 2358 line 3.

970. Although the merger parties submit that the proposed transaction will not give rise to any anti-competitive effects, they tendered, mainly behavioural, conditions to address the competition concerns. The CAC in *Imerys* made it clear that where the Tribunal is asked to approve a merger with conditions, it has a discretion to determine the choice of remedies, and the Tribunal has the power to prohibit a merger if it is not satisfied that the conditions will adequately remedy the likely substantial prevention or lessening of competition ("**SLC**").

971. The merger parties tendered a structural remedy, i.e., a divestiture remedy relating to the overlapping FTTH infrastructure between Vodacom and Maziv, and further offer behavioural remedies. They also tendered fibre roll-out and other public interest commitments that we assess under the public interest.

972. We note that the merger parties allege that their final set of conditions have the support of the dtic (on public interest), MTN and Rain (on competition effects) and that this alone suggests that the conditions satisfactorily address any legitimate competition or any public interest concerns relating to the merger.[952] We disagree with this suggestion for the reasons that become clear when we deal with the adequacy and/or sufficiency of the competition remedies tendered below and their monitoring and enforcement. Furthermore, many more third parties other than MTN and Rain raised competition concerns with the proposed transaction during the Commission's investigation. Telkom and Frogfoot[953] gave evidence at the hearing and both submit that the proposed conditions, even after revisions, do not adequately address their competition concerns of the proposed transaction.

973. At the outset it must be noted that the dtic representing the Minister only participated on public interest issues and did not participate in the proceedings in relation to any of the competition issues, including the tendered conditions relating to competition. The dtic submitted that it will abide by the Tribunal's findings regarding the competition issues. As we have already explained in

[952] Merger Parties HOA p 167 para 36.
[953] Exhibit BK2.1: Letter from Primerio to the Commission dated 31 May 2024 para 10.

paragraph 62 above, MTN has its own motivations for favouring a conditional approval as opposed to a prohibition. Although MTN perceives the conditions as a profound improvement on what was proposed at the time of MTN's intervention in these proceedings, MTN also conceded that "*…there may be residual risks that are not directly addressed, as MTN reads the conditions…*"[954] Regarding Rain which opposes an unconditional approval of the merger, during the hearing, it became clear to us that Rain sees the conditions as a "*less risky*"[955] option.

974. During the Commission's investigation, the merger parties proposed conditions on 2 February 2023, which were subsequently revised on 9, 17, 27 February and 27 June 2023.

975. Since the versions of conditions that were tendered by the merger parties during the Commission's investigation, there were several iterations of the conditions tendered before, during and even after the hearing, as follows:

975.1. The merger parties filed revised conditions on 14 March 2024. Rain which had previously objected to the transaction, withdrew its objection and on 28 March 2024 Rain indicated that it was satisfied with the revised remedies.

975.2. On 12 April 2024, the merger parties filed an updated version of the conditions.

975.3. On 24 May 2024, MTN and the merger parties proposed separate revised conditions[956] each purportedly intending to address concerns raised during the hearing.

975.4. MTN circulated further revisions to its proposed conditions on 25 June 2024, to address its concerns regarding the exclusion of Herotel from the conditions.

[954] MTN HOA p 87 para 115 with reference to Nunes' second witness statement at FWB p 1191 – 1192 para 1.4.
[955] Schoeman Transcript p 1019 lines 9 – 14.
[956] Exhibit L: MTN's marked-up version of the merger parties' proposed conditions reflecting MTN's proposed revisions, as presented to the merger parties on 16 May 2024; and Exhibit M: Merger parties' proposed conditions as circulated on 14 March 2024.

975.5. Following MTN's revisions to the conditions, the merger parties filed revised conditions on 2 July 2024.

975.6. MTN then reached a settlement with the merger parties on 19 July 2024 in respect of the conditions.[957]

975.7. On 28 August 2024, a further set of conditions were filed as agreed between the dtic and the merger parties. Notably, even the merger parties admit to the gaps in the conditions and that revisions were made to the conditions as a result of the "*various lacunae that were identified by the DTIC*".[958] Certain of the definitions in these conditions were subsequently revised in a revised version submitted to the Tribunal on 30 September 2024.

976. At this point, we pause to record the undesirability and practical difficulties of having (further) conditions tendered after factual witnesses have taken the stand since the conditions and revisions thereto are then not tested with the factual witnesses. Whilst we understand that revisions to conditions may be necessary, we nonetheless echo the concern raised by Frogfoot, which is framed as follows:

"*In our view, it is problematic for the merging parties to seek to make material changes to their proposed conditions <u>after</u> the Commission's factual witnesses have concluded their oral testimonies. This is particularly so where the market is highly technical and where any potential shortcomings in the revised conditions may not be immediately apparent. One would need sufficient time to grapple with any revised conditions and an opportunity for Frogfoot's representative, Mr Abraham van der Merwe, to explain to the Competition Tribunal ("Tribunal") whether the proposed conditions are workable or not, as well as how they could be open to abuse. All of this is rendered impossible when new conditions are tendered late in the day*".[959]

[957] Nunes FWB p 1392 – 1424 Annexure A of Nunes' second witness statement.
[958] Transcript p 4490 lines 8 – 10.
[959] Exhibit BK2.1: Letter from Primerio to the Commission dated 31 May 2024 para 3.

977. Given the many iterations of the proposed conditions, we refer to the last version that was tendered to the Tribunal (after the hearing) on 30 September 2024, since this is ultimately what is before us for consideration.

978. The many iterations needed of the conditions show how cumbersome it is to draft behavioural conditions to try and deal with the competition concerns in this matter. Ultimately, the various iterations have resulted in a lengthy, complex and cumbersome set of mainly behavioural conditions that are technical in nature.

979. After considering the version of the remedies that were finally tendered, and hearing from the Commission and witnesses, we conclude that the remedies will not be effective and cannot be effectively monitored and enforced by the competition authorities.

APPROACH TO REMEDIES IN MERGER CONTROL

980. As stated by the CAC in *Imerys* it is permissible for the Tribunal to prohibit a merger based on the following reasoning:

> "*[40]* *…[A]lthough, the proposed conditions are more likely than not to remedy the likely SLC there is a reasonable possibility that they will fail to do so.*
>
> *[41]* *Particularly where the uncertainty about the adequacy of the conditions concerns the likely duration of the SLC rather than the nature and content of the SLC, prohibition has this advantage over conditional approval: it does not necessarily represent the final word. If the merger is conditionally approved and the conditions turn out to be inadequate to neutralise the SLC, the harm cannot be reversed. If, on the other hand, the merger is prohibited and with the passing of time it becomes clear that the merger will no longer give rise to SLC, the transaction can be renewed.*

> [42] *I do not say that the Tribunal would be obliged to reject conditional approval just because there was a reasonable possibility (falling short of a preponderance of probability) that the conditions would fail to remedy the likely SLC. The Tribunal might properly exercise its discretion in such a case to give conditional approval. In exercising its discretion, the Tribunal could be expected to take into account, on the one hand, the precise likelihood and extent of the SLC; and, on the other, the precise extent of the risk that the conditions will fail to remedy the likely SLC. The public interest may also enter into the balancing exercise, particularly the public importance of the markets which would be directly or indirectly prejudiced if the conditions failed to remedy the likely SLC*".[960] (Own emphasis)

981. In *Mediclinic*, the Constitutional Court cites with approval the Tribunal's approach to remedies based on the CAC's guidance in *Imerys*: "*It [the Tribunal] concluded that the merger would most likely give rise to a substantial lessening of competition and that the conditions put forward by Mediclinic to ameliorate that substantial lessening of competition were inadequate. Heeding the sound word of caution in Imerys and in the exercise of its discretion, it chose to prohibit rather than approve the proposed merger. Evidently, the benefit of doing so was to circumvent the highly detrimental consequences of approving the merger in circumstances where the predictable harm, most likely to flow from the approval, would be irreversible. This would be so should the remedial conditions propounded by Mediclinic turn out to be inadequate for the purpose of neutralising the substantial lessening of competition, particularly because the Commission lacked the necessary capacities and resources to effectively monitor Mediclinic's compliance. And this applies with equal force to the consequential harm the merger posed to the substantial interests of the public*."[961] (Own emphasis)

[960] *Imerys* (CAC) paras 40 – 42.
[961] *Mediclinic* (Constitutional Court) para 80.

982. The Tribunal has in previous cases prohibited transactions where the remedies were insufficient or inadequate to address the competition concerns and would not be capable of effective monitoring and enforcement by the Commission. In *Draslovka*, the Tribunal held:

> "*[299] A further difficulty raised by the Commission with the proposed conditions is that they are not readily capable of monitoring and enforcement. This applies not only to the terms of the pricing mechanisms themselves, but also the vaguely defined nature of, and conditions attached to, Draslovka's proposed investment commitments. This further increases the risk that the proposed conditions will not be effective.*
>
> *[300] We therefore conclude that the remedies proposed by Draslovka do not sufficiently address the adverse pricing effects of the proposed merger, are lacking in specificity and certainty, and would not be capable of effective monitoring and enforcement by the Commission*".[962]

INSUFFICIENT AND/OR INADEQUATE REMEDIES TO ADDRESS THE HORIZONTAL THEORIES OF HARM

Divestiture remedy for FTTH

983. In relation to the overlap in the merger parties' activities in FTTH infrastructure, they propose divesting of the overlapping wholesale fibre infrastructure of either Vodacom SA Group or the Maziv Group within [redacted] of the implementation date (or as soon as the regulatory approvals required for such disposal have been granted). If Maziv is unable to find any potential purchasers within [redacted], Maziv may apply to the Tribunal for this condition to be waived.[963]

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[962] *Draslovka* paras 299 – 300.
[963] Clause 8.1 of the Conditions.

984. The divestment remedy relates to all areas where Vodacom SA Group has rolled out an infrastructure which (i) has overbuilt Maziv Group FTTH infrastructure as at the implementation date; (ii) is being transferred to Maziv in terms of the merger; and (iii) Vodacom SA is using to provide wholesale FTTH services as at the implementation date.[964]

985. From a horizontal effects perspective, the Commission expressed a concern that the divestiture condition cannot address the SLC that is likely to result from the merger and the harm to consumer welfare remains. Price increases on the Vodacom network that would be a consequence of the merger would also occur in areas where Vodacom is not overbuilt, and the divesture condition would therefore not impact on the SLC.

986. According to the Commission the divestiture remedy is also inadequate for the following reasons:[965]

986.1. In order to effectively address the loss of competition resulting from a merger, the divested entity or assets should represent a competitive constraint equivalent to the expected loss in competition in the overlapping area. In this regard, the Commission refers to the Tribunal's judgment in the *JD Group Ltd*[966] matter wherein it was confirmed that "*not every anti-competitive merger can be cured by a divestiture order. Or conversely, it is not simply any divestiture order that will cure an anticompetitive merger … the practical measure of the effectiveness of a pro-competitive divestiture is whether or not the divested assets constitute the basis for introducing a new competitor into the market, or for strengthening the competitiveness of an established participant*." However, the divestiture remedy proposed by the merger parties may result in an increase in concentration if Vodacom's or Maziv's FTTH infrastructure is divested to

[964] Clause 8.1 of the Conditions.
[965] Commission HOA p 185 – 188 paras 405 – 411.
[966] *JD Group Ltd v Ellerine Holdings Ltd*, CT Case No. LM040Jul00 ("***JD Ellerine***") p 35, citing the Federal Trade Commission.

an existing player in the overlapping areas (where Vodacom, Maziv and the buyer are present prior to divestiture).

986.2. Further, the overlapping infrastructure may not form a useful network that could be used by a new entrant to compete and to provide for a sufficient competitive constraint.

986.3. Also, a new entrant would not have Vodacom as an anchor customer and would be highly dependent on DFA's metropolitan infrastructure.

986.4. It was pointed out that the merger parties conceded during the Commission's investigation that the proposed divestiture condition was impractical because it would be difficult to divest of the overlapping parts of the network which are in isolated pockets that comprise a subset of a network, and impractical to sell these isolated pockets.

986.5. The *JD Ellerine* judgment further confirms that the details of the proposed divestiture condition are important.[967] In other words, the conditions should not only contain the barest of details. The Commission points out that the divestiture conditions proposed by the merger parties are weak and non-committal in that there is no provision for a trustee to manage the divestiture, the divestiture clause only provides for the parties to apply good faith and best endeavours in divesting of the overlapping infrastructure thereby allowing the merger parties to allege that no offers meet their valuation (which is a subjectively determined threshold), and there is a lack of duty of care and maintenance of the assets to be divested such that the merger parties would be able to devalue the assets, reduce quality and erode customer services. All of this will adversely impact the effectiveness of the tendered remedy. We concur with these observations of the Commission.

[967] *JD Ellerine* p 35.

986.6. Therefore, the divestiture remedy itself is inadequate to address the horizontal competition concerns associated with the FTTH infrastructure overlap between the merger parties.

986.7. Furthermore, apart from the overlapping FTTH infrastructure, the divestiture condition would not impact on the rest of the Vodacom network where increases in ARPU are expected by Vumatel post-merger.

987. The merger parties do not deal in any detail with the Commission's concerns regarding the inadequacy of the divestiture remedy.

988. Having considered the submissions and the evidence regarding the divestiture remedy, we find that the divestiture condition does not address the SLC that is likely to result from the merger and the harm to consumer welfare remains. The divestiture remedy may result in an increase in concentration in overlapping FTTH areas and if a new entrant buys the infrastructure it may not become an effective competitor without Vodacom as an anchor customer. The divestiture condition further lacks sufficient detail, since there are no provisions for (i) a trustee to ensure that the overlapping infrastructure is divested should the merger parties fail to find a buyer or buyers; (ii) maintaining the infrastructure assets pending the sale thereof; (iii) ensuring that the assets are not devalued in any way; and (iv) ensuring that there is no reduction in quality or eroding of customer services, where applicable.

The loss of future dynamic competition

989. The horizontal competition concerns that we have found in relation to metro fibre, FTTB and FTTH are wider than a static analysis i.e., just considering current market shares and the current overlapping activities. We have explained why one should take a non-static approach assessing future dynamic competition in the markets concerned. Furthermore, the competition effects must be considered holistically since the reality of the markets under evaluation (dark fibre, metro fibre, FTTB and FTTH) is that they are interrelated and dynamically connected.

990. The concerns about the horizontal effects of the merger relate to the counterfactual which we have discussed in detail earlier in these reasons. Vodacom is not only a current competitor, but it also wants to become a significant competitor to Maziv in both FTTH and FTTB. Furthermore, in the counterfactual, Vodacom would find alternatives to DFA, whether through self-build or JV partnerships.

991. We agree with the Commission, that "*there is no formulation of the conditions capable of addressing the effective removal of (i) Vodacom as a potential* competitor *to DFA (in metro backhaul fibre and the wholesale market for FTTS/B) and to Vumatel (in the market for wholesale FTTH); (ii) the removal of the organic dynamic competition between Vodacom and Maziv in the deployment of FTTx as well as in the context of FWA and FTTH competition; and (iii) the threat of Vodacom switching and securing services from a competitor of DFA.*"[968]

992. We have found that the land grab nature of fibre competition means that stronger dynamic competition results in *inter alia* more innovation and lower pricing. In contrast, the proposed transaction will reinforce and strengthen market concentration, with negative implications for the long run structure and competition to the detriment of consumers. The proposed transaction enables both the merger parties to strengthen their market positions in the various markets and reinforce and grow existing concentration in the telecommunications sector as a whole.

993. In relation to FTTH, we highlighted that for a very large part of the Vumatel FTTH areas, there is no overbuild and hence the only competition can come from FWA for home broadband services. Given Vodacom's unilateral incentives due to its shareholding in Maziv, the proposed transaction will chill competition in those areas resulting in harm to consumers, in a growing market. Absent the proposed

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[968] Commission HOA p 198 para 422, with reference to Hodge's Report in EWB, p 181 – 185 paras 372 to 386.

transaction, Vodacom will likely compete more aggressively with its FWA, that will increase absent the proposed transaction, forcing Vumatel to respond on price, and on overall value-proposition to consumers, including a mix of speed, FUP and router packages. Price levels influence affordability and usage, both of which are harmed from higher pricing. Furthermore, as the proposed merger would be permanent, it will likely entrench Maziv as the leading FTTH provider going forward.

994. Other than the FTTH divestiture condition as discussed, there are no other remedies that deal with the above dynamic future horizontal aspects resulting from the proposed merger.

995. In our horizontal assessment of metro fibre and FTTB, we concluded that the proposed transaction, which eliminates Vodacom as a future competitor, will substantially lessen future dynamic competition in metro fibre and FTTB to the ultimate detriment of South African consumers. The merger parties' proposed remedies do not address this.

Conclusion

996. Based on the above, we conclude that the remedies tendered by the merging parties do not address the horizontal concerns.

Bundling

997. The post-merger bundling concern in the markets concerned relate to offering fixed and mobile services. We have found that the merger parties' own strategic documents reveal that bundling [redacted] post-merger and the proposed merger would, due to its size and other advantages from the combination, enable them to execute this strategy.[969] Successful bundling as a result of the merger would further entrench the dominance of the merger parties in

[969] Bundle M p 12863. See also Hodge EWB p 126 para 196.

their respective markets, namely fibre for Maziv, and mobile (including FWA) for Vodacom.

998. The concerns expressed by market participants regarding post-merger bundling cannot be ignored. These concerns are not "*red herrings*" and are "*genuine concerns*".[970]

999. We note that there is no explicit condition that the merger parties cannot market and sell bundled products or services.

1000. They do however tender conditions intended to prevent Vodacom from discriminating between its fixed mobile services provided by it to the Maziv Group and to third parties. In terms of the conditions tendered, Vodacom Group SA shall from the implementation date not provide fixed mobile services to any party on wholesale terms that are discriminatory – such terms and conditions shall be the same including in respect of pricing, requisite quality, and timeliness and security of delivery, as those offered to the Maziv Group, Herotel Group or any related entity for the supply of fixed mobile services of like grade and quality, and in "equivalent transactions" and measured on an aggregated basis per product category and per customer. For as long as Vodacom SA Group controls Maziv, it shall only provide fixed mobile services to the Maziv Group and Herotel Group at Vodacom Fixed Mobile Services Rate Card Prices. The conditions allow Vodacom to provide bespoke (customer-specific) fixed mobile services to the Maziv Group or the Herotel Group if it notifies the Commission and the Monitoring Trustee of it, and to add the bespoke products to Vodacom SA's rate card.[971]

1001. We note that this condition does not apply to mobile services.

1002. Although the bundling concern "*becomes less of a risk*"[972] according to Mr Schoeman because of the remedies proposed by the merger parties, it is

[970] Transcript p 1019 line 7 to p 1020 line 13.
[971] Clause 12 of the Conditions.
[972] Transcript p 1019 lines 9 – 14.

nevertheless still a risk. He explains that if the merger parties "*create some bespoke product to bundle in with something*" that is a concern.[973]

1003. The Commission points out that there is no open access condition or obligation to supply fixed mobile services to any third party. Vodacom is therefore able to engage in many of the bundling practices and engage in 5G scaffolding tactics.[974] We agree with the Commission that there is no open access condition or obligation to supply fixed mobile services to any third party which is a concern.

1004. We also agree with the concern expressed by the Commission, Mr Motlekar[975] and Mr Schoeman,[976] regarding the provision of bespoke services to the Maziv Group and Herotel Group. The conditions provide for nothing further other than notifying the Commission and the Monitoring Trustee of these bespoke services. There is no provision for an "adjudication" of whether the bespoke products ought to be added and what the implications of such addition would be. We agree with the Commission that Maziv could take advantage of the offer of bespoke products.

1005. Even where bespoke products may be offered, it is easy to shape the bespoke products such that it is only Maziv that can take advantage of that offer. One aspect is scale and Maziv is the largest FTTH and FTTB provider, and Maziv has already considered [redacted] for its FTTB business to improve its overall offer.[977] Such offers fit within the 'boundary pushing behaviour' cited by Mr Johnson as something prevalent in other markets. Mr Johnson also gave a specific example of a large FTTB contract with both 5G and FTTB links, citing the difficulty in determining if the conduct was compliant.[978]

1006. As per the CAC's guidance in *Imerys*, "*I think it is permissible for the Tribunal to reason thus: 'The merger will likely give rise to an SLC. Although the proposed*

[973] Transcript p 1019 lines 14 – 18.
[974] Commission HOA p 199 para 424.
[975] Commission HOA p 200 para 426 and Motlekar Transcript p 519 lines 17 – 22.
[976] Transcript p 1019 lines 14 – 18.
[977] Exhibit BW p 24.
[978] Transcript p 3199 line 22 to p 3200 line 20.

conditions are more likely than not to remedy the likely SLC, there is a reasonable possibility that they will fail to do so. Therefore we prohibit the merger'",[979] there is a reasonable possibility that the merger parties' tendered conditions will not be effective in addressing the post-merger bundling concerns.

INSUFFICIENT AND/OR INADEQUATE REMEDIES TO ADDRESS CONCERNS REGARDING THE VERTICAL EFFECTS OF THE TRANSACTION

1007. The Commission and Vodacom's rivals including MTN and Rain, raised serious concerns regarding the vertical effects of the transaction. Concerns essentially relate to issues of control and foreclosure (on the evidence of Mr Hodge and Mr Smith the primary concern is partial non-price foreclosure). This is dealt with extensively in the competition assessment of the vertical concerns.

1008. The merger parties tendered the behavioural conditions in an attempt to address vertical concerns arising from the merger and identified by the Commission and third parties. The merger parties concede that "*it is always possible whenever you have a vertical concern to raise difficulties and to poke holes in exactly what non-discrimination means and exactly what equivalent services means…*".[980] The merger parties submit that it would be a significant shortcoming to seek perfection in conditions applicable to vertical mergers which have significant benefits worth preserving.[981] We have already concluded that the merger does not have efficiency benefits and in these circumstances, it is important to ensure that conditions tendered are effective in remedying the vertical concerns identified.

1009. Having considered the conditions that were tendered, we conclude that they will not remedy the anti-competitive harm (and ultimately the harm to consumers) that arises from the proposed transaction.

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[979] *Imerys* para 40.
[980] Transcript p 4501 lines 6 – 8.
[981] Transcript p 4501 lines 9 – 13.

1010. Furthermore, these conditions cannot be effectively monitored and enforced. We deal more with this below under the section "*Monitoring and enforcement of the conditions*".

Concerns regarding the control structure

1011. It is common cause that Vodacom is acquiring control over Maziv in terms of section 12(2)(g) of the Act which gives it the ability to materially influence the policy of Maziv – this was the basis for its notification of the merger to the Commission.

1012. Concerns about control stem from the fact that Vodacom is not a passive shareholder in Maziv and it has extensive rights which would allow it to influence key decisions of Maziv which would lead to anti-competitive and anti-innovation outcomes over time. The evidence confirms this (see paragraph 158 above).

1013. Post-merger, at shareholder-level, Vodacom will have the ability to *inter alia* veto the appointment or dismissal of Maziv's CEO and CFO, the issuing of shares, the financing of debt and the adoption or amendment of the dividend policy. Further, at board-level, CIVH and Vodacom will have equal representation on the Maziv Board and the same voting rights.

1014. There is no doubt that control is important for Vodacom. Vodacom needs to safeguard its multi-billion Rand investment in Maziv and its valuable fibre assets which Maziv will control post-merger. This is the reason that it chooses to retain its minority rights protections.

1015. As stated in the competition assessment above, we found that there is likely to be alignment at a strategic level between Maziv and Vodacom and their commercial interests. Vodacom is DFA's [redacted] customer. Vodacom will have a 30% to 40% economic interests in Maziv and strategies that benefit Maziv will benefit Vodacom. Similarly, Vodacom is Maziv's largest customer and Maziv has an economic incentive to give Vodacom preference and to grow Vodacom's business, amplified by the ROFR, as discussed above, in growing markets. Further, there are coordination concerns that arise because of the control structure being that competitively sensitive information may be shared between Vodacom nominated directors, Maziv and Herotel.

1016. In order to address concerns regarding control, the merger parties tendered conditions:

1016.1. regulating who could be appointed or nominated to the board of directors of any entity within the Maziv Group,[982] essentially excluding any person who is or was employed by Vodacom SA (during the preceding six months[983]), or who serves or served in an "excluded role"[984] within Vodacom SA (during the preceding six months); and

1016.2. imposing restrictions regarding reserved matters and Vodacom's shareholder representation.[985] These include *inter alia* that no person serving as a director on any Maziv Group entity's board of directors shall be entitled to be Vodacom SA's representative at Maziv shareholder meetings, Vodacom SA may only use its veto rights as provided for in Maziv's MOI for instance where Maziv's proposed business plan and budget would result in an impairment of Vodacom's investment in Maziv, and Vodacom shall only be entitled to receive a redacted version of any proposed or approved budget and business plan of any Maziv Group entity in respect of which all detailed product planning, product or customer-specific pricing and detailed roll-out plans have been removed.

1017. Despite the abovementioned commitments, concerns remain that Vodacom has the ability to materially influence the strategic direction of Maziv and its

[982] Clause 10.1 read with clauses 1.22 and 1.23 of the Conditions.
[983] We note that this period is inappropriately short in the context of infrastructure/technology markets.
[984] Clause 1.23 defines "Excluded Role" which includes *inter alia* any person serving on (i) the Vodacom Group board of directors, (ii) the Vodacom SA board of directors, or (iii) the Vodacom SA Executive Committee.
[985] Clause 11 of the Conditions.

subsidiaries DFA and Vumatel. As Mr Van der Merwe stated, "*If my main shareholder that sits on my Board that has veto rights over just about everything that I do, is unhappy I'm not going to do it*."[986] And concerns remain regarding the sharing of competitively sensitive information. Mr Van der Merwe queried, "*…how do you even monitor that there is no whispers in the corridors, which you know I think is [a] very real probability…*"[987] Mr Schoeman also confirmed that the potential of information being leaked "*is a real concern*" and *"…it's impossible to have a Chinese firewall in your head to imagine that I'm making a decision on this side, but I don't know what's going on on that side."*[988]

1018. The Commission in its assessment finds as follows regarding these provisions, with which we agree:

> "*The restrictions on information flows and confidentiality do not prevent anti-competitive effects. Vodacom and CIVH have aligned incentives. Preventing Vodacom from seeing certain confidential information in the business plan does not render Maziv independent from Vodacom's direction on issues of strategy, infrastructure expansion and pricing. Vodacom board members can simply make known their preferences, and CIVH-assigned board members and Maziv as a whole will have incentives to align themselves with Vodacom in any event. The Vodacom-nominated directors are also able to view confidential information to determine the optimal strategy in Vodacom's interests and can take instruction from Vodacom as to what those interests are and what strategy to pursue. Vodacom SA not being able to view confidential information, or having the directors not communicate confidential information back to Vodacom, is no impediment to Maziv adopting strategies that preference Vodacom and Maziv entities over their rivals.*
>
> *No condition is capable of monitoring the behaviour of board members to ensure there is no sharing of competitively sensitive information post-*

[986] Transcript p 131 lines 3 – 5.
[987] Transcript p 130 lines 11 – 13.
[988] Transcript p 1054 lines 3 – 5.

merger between Maziv board members, some of whom will be appointed by Vodacom".[989]

1019. We agree with the Commission's findings in this regard. Vodacom would still have the right to appoint an equivalent number of directors to the Maziv Board as CIVH. Vodacom's veto rights in respect of Maziv's business plans and budget is applicable where Vodacom's investment is impaired. "Impairment" is not defined in the proposed conditions. In growing and dynamic markets it is difficult to foresee what Vodacom may or may not in future regard as an "impairment" of its investment in Maziv and how the Commission would be able to monitor and enforce such a condition. Recall that this condition is of infinite period.

1020. Regarding access to a redacted version of Maziv's budgets and business plans, the concern remains that redacted versions of such documents may still contain sufficient information to enable Vodacom to materially influence Maziv's roll-out such that Vodacom is given preference. We have dealt with the evidence regarding repeated "mistakes" of the inclusion of unredacted, detailed Herotel budgets in CIVH's board documents. These "mistakes" could easily be repeated post-merger and cannot be policed by the Commission.

1021. We therefore conclude that the conditions tendered do not adequately and or sufficiently address concerns regarding Vodacom exercising co-control and/or influence over the policy of Maziv and the post-merger alignment of broader strategies between Maziv and Vodacom, which cannot be effectively monitored and enforced.

Summary of foreclosure concerns and proposed remedies

1022. To frame out the evaluation of the proposed remedies, we briefly summarise our findings in relation to each vertical foreclosure theory of harm below.

[989] Commission HOA p 221 – 222 paras 462 – 463.

1023. FTTS and foreclosure of MNOs – the Commission, MTN and Rain expressed concern that the merged entity would have the ability and incentive to partially foreclose on Vodacom's MNO rivals through non-price mechanisms. MNOs use and depend on DFA's FTTS infrastructure and DFA provides its dark fibre products to MNOs (Vodacom, Rain and MTN). The merger leads to a change in incentives which may lead to Vodacom receiving preferential terms,[990] and non-price discrimination or self-preferencing on non-price factors. In addition, there is a risk of sharing competitively sensitive information which could give Vodacom a first mover advantage. After hearing and considering all the relevant evidence, we concluded that Maziv through DFA has an ability to foreclose MNO rivals of Vodacom of access to critical dark fibre inputs for FTTS connectivity or mobile backhaul.

1024. Foreclosure in the provision of wholesale FTTB dark fibre products used by FNOs to provide wholesale FTTB lit services – FNOs such as Frogfoot, Netstream, BitCo and MFN expressed concerns that post-merger the merger parties can employ a range of foreclosure strategies (including DFA favouring Vodacom through timing, pricing and supply). DFA is the leading provider of wholesale dark fibre for metro connectivity/backhaul. Concerns relate to input foreclosure in terms of access to wholesale FTTB dark fibre products used by FNOs to provide wholesale FTTB lit services. We concluded that post-merger the merger parties have an ability and incentive to foreclose on rival FNOs.

1025. Foreclosure of access to wholesale FTTH/B used by ISPs to service households and businesses – This relates to the foreclosure of access to wholesale FTTH as an input to retail FTTH; and the foreclosure in relation to wholesale FTTB access used by FNOs typically to service enterprise clients or as an input for ISPs providing lit FTTB services. We concluded that post-merger the merger parties will have the ability and incentive to strengthen their positions in these market segments through foreclosure of rivals using price and non-price mechanisms. This is likely to lead to anti-competitive harm to ISPs (and FNOs) in the market, and ultimately consumers.

[990] Rain HOA p 5 para 8.1.

1026. Maziv is likely to give preference to Vodacom and grow Vodacom's business. Further, Vodacom will be incentivised to limit competition with Vumatel and would have less incentive to develop, promote and competitively price products that compete with Maziv.

1027. The open access and non-discrimination commitments in the proposed conditions are the two primary remedies put forward to address vertical foreclosure concerns raised by the proposed transaction. In broad terms, they seek to remedy issues across all vertical theories of harm we have evaluated above, and so are intended to address concerns at the metro dark fibre/FTTS level (MNO foreclosure), wholesale dark FTTB (FNO concerns), and wholesale FTTH/B services provision to ISPs.

1028. At the outset, it is important to distinguish that the open access provision (Clause 4) as tendered focuses only on ensuring that any existing or would-be customers of the Maziv Group would not be refused access to its products, whereas the non-discrimination provision (Clause 5) seeks to deal more substantively with the terms of such access. It is in the latter category that the most significant concerns arise, given the range of price and non-price mechanisms that we have found can be employed by the merger parties to undermine rivals at the different levels of the value chain. These are also the concerns most closely related, in terms of the economics of the different theories of harm, to partial input foreclosure. We consider these provisions further below.

1029. The open access provisions proposed in this transaction have two primary focuses: i) mitigating against an outright refusal to supply (Clause 4.1), and ii) addressing the sunsetting concern (Clause 4.2) in requiring Maziv to continue to provide dark fibre products for as long as it continues to supply these products to Vodacom or any other customer in South Africa.

1030. In the first category, the tendered remedy provides that the Maziv Group undertakes that it will not refuse to offer the following services that are provided by the Maziv Group if and for as long as it is reasonably capable of rendering such a service in the ordinary course of business of Maziv Group:

1030.1. wholesale metropolitan fibre services to any Third Party FTTH ISP, Third Party FTTB ISP, Third Party FTTH Provider, Third Party FTTB Provider, or MNO;

1030.2. wholesale FTTH services to any Third Party FTTH ISP;

1030.3. wholesale FTTB services to any Third Party FTTB ISP or Third Party FTTB Provider;

1030.4. wholesale Key services to any third party ISP or Third Party Key Reseller for re-sale; and

1030.5. wholesale Herotel services to any third party ISP or Third Party Herotel Reseller for re-sale.[991]

1031. In terms of the proposed wording, the provision therefore does not deal expressly with partial foreclosure wherein the terms of access in terms of quality, price or other parameter may ostensibly be differentiated across customers of a particular service.

1032. Although "open access" is not defined in the conditions, it is explained in general terms by Mr Van der Merwe as follows:

> "*The open access terminology is commonly used in telecommunications and broadly refers to a non-discriminatory access regime which does not favour any downstream players in price or service delivery. The principle behind Open Access is to provide open and fair access to strategically important infrastructure and to encourage sharing of this infrastructure, thereby increasing uptake and efficiencies and thereby allowing the open access network ("OAN") to offer reduced pricing while still achieving an attractive return on capital invested. It is an approach that DFA has positioned itself as employing, as well as other players such as Openserve, Vumatel and Frogfoot itself.*"[992]

[991] Clauses 4 to 4.1.5 of the Conditions, read with clauses 1.78 to 1.82 which deals with the definitions of the respective services.
[992] Van der Merwe FWB p 49 para 49.

1033. Mr van der Merwe's description appears to conflate aspects of open access and non-discrimination. We have discussed above that open access principles do not necessarily equate to provision on non-discriminatory terms from a competition perspective and so we evaluate these aspects separately. Having set out the commitments that were tendered, we now turn to deal thematically with the various concerns identified regarding the open access conditions.

Open access does not specifically apply to new services and products

1034. The conditions are not clear on whether the open access condition caters for new services and products that may arise in the future in growing and dynamic markets. The evidence points to new products planned for the future.[993] Mr Hodge, albeit referring to developments in mobile services, stated as follows regarding likely changes in the market over time that are likely to be difficult to pre-empt and regulate for in the proposed remedies:

> "*…Now these may or may not materialise. I don't know where they are in the process, but it makes the point more than that you're not regulating for the future, you're regulating based on the current products before you, yet you are dealing with a highly dynamic market…We've heard that ICASA is intending to release more spectrum and there's a lot more spectrum on top of that that can be released. We know that 6G technology is already being talked about in mobile space, so there's huge amount that is coming in a dynamic market and yet, we would be trying to regulate it ex-ante with the contract…this is why our regulator [ICASA] has powers to issue new regulations and look at new issues. But I would argue this multiplies the risk of the Tribunal that if you approve, multiplies the risk that you may well be wrong on some area where we might have had competition moving forward. And yes, we may not be able to forecast with certainty at this stage, but what we do know for sure is this is a dynamic market, an evolving market and certain changes in technologies and spectrum allowance and ideas are definitely coming…should we be now risking approval versus a*

[993] Exhibit BW p 25 – 26.

prohibition where…at the most I lose is potentially a faster rollout."[994]

1035. We agree with Mr Hodge's assessment. The open access condition may become defunct where new products or services or use cases replace existing products or services, or where new combinations of product offerings are introduced. This creates opportunities to bypass the open access condition.

1036. We have already noted in our analysis how DFA's products and services have evolved over time from a focus on the provision of dark fibre access to MNOs in the main, to various combinations of lit and dark offerings. Any remedies would need to be capable of encompassing future changes and not only current products. It is also evident from our assessment that the specific nature of (new) products offered shapes how market dynamics and competition evolves around each product where, for example, the specific terms of access for an infrastructure product (such as where links terminate or technical specifications) can shape access and competition at the wholesale and/or retail level in different ways.

1037. After the hearing, the merger parties submitted revised wording of the descriptions of the various wholesale services, to respond to the abovementioned concerns, changing the definition of each of the relevant wholesale services to delete reference to the date at which the service was provided.[995] However, we are not convinced that these last minute changes make it clearer that open access will apply to new services and future products in dynamic markets. The concerns remain. These changes were furthermore not tested with any of the factual witnesses.

"Reasonably Capable" and "Ordinary Course of business" provisions in the open access commitment

[994] Transcript p 3929 line 5 to p 3930 line 11.
[995] In the version of the conditions dated 28 September 2024,[995] the definition read "*services provided by the Maziv Group on the Approval Date…and which will be provided by the Maziv Group following the Implementation Date*". This reference to the approval date and implementation date was deleted following concerns that the open access commitment applies to existing wholesale products only.

1038. The open access commitment is subject to the provision "*if and for as long as it is Reasonably Capable of rendering such…service in the Ordinary Course of business of the Maziv Group*".

1039. The term "*Reasonably Capable*" has an extensive meaning which is subject to further technical stipulations (wayleaves and/or other approvals, and fibre capacity), and that "*the provision of such services is <u>reasonably feasible</u> (technically and/or commercially) with the application of <u>good faith and reasonable endeavours</u>*". The difficulties with monitoring and enforcement of such broadly phrased behavioural conditions, that allow for conflicting interpretation and create potential loopholes, are self-evident. There are various concerns with this approach.

1040. The requirement that provision of services is reasonably feasible for Maziv can create opportunities to deny services to rivals where they are also clients of Maziv if the provision of such services would compete with Maziv's own offering or create a first mover advantage for a rival ahead of the merged entity. This can be subjectively justified by Maziv to be due to the economics of supplying these areas where the model, pricing and costs are different to traditional products. For example, while Maziv has generally applied open access principles historically for its Core products in FTTH, it has allegedly sought to restrict the number of ISPs that can sell its Vuma Reach and in Key areas. On Vuma Reach, for example, Vumatel has allegedly excluded some ISPs, in order to enable it to achieve certain price points, which is inconsistent with an open access approach.[996]

[996] Hodge EWB p 148 para 256. Regarding Vuma Reach access, see [redacted] Part B of the Record p 4682 paras 16 – 21. [redacted] stated that while it met criteria for inclusion it initially made numerous attempts over years to join the Vuma Reach network which was initially restricted to ISPs that had participated in the trial of the product with a certain minimum number of customers (7,500). It states that even once the minimum customer criteria was removed, Vumatel advised it that it was not accepting more ISPs onto the Vuma Reach network, even as RSAWeb observed that other ISPs were being added to the network and while it was being denied. It only received communication in 2022 that it may be granted access to Vuma Reach [redacted] suggests that this transaction and the merger parties' engagement with the Commission may have influenced the view to grant it access to Vuma Reach. [redacted] notes that while it may be granted access, relevant agreements have not been signed thus there is a degree of uncertainty.

1041. Relatedly, one only has to consider an instance (akin to the Frogfoot experience) where an innovative rival seeks to target a growing or new market, such as a township, with a solution that requires a wholesale FTTH input and partnership with Maziv which has its own plans to enter such markets. Such a scenario gives rise to a conflict of interest of competitive significance in that Maziv may face an incentive to restrict, delay or decline access on commercial or technical grounds (as it has already planned to enter these markets), when it is otherwise economically feasible to supply access. Frogfoot has alleged that similar concerns have arisen in the past regarding delays in provision of certain services for FTTB by Maziv to favour itself. The factual contestation even in these proceedings about the incidents alleged by Frogfoot, points to the difficulties of determining objectively whether such technical or commercial grounds for refusal, delay or restriction are reasonable. Such an exercise would evidently be a complex and time-consuming task that may undermine the realisation of commercial opportunities.

1042. During the hearing, Mr Motlekar raised a similar concern regarding the term "*Reasonably Capable*":

> "*…what is reasonably capable, who decides what is reasonably capable. Who decides the commercial and technical viability of feasibility of what's reasonably capable. And maybe we need to insert some form of objective metrics, and then some form of validation in terms of vetting either from customers or regulatory – some kind of regulatory body. It just – felt a bit too broad.*"[997]

1043. The forms of validation and objective metrics envisaged by Mr Motlekar are not present in the proposed conditions. We discuss further below the limitations of the Monitoring Trustee model as envisaged by the merger parties.

1044. Ultimately, the concern is that the Maziv Group has been given the discretion to determine what it is reasonably capable of rendering insofar as it may determine whether it is reasonably feasible to do so, after applying "good faith" and "best

[997] Transcript p 511 line 20 to p 512 line 4.

endeavours", and may also determine whether to incur additional capital expenditure and costs. In the context of a bargaining relationship with customers that are largely dependent on Maziv for wholesale FTTH/B and FTTS, it is unlikely in our view that most customers would be able to compel service provision from Maziv where it was against its own commercial interests to do so (such as in growth markets that it and/or Vodacom are targeting including lower-income areas, lit FTTB services, and growth in FTTH to own the home).

1045. During the hearing Mr Hodge testified that in:

> "*…the amendments to the Electronic Communications Act this was one thing raised for the reasonable – reasonably feasible test for access to central facilities was raised as something that should be fixed because it is so subject to discretion and abuse*".[998]

1046. Similarly, the term "*Ordinary Course of Business*" also raises concerns.[999] When considering revisions to the conditions of 24 May 2024, Frogfoot raised its concern that the clause "*(Ordinary Course of Business) still provides…"in accordance with the business plan" (which can be anything the merging parties come up with)*".[1000]

1047. Mr Motlekar expressed similar concerns pointing out that a business plan is a living document which raises additional difficulties regarding the ability to assess and monitor the business plan.[1001]

1048. Further, in terms of the definition, it may result in additional capital expenditure or direct costs which the customer would have to be willing to commit to pay for.[1002] This means that the customer may end up paying for infrastructure that they do not own.

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[998] Transcript p 3943 lines 7 – 11.
[999] Clause 1.49 of the Conditions: "*Ordinary Course of Business*" means the business conducted as a reasonable and prudent operator operating in accordance with the business plan of the business.
[1000] Exhibit BK2.1: Letter from Primerio to the Commission dated 31 May 2024.
[1001] Transcript p 511 lines 16 – 19.
[1002] Clause 1.52 of the Conditions: "*Reasonably Capable*" means, at the time that a service is requested by a potential customer, that: (i) the Maziv Group has existing infrastructure with available fibre capacity

1049. Our concern with the above provisions is not one about the precise wording of the various definitions, but rather a principled concern with the inherent ability and incentive of Maziv to exercise its own discretion, underpinned by a position of market power, to determine the provision of access in markets in which Maziv Group firms or Vodacom may themselves seek to compete and grow *qua* player and referee/gatekeeper. This is of competitive significance in markets in which timing, first mover advantages and emerging growth opportunities are a critical feature of competition, and where exercise of such market power particularly where there is limited or no overbuild can be of significant advantage to the merger parties. Inherent in this scenario are serious difficulties in detection, monitoring and enforcement to prevent such conduct, as we discuss below.

Open access to dark fibre services

1050. The Maziv Group undertakes that for as long as it supplies dark fibre services to Vodacom SA Group, Maziv Group and/or any other customer in South Africa, it will not cease supplying dark fibre services to third parties and it will not terminate any contracts concluded prior to the implementation date for the provision of dark fibre services. The Maziv Group also undertakes that dark fibre services supplied to any party in South Africa shall be provided on an open access and non-discriminatory basis.[1003]

1051. This commitment relates to concerns raised about potential sunsetting of dark fibre products should Maziv decide to offer only lit services or if Vodacom ceased to purchase dark fibre from it. Such a shift would affect FNO customers that rely on access to dark fibre inputs provided by DFA, or to rival MNOs. The concern

on the duct route required to provide the service, (ii) wayleaves and/or all other approvals required to provide the service have been or can be obtained, (iii) the provision of such services is reasonably feasible (technically and/or commercially) with the application of good faith and reasonable endeavours; and (iv) additional capital expenditure or direct costs do not need to be incurred unless the customer is willing to commit to pay for such additional costs, it being recorded that the Maziv Group shall not reserve any Wholesale Metropolitan Fibre Service, Wholesale FTTH Service, Wholesale FTTB Service and/or Wholesale Key Service for any entity within the Maziv Group and/or Vodacom SA Group.

[1003] Clause 4.2 of the Conditions.

is also significant in light of our analysis of the incentive that Maziv would face post-merger to grow its position in the provision of lit services.

1052. This commitment (Clause 4.2) is faced with the same challenges insofar as it is ultimately subject to what the Maziv Group is reasonably capable of rendering in the ordinary course of its business (in that it relates to Clause 4.1). We have discussed our concerns in this regard.

1053. Significantly, it also does not address Frogfoot's concern at all, that "*DFA has entered* downstream *such that it competes directly with Frogfoot and does so at prices lower than what it charges Frogfoot upstream.*"[1004] As was submitted on behalf of Frogfoot:

> "*Importantly, this concern has not been addressed by the new clause 4.3*[1005] *at all. The new clause 4.3 does not seem to adequately address the FTTH/FTTB foreclosure concerns, as these are subject to the same issues around monitorability and enforcement that was the case previously. In any event, the concern was never around an outright refusal to supply to DFA, but rather around a contractive refusal/margin squeeze (which is not address by the new proposed clause).*"[1006]

1054. The concern above is in essence that while continued access to dark fibre, which FNOs procure from DFA, is provided for in the conditions, the terms of such access are not effectively regulated for. This is an issue about the terms of both open access and non-discrimination. We note in this regard that while Maziv commits to continue with existing contracts for dark fibre access, this could be i) at terms and prices that are detrimental to FNO rivals or that preference Vodacom in the case of MNOs; ii) rendered irrelevant if DFA competes more aggressively with these FNOs in wholesale FTTB with its lit offerings such that operators that are reliant on dark fibre may be undermined in terms of relative

[1004] Exhibit BK2.1 para 9.3.
[1005] The comment relates to an earlier version of the proposed conditions. Clause 4.3 was subsequently removed.
[1006] Exhibit BK2.1 para 9.4.

costs and pricing dark fibre. We return to the terms of access including pricing further below.

1055. The specific concern around constructive refusal or margin squeeze was raised above in our assessment of foreclosure in the provision of wholesale access for FTTB. While the claims may remain contested between the parties concerned, we have noted above that these real-world examples are illustrative of the types of mechanisms and conduct, and competitive disposition of Maziv, that characterise the market and likely outcomes post-merger. It suffices to note at this point that DFA can still make dark fibre highly unattractive through its pricing or introducing problematic terms and conditions such that some market participants cannot or would not want to procure such services. Uncovering and assessing such an unfair pricing concern is known in competition economics and law to be a very difficult exercise, requiring extensive economic and factual evidence, often considered over a lengthy period of time.

1056. Dealing with a concern of this nature, were it to arise, is tantamount to the prosecution of an abuse of dominance margin squeeze matter in competition law which could not be readily done to finality by a Monitoring Trustee, not least because of the inherent debates about relevant costs, fairness of discounts, transfer pricing, technical equivalence of services being provided, and competing rationales for prices and costs included. In this regard, recall the earlier evidence of Prof Theron that, other things being equal, Maziv would prefer to discriminate between its customers on pricing and offers so as to optimise returns and uptake, which is consistent with the competition economics theory. This implies that Maziv would otherwise face very powerful economic incentives to offer differential prices and terms including in support of its own commercial and competitive interests, and so any remedies that seek to prevent such conduct need to hold up against this natural tendency of firms in Maziv’s position.

Open access conditions do not address customer locking-in

1057. Frogfoot's evidence is that an open access network (OAN) should conform to certain principles to benefit competition, including "*no customer lock-in*" through conduct such as offering long-term contracts, prohibiting interconnection at its network aggregation facilities, and asymmetric or unfair pricing. Further, the costs of switching from one network to another, interconnecting networks, or switching from one retail service provider to another, should not be so high that the customer is trapped with the OAN provider.[1007] In this regard, Mr Van der Merwe stated:

> "*Efficiencies from vertical integration are also not likely to arise where an 'open access' provider holds itself out as being open access, and subsequently becomes vertically integrated to compete and foreclose its own customers, who have been locked into the provider. Unfortunately, many FNOs claim to offer open access services, but breach one or more of these fundamental principles in which retail service providers no longer have a clear incentive to share the infrastructure and/or where the customer becomes trapped with the incumbent with no easy way to switch networks or retail service providers*".[1008]

1058. The evidence from Frogfoot is that DFA has previously locked-in customers through volume incentives and longer contract durations.[1009]

1059. Rain expressed similar concerns regarding lock-in and a lack of alternatives. Mr Schoeman testified that there are "*big service issues with DFA at the moment and then it does make it difficult to find an alternative.*"[1010]

1060. Despite Rain's acceptance of the conditions, and although Mr Schoeman testified that Rain's concerns about DFA locking in customers are operational concerns which are not compounded by the merger, he nevertheless conceded that it is a concern.[1011] We have in the vertical analysis above dealt not only with the ability to foreclose, but also the post-merger incentives to foreclose.

[1007] Van der Merwe FWB p 50 para 50.3.
[1008] Van der Merwe FWB p 55 para 68.
[1009] Van der Merwe FWB p 51 para 53.
[1010] Transcript p 955 lines 15 – 16.
[1011] Transcript p 958 lines 20 – 21.

1061. The evidence from Rain is that a material concern "*has been the restrictions* imposed *by DFA that prevent it and other smaller fibre providers from terminating their fibre at aggregation nodes in which customers such as Rain have leased space from DFA. This restriction effectively prevents Rain from procuring fibre from other providers or deploying its own fibre infrastructure in areas where DFA does not have infrastructure and chooses not to deploy its infrastructure or where DFA is not providing services to the standard required by Rain.*"[1012]

1062. This concern is both about the terms of access and the conditions under which such access is granted, whereby DFA's position of market power and dependency of rivals and customers on its infrastructure, means that any refusal or degradation of access can be harmful for other operators. There is nothing in the conditions which addresses concerns regarding the lock-in of customers.

Non-discrimination and transparency commitments

1063. The merger parties also committed to transparency and non-discrimination in order to address the foreclosure concerns.

1064. In terms of the non-discrimination commitments, the Maziv Group undertakes to provide wholesale metropolitan fibre services, wholesale FTTH services, and wholesale FTTB services on terms and conditions, including prices, which are transparent and non-discriminatory.[1013]

1065. Regarding transparent terms and conditions, the Maziv Group undertakes that key[1014] component elements of the pricing of products will be set out separately in rate cards and, where applicable, reflected in Transfer Pricing so that it is possible to compare pricing applied to FTTH Providers, FTTB Providers, FTTB

[1012] Transcript p 953 lines 9 – 18.
[1013] Clause 5 of the Conditions.
[1014] We note that the reference to '<u>key</u> component elements' is not comprehensive, and it is not clear whether there are therefore other components of pricing that would not be included on separate rate cards for comparison.

ISPs, FTTH ISPs, or MNOs that operate within, or are controlled by, the Maziv Group, the Herotel Group, or the Vodacom SA Group, versus those applied to third parties.[1015]

1066. Regarding non-discriminatory terms and conditions, Maziv Group undertakes to offer standard rate card prices to its third party customers and to the Maziv Group, the Herotel Group and Vodacom SA Group for equivalent services, and undertakes that the Maziv Group, the Herotel Group and Vodacom SA Group will not be offered an advantage in respect of pricing, requisite quality, hand-off locations or demarcation points, and timelines and security of delivery for the supply of wholesale metropolitan fibre services, wholesale FTTH services, or wholesale FTTB services.[1016]

1067. Maziv Group is not precluded from offering prices to its third-party customers that are lower than the standard rate card prices and from offering the Maziv Group, the Herotel Group or Vodacom SA Group prices that are lower than the standard rate card prices in order to match a legitimate alternative competitor quote. In such cases, it only has to provide evidence of the alternative competitor quote to the Commission and the Monitoring Trustee.[1017]

1068. The Maziv Group also undertakes to provide wholesale Key and wholesale Herotel services to third party ISPs and third-party Key/Herotel Resellers, for re-sale on terms and conditions, including prices, which are transparent and non-discriminatory. It undertakes not to offer the Maziv Group, the Herotel Group and Vodacom SA Group advantage in respect of pricing, requisite quality, and timeliness and security of delivery for the supply of wholesale Key services or wholesale Herotel services.[1018]

1069. The Maziv Group undertakes to employ its "*best endeavours*" in providing the abovementioned services in line with product-specific terms and conditions, as

[1015] Clause 5.1.1 of the Conditions.
[1016] Clause 5.1.2 of the Conditions.
[1017] Clauses 5.2 and 5.3 of the Conditions.
[1018] Clause 5.4 of the Conditions.

described in the Product Rules, or Vumatel Framework Agreements, and to ensure that, if the Maziv Group is unable to comply with such product-specific terms and conditions, that any such failure to comply is remedied "*without delay*".[1019]

1070. The Maziv Group undertakes to ensure that compliance with the Product Rules and Vumatel Framework Agreements is consistently applied and monitored.[1020]

Non-discrimination and transparency provisions do not remedy likely competitive harm

1071. Rain and MTN believe that their concerns can be addressed with substantial conditions, while the Commission does not believe that conditions will remedy the concerns. We have already found that differences in mean time to repair (MTTR), for example, can be sustained and are significant despite any controls in place within DFA's operational system, SLAs or rules (see paragraphs 744 to 748), such that it would be difficult to identify or remedy perceived or actual differences in quality of supply from DFA/Maziv.

1072. We have also raised the concern that in areas where an MNO (or FNO) customer of Maziv is dependent on Maziv links, a degradation or interruption of service will be harmful to its operations and ultimately to customers in those areas. Rain stated that it was not aware ofthe differences in the MTTRs it was receiving from DFA relative to its rival MNOs. This is despite the evidence of Mr Mare that all MNOs all have substantively the same SLAs, which highlights our concern about detection and early identification of any quality and service-related discriminatory treatment or preferencing on the part of the merger parties post-merger.

1073. Despite the non-discrimination and transparency remedies proposed the following concerns remain:

[1019] Clause 5.5 of the Conditions.
[1020] Clause 5.7 of the Conditions.

1073.1. Post-merger, a party such as Rain would not be capable of determining whether Maziv is using its "*best endeavours*" in complying with the conditions and any undertaking to remedy a failure to comply "*without delay*" is meaningless.[1021] Mr Schoeman conceded that this issue is still of concern to Rain given past experiences.[1022]

1073.2. The non-discrimination commitments[1023] are deficient of a true non-discrimination regime. The ROFR is still retained with the result that third party FNOs would likely lose Vodacom as a customer.

1073.3. Regarding transparent terms and conditions and the Maziv Group's commitments in respect of standard rate cards and transfer pricing, the concern is that there is no mechanism to ensure that: transfer pricing is equivalent to what is offered in the open market; there is no preferential discount and whatever discount structures are available are based on the terms and unit prices available to all; there is no (tacit) discrimination against third parties buying from the Maziv Group using factors or parameters that fall outside of 'key component elements' of pricing; there isno structure that favours Vodacom because of the volumes that it is able to amass.[1024]

1074. The non-discrimination provisions do not deal with nor prevent strategies that the merger parties may adopt to raise rivals' costs. We have assessed above in relation to wholesale FTTB and dark fibre that the merged entity will have incentives to raise rivals' costs, and so Maziv may apply price increases to all of its customers whilst complying with the non-discrimination clauses (with the knowledge that Vodacom, for example, may accommodate such an increase through its share in the returns of Maziv). There is no provision to ensure that prices are fair and reasonable and cost-reflective (accounting for normal economic profit), in circumstances where Maziv has been shown above to have market power which is strengthened through the proposed transaction. It is also not possible to regulate the prices given the complexity and multiplicity of the

[1021] Transcript p 966 lines 2 – 18.
[1022] Transcript p 967 line 2.
[1023] Clause 5.1.2 of the Conditions.
[1024] Clause 5.1.1 of the Conditions.

products involved in the merger, which may themselves change over time, and the number of determinants of such pricing that must be considered (akin to an excessive pricing evaluation).

1075. In addition, we consider that a standard rate card commitment may be rendered ineffective if in reality the *effective* prices determined for different customers can be differentiated significantly and justified based on nuances in the particular specification of the requirement, timing of access, scale and volume, and other customer-specific traits and requirements. Indeed, it has been DFA's practice to differentiate pricing in this manner.

1076. Furthermore, the standard rate card provision is potentially problematic at the level of principle. For example, a price for a service that is determined to be optimal for Vodacom (upstream or downstream) and thus offered to it and imported into standard rate card prices, as is the commitment under the proposed conditions, is not necessarily optimal or fair to a reasonably efficient rival given differences in scale, capabilities and business models.

1077. In addition, such a pricing regime may have unintended consequences of restricting innovation on the part of customers that may wish to approach DFA/Maziv with bespoke requests and opportunities (as Frogfoot did), only for Maziv to be constrained in its ability to determine such a customer-specific price and specification regime. We have noted this unintended outcome in our analysis above. However, this should not be taken to negate or offset the greater concerns of anti-competitive harm that we have raised above, and in any event the pro-competitive effects/efficiencies of dynamic and differentiated pricing have not been argued by the merger parties in these proceedings.

1078. This commitment should also be read with the commitment that Maziv Group may offer prices to third party customers that are lower than the rate card prices or offer discounts to Vodacom and Maziv Group in order to match alternative competitor quotations. The latter provision is problematic in that it requires that there is comparability and equivalence of services and specifications to allow for an assessment of the legitimacy of a competitor quotation claim, which is known in competition economics and law to often become a confounding exercise in price discrimination case analysis.

1079. Taken together, these provisions create scope to differentiate pricing significantly across customers, and favourable transfer pricing.[1025] In a market where Vodacom is understood to be the [redacted] purchaser from DFA, and at least compared to other smaller MNOs or those that procure less volume (such as MTN due to a higher ratio of self-build), there is a concern that discounting practices could be structured to favour Vodacom over rivals; or DFA group companies over rival FNOs for that matter.

1080. On the whole, we take the view, as set out in our conclusion of the competition assessment above, that the anti-competitive strategies and likely harms should also be considered together. This is particularly in circumstances where the same group of firms will, post-merger, set prices and terms of access across multiple levels of the market often to the same or related customers at each level, and across a multiplicity of evolving products and services. We concluded that the theories of harm and mechanisms should not be considered in isolation but in terms of their combined effects and interrelated nature. The same is true of the complexity of the foreclosure strategies, the proposed remedies that seek to respond to them, and ultimately the likelihood of effective enforcement of such remedies.

1081. Further, the non-discrimination and transparency provisions are extremely difficult to effectively monitor, especially in perpetuity in evolving markets, which we deal with under the Monitoring and Enforcement section below.

Coordination

1082. ISPA raises the concern that the proposed transaction will make coordination among competitors more likely i.e., it may make tacit coordination or explicit

[1025] Transcript p 514 lines 1 – 18.

cartel behaviour more likely. We note that the increased level of transparency created through the proposed behavioural conditions, and the involvement of a Monitoring Trustee (that the Commission would have no control over), increases the post-merger possibility of coordinated outcomes.

THE PROPOSED CONDITIONS ARE INCAPABLE OF BEING EFFECTIVELY MONITORED AND ENFORCED

1083. In order for conditions to be effective, they must be capable of being monitored and enforced by the competition authorities that impose them. This much is clear from the Tribunal's approach in *Mediclinic*[1026] which was subsequently reiterated by the Constitutional Court.

1084. In the *Mediclinic* matter before the Tribunal, the Commission submitted that the effective monitoring of the proposed condition would require the services of independent auditors and actuarial experts as the Commission does not possess these skills inhouse and "*[t]he complexities will increase the risk of the proposed remedies being ineffective*."[1027] The Tribunal found the proposed behavioural remedy to be inappropriate because of *inter alia* "*serious doubts regarding the Commission's ability to effectively monitor and enforce the proposed pricing and non-price behavioural conditions.*"[1028]

1085. In *Mediclinic*, the Tribunal also considered the duration of an appropriate remedy and concluded that an "*infinite remedy will place an inappropriate administrative burden on the Commission to monitor. It is further highly doubtful if this proposed remedy could ever be effectively monitored by the Commission*"[1029] and that "… *behavioural conditions in perpetuity would be unpractical and undesirable and would put an inappropriate administrative burden on the Commission.*"[1030] Likewise, in this case the proposed behavioural conditions are

[1026] *Mediclinic Southern Africa (Pty) Ltd and Matlosana Medical Health Services (Pty) Ltd* (CT Case No.: LM124Oct16) [22 March 2019] at p 103 para 40 ("***Mediclinic CT***").
[1027] *Mediclinic CT* p 105 para 421.
[1028] *Mediclinic CT* p 103 para 40.
[1029] *Mediclinic CT* p 105 para 422.
[1030] *Mediclinic CT* p 104 para 412.

not only infinite in duration, but also highly technical and cumbersome in nature, affecting many customers and competitors of the merger parties. Maziv is currently servicing over [redacted] enterprise customers (FTTB, MNOs and ISPs) and approximately [redacted] consumer customers (FTTH ISPs).[1031]

1086. The Constitutional Court, in its judgment in *Mediclinic* repeated the Tribunal's conclusion (which it stated the Competition Appeal Court was not able to interfere with), namely that the "*…proposed behavioural remedies do not address the source of the competitive harm, are limited in duration and inappropriate or inadequate in a number of respects, <u>including the Commission's inability to effectively monitor and enforce the various proposed behavioural conditions</u>…*"[1032] (Own emphasis)

1087. A transaction ought to be prohibited if the conditions tendered are not capable of being effectively monitored and enforced.

1088. The Commission expressed concerns that the conditions are incapable of effective monitoring and enforcement, leave room for the merger parties to circumvent them, and to the extent that they can theoretically be monitored, a large team and significant resources would be required by the Commission (and Tribunal) as the only institutions tasked with enforcement of merger conditions.

1089. We deal thematically with the main concerns below. We first consider the appointment and resources of the proposed Monitoring Trustee, before considering the economic complexity of the markets under consideration, and finally the roles and power of the competition authorities.

Appointment and resources of a Monitoring Trustee

1090. In order to monitor compliance with the conditions the merger parties proposed the appointment of a Monitoring Trustee in terms of a Monitoring Trustee

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[1031] Mare FWB p 444 para 56.
[1032] *Mediclinic* (Constitutional Court) para 78.

Mandate.[1033] The Monitoring Trustee is professed to act on behalf of the Commission to monitor the merger parties' compliance with the conditions,[1034] and to assess any concerns or complaints with the Conditions.[1035] The Monitoring Trustee shall be independent of the merger parties and possess the necessary qualifications and resources to carry out the Monitoring Trustee Mandate.[1036]

1091. Regarding this proposed monitoring function, MTN's opening statement best describes its concerns on the monitoring and enforcement of the proposed conditions:

> "*The remedies proposed by the merger parties are behavioral rather than structural in nature. <u>Whether they would be monitorable and enforceable are questions that plainly arise. The merger parties propose that a "monitoring trustee" be appointed to do the work of a competition regulator, presumably due to the Commission's resource constraints. MTN considers that such a trustee would need sufficient independence, expertise and capacity to detect and discipline even subtle instances of preference or prejudice; and to monitor and enforce an equality and simultaneity of disclosure of "all relevant information</u>" …*" (Own emphasis)

1092. We agree with MTN's concerns in this regard, and do not find that subsequent revisions to the conditions have resolved the issues. Ultimately, the extent to which the Monitoring Trustee is able to effectively carry out its mandate is dependent on the resources that Maziv is willing to expend given that Maziv is responsible for appointing the Monitoring Trustee,[1037] and for paying the fees and expenses of the Monitoring Trustee and the Monitoring Trustee's team, on the terms and conditions agreed upon between Maziv and the Monitoring Trustee.[1038]

[1033] Clauses 17 and 18 of the Conditions read together with the Monitoring Trustee Mandate.
[1034] Clause 1 (1.2.1) of Appendix B to the Conditions.
[1035] Clause 1 (1.2.4) of Appendix B to the Conditions.
[1036] Clause 17.2 of the Conditions.
[1037] Clauses 17.6 and 17.8 of the Conditions.
[1038] Clause 17.9 of the Conditions read with clause 4 of Appendix B.

1093. This, in our view, creates obvious conflicts of interest, a risk of bias, and a high likelihood that the Monitoring Trustee would not be viewed in the market as impartial and independent in the execution of its mandate.

1094. During closing arguments, MTN submitted that it "*anticipates that the monitoring trustee process, if implemented in good faith, would render the conditions effectively monitorable and enforceable.*"[1039] In our view, MTN's reliance on the merger parties' good faith is not sufficient to address concerns. Concerns regarding the independence of the Monitoring Trustee remain when its fees will be paid by the merger parties in perpetuity. Furthermore, there is nothing in the conditions that gives the Monitoring Trustee powers to discipline even subtle instances of preference or prejudice; and enforce an equality and simultaneity of disclosure of all relevant information. There can be no such powers given to the Monitoring Trustee because it is not the appointed regulator – it cannot carry out the mandate of the competition authorities.

1095. In terms of the resources and capacity required, most of the conditions will apply for as long as Vodacom SA controls Maziv[1040] (save for the public interest conditions that apply for specific time periods). The Commission will therefore have to employ a substantial number of resources including skilled teams (including engineers, economists, sector and financial experts) to effectively monitor and enforce the conditions for an unspecified, lengthy period of time.

1096. The merger parties were not forthcoming in terms of the capacity and expertise required to implement the proposed monitoring function. Mr Johnson for the Commission submitted that "*carrying out this trustee's remit…might require dozens of staff and potentially a budget of millions of dollars, and the basis for this was just observing what might be the size of the wholesale department, and …the department inside a regulator of a typical electronic telecommunications*

[1039] MTN HOA p 111 para 135.
[1040] Clause 2 of the Conditions.

competition regulator."[1041] We agree that the proposed monitoring function is akin to the Commission assuming a sector regulatory function.

1097. Ultimately, concerns remain regarding the practicalities of enforcement of the conditions, and the time and resources it would take to resolve matters. These concerns are highlighted in the response of MTN's counsel to questions from the Tribunal:

> "*ADV KESSERY: … But the one thing the trustee doesn't have is enforcement powers, right. So, if there is a contravention that it identifies it will have to report this to the Commission, correct and then it might go to the Tribunal depending on the outcome of the investigation. Now, how does that work practically or how does MTN see that rolling out practically in terms of the fact that the Commission has said it doesn't have the same kind of resources, it's not being paid obviously by Maziv, so it's not going to get the same staffing, the same budgets, the same financial implications that it's going to take to actually investigate and come to a determination of whether there's a contravention or not? That's one. Two is given that this is – if there is all of this that is found it's going to take time and what's going to happen in the interim if there is discrimination identified? So, on those two issues how will it work practically for MTN?*
>
> *ADV PEARSE SC: … It is hopefully the case that with a properly resourced and qualified monitoring trustee that most issues will be resolved without there being a dispute, <u>but what I can't give you an assurance of is that there wouldn't be a dispute and that it would not be a time costing dispute. I must accept that</u>."*[1042] ; and
>
> *<u>"… </u>certainly MTN would be hopeful that disputes could be resolved quickly <u>but there is a concern that we acknowledge</u>*".[1043] (Own emphasis)

[1041] Transcript p 3204 lines 12 – 18.
[1042] Transcript p 4297 line 21 to p 4299 line 9.

1098. We find that these concerns cannot be resolved through the proposed conditions.

Complex products and highly technical conditions

1099. We find that the conditions involve complex products and are highly technical in nature. Put starkly, we are not dealing here with a simple security of supply or price-cap remedy as in most cases with vertical and horizontal dimensions. The volume of submissions, sophistication of economic analysis and breadth of resources in terms of legal, economic and industry expertise that has been required in these proceedings attest to this.

1100. It is also evident that we are asked to consider behavioural remedies that will impact an industry which is dynamic and evolving. If accepted, the set of behavioural conditions proposed in this transaction would likely require an unparalleled amount of resources and expertise to be enforced effectively.

1101. As we noted above in our assessment of the competition effects, the technical nature of foreclosure mechanisms and harms that can arise is exceedingly complex in this matter, coupled with the sophistication and technical specificity of the industry, operators and products/services concerned, and the very large number of affected customers. It is likely that in many cases, the competition economics assessment of any alleged breach of the proposed behavioural remedies (if contested between the merger parties and industry complainants) would be tantamount in scope, depth and analytical requirement to a full margin squeeze, price discrimination, excessive pricing or bundling enforcement case if an appropriate and fair resolution of a complaint is to be reached.

1102. In addition, given the nature of complaints that may arise pursuant to these conditions, and the specific formulation of the remedies proposed, it is likely that a complaint or challenge on a given alleged breach by the merger parties would have market-wide impact and thus give rise to a large amount of complaints.

1103. As we explain further below, the ultimate enforcement of the behavioural conditions cannot be outsourced by the Commission, and it cannot take enforcement action in terms of the Act and its Rules before it has itself conducted a thorough investigation of all the relevant facts in complex and interrelated markets.

1104. We heard evidence regarding the difficulties of monitoring this complex market from Mr Van der Merwe (Frogfoot) who expressed his concerns as follows:

> "*…the market is quite complex. There is different ways in which you can look at it. There is subtle things that you can do that creates harmful effects in the market. The products are complex. You can tweak a little thing here and it has massive detrimental impact. So, <u>I really am concerned around anyone being able to monitor the merging parties and really determine whether there's going to be harmful effects or not</u>.*"[1044] (Own emphasis)

1105. Furthermore, there is nothing in the conditions that describes exactly how the Monitoring Trustee will go about monitoring compliance and what standards or benchmarks will be applied. In terms of the Monitoring Trustee Mandate, the Monitoring Trustee shall in consultation with Maziv and the Commission prepare a detailed working plan, including a resourcing schedule, describing how the Monitoring Trustee intends to monitor compliance with the Conditions.[1045] In our view, this proposal does not address the question of what substantive benchmarks, guiding principles and analytical and legal standards would be used to consider matters brought to the Monitoring Trustee.

1106. Regarding the open access and non-discrimination provisions that were tendered to address concerns regarding the vertical effects of the merger, Mr Johnson's evidence was that there is insufficient detail in the conditions regarding resources required by the Monitoring Trustee, including the skills and ability to critically appraise explanations given and how the conditions will be enforced. While the merger parties contend that the Tribunal must place no

[1044] Transcript p 137 lines 5 – 11.
[1045] Clause 1.1 of Appendix B to the Conditions.

weight on Mr Johnson's criticism of the merger parties' proposals regarding the Monitoring Trustee, we find his evidence in this regard to be consistent with the concerns[1046] and the lack of detail contained in the conditions.

1107. Regarding the monitoring of non-price discrimination, the merger parties submit that the Monitoring Trustee would have the power and ability to interrogate the outputs to satisfy itself that they are based on legitimate reasons.[1047] In this regard, we are of the view that the Monitoring Trustee's powers fall short insofar as they do not extend to ensuring that systems are in place to guard that there is no preferencing, which will arise if bespoke discounts and customer-specific deals and arrangements can be done (which makes a test of equivalence of transactions very complex) as we have discussed in the vertical analysis section.

1108. Applying the *Imerys* test to the current matter, it follows unavoidably that in circumstances where the Commission's factual witnesses have not had an opportunity to testify to the revised conditions and whether they resolve the complex competition issues arising, there will always be a reasonable possibility that the conditions proposed will not remedy the SLC.

Powers and the role of the competition authorities

1109. The Commission is the statutory body appointed to regulate mergers and is responsible for the monitoring and enforcement of the tendered behavioural remedies. The telecommunications regulator (ICASA) is responsible for *inter alia* promoting access to basic communication services at affordable prices, putting requirements in operators' licenses to roll out services in under-serviced areas, and ensuring fair pricing with non-discriminatory terms and conditions. The Monitoring Trustee will in many respects be expected to usurp the roles that are legally reserved for these regulators, including *inter alia*, receiving complaints, investigating complaints and potentially issuing interim relief directions. The Monitoring Trustee however lacks any legal powers.

[1046] Van der Merwe Transcript p 137 lines 5 – 11; Johnson Transcript p 3198 line 10 to p 3200 line 20.
[1047] Transcript p 4049 lines 3 to 5.

1110. In terms of the final proposed conditions in an attempt to address monitoring, "*the* Complainant *may also request a fast-track directive from the Monitoring Trustee in terms of this clause 7 for interim relief pending the resolution of its Rule 39 Complaint*".[1048] (Own emphasis) However, a third party cannot be compelled to make use of this fast track provision, and third parties may prefer to rather have the Commission deal with non-compliance, from a competition perspective rather than a technical one, also considering that there may be some bias on the part of the Monitoring Trustee since it will be paid by the merger parties in perpetuity to fulfil this role. Furthermore, any decision by the Monitoring Trustee not to give interim relief will likely immediately fall on the Commission's shoulders for determination. It therefore in our view offers no solution to the monitoring and enforcement concerns.

1111. Furthermore, there is a lack of detail regarding the enforcement of such an interim relief directive, and it is "toothless" and unenforceable, falling outside of the legal prescripts. The merger parties' counsel conceded that "*you would not want …as a matter of public policy to be subcontracting these disputes for final determination by a third party. That would be unattractive I think and for the Commission and for ourselves*, …."[1049] Ultimately, any interim relief process of the Monitoring Trustee would still be subject to the final determination of the competition authorities.

1112. In this regard, it is important to note that the competition authorities were established by the Act to *inter alia* investigate and control mergers. The competition authorities are mandated by the Act to ensure compliance with and enforce the Act. And it must exercise and deliver on its mandate with a duty of care, such as ensuring that interventions in markets (such as remedies) are tractable and will protect the interests of consumers and competition in the long-term. The remedies should be economically and legally sound, and reasonable for all parties concerned, including but not limited to the merger parties. Further, in executing their mandate, the Act places an obligation on the competition

[1048] Clause 7 (7.1) of Appendix B to the Conditions.
[1049] Transcript p 4497 lines 19 – 21.

authorities to ensure fairness in the processes and outcomes in the adjudication of complaints particularly where there are likely to be significant differences in power and resources between affected parties as is often the case in our economy. Participation, inclusion and fairness in process matters, especially when matters are likely to be heavily contested such as arisen in this case. There is frankly little in the proposed conditions and mandate of the Monitoring Trustee that provides safeguards against bias and unintended consequences of decisions that may be taken by a Monitoring Trustee pursuant to the proposed conditions.

1113. Our view is that it is important to preserve and protect the interests of justice by *inter alia* ensuring that remedies preserve competition and protect the interests of consumers, are credible, and can achieve their intended effect and are enforceable. We have said above that context matters, and indeed what is at stake in this merger is ultimately the welfare of consumers and the public, in the context of an economy that is highly concentrated and unequal, and where economic outcomes can often be 'anti-poor' as the Commission found in its DSMI. The competition authorities cannot abdicate or outsource their responsibility, in circumstances where custodianship of the Act and the recourse and relief it provides for firms and consumers in the economy, including the merger parties, resides with them as intended by the legislature. As such, it would be imprudent in our view to relegate to a third-party Monitoring Trustee, the important task of monitoring and enforcing remedies that impact on competition in this market and have far-reaching effects on ordinary South African consumers.

1114. Notably, the Monitoring Trustee will not be guided by the same objectives as a Commission which investigates complaints within the parameters of the Act and having expert knowledge in matters of competition. The Monitoring Trustee would also not necessarily be bound by the requirement to ensure fairness and justice in the same manner that is incumbent of bodies in our competition law system such as the Commission.

1115. Significantly, as indicated above, the Monitoring Trustee has no legal, remedial or enforcement powers. In our view, this raises a crucial concern regarding the effectiveness of the Monitoring Trustee's role. The Monitoring Trustee will not be able to prevent non-compliance and will simply react by reporting its view of non-compliance to the Commission. The Commission, in order to be fair to all parties concerned, will then have to commence its own thorough investigations to independently establish whether there has been a breach of the conditions. By the time the Commission receives the complaint from the Monitoring Trustee and then completes its own investigation, it may be too late to "unscramble the egg" and undo any harm that would have occurred from the conduct.

Conclusion

1116. We were given many versions of mostly behavioural conditions, each purporting to address the competition concerns raised and to incorporate the input received specifically during the hearing.

1117. Ultimately, serious concerns remain regarding whether the conditions address the anti-competitive effects of the merger, and whether they are capable of being effectively monitored and enforced.

1118. Based on the evidence before us, we concluded that the conditions do not address the competition concerns identified and are incapable of being effectively monitored and enforced.

1119. We agree with the Commission, being the body that is tasked with the monitoring and enforcement of the conditions, that monitoring such extensive and highly technical conditions would require a large team and significant resources, and that the Commission and Tribunal as the only institutions legally tasked with enforcement of merger conditions, would not be in a position to effectively do so. Even with the advent of a Monitoring Trustee, ultimate monitoring and enforcement, including investigation of complaints, would still be the Commission's responsibility. The role of the Commission in effectively monitoring and enforcing the conditions cannot be avoided by means of a Monitoring Trustee.

1120. Furthermore, monitoring and enforcing these conditions effectively, will likely place a huge regulatory burden on the Commission and Tribunal given that the conditions are lengthy, extremely complex, cumbersome and highly technical in nature, and furthermore are of infinite duration. The competition authorities are not in a position to take on this regulatory burden in this sector, and certainly not for an indefinite duration.

PUBLIC INTEREST

1121. As indicated above, section 12A(1A) of the Act requires us to determine whether the merger can or cannot be justified on substantial public interest grounds by assessing five factors set out in subsection (3). These factors are the effect that the merger will have on:

(a) a particular industrial sector or region;

(b) employment;

(c) the ability of small and medium businesses, or firms controlled or owned by historically disadvantaged persons, to effectively enter into, participate in or expand within the market;

(d) the ability of national industries to compete in international markets; and

(e) the promotion of a greater spread of ownership, in particular to increase the levels of ownership by historically disadvantaged persons and workers in firms in the market.

1122. One should assess these factors with the guidance of the Constitutional Court in Mediclinic in mind where the court held "*In interpreting s 12A of the Act, [it is] <u>required to have had regard to the provisions of s 39(2) of the Constitution, which provides instructive guidance in construing any provision, including s 12A, the preamble to and purpose of the Act</u>. This [must be] done also with due regard to the state's constitutional obligation to give effect to the rights in the Bill of Rights. Besides, both the Tribunal and the Competition Appeal Court are institutions of* *the state that bear the obligation to facilitate rather than impede, albeit inadvertently, [rights in the Bill of Rights].*"[1050] (Own emphasis).

1123. The Commission submits that following a negative competition finding as in this case, the Tribunal must consider whether there are substantial positive public interest grounds that could outweigh the negative competition effects. This requires a balancing of the competition and public interest issues and must be dealt with on a case-by-case basis. The Commission highlights the word "*justify*" used by the legislature in section 12A(1) of the Act and submits that if the cost of the loss of competition is very high, such as in this case, the positive public interest effects of the merger must be very substantial or far reaching to justify approving a merger.[1051]

1124. The merger parties submit that a proper assessment of a merger in terms of section 12A, not only requires independent inquiries into both a substantial prevention or lessening of competition and substantial public interest effects but also requires combining the outcome of these two inquiries. In other words, the effects of a merger as a whole must be considered – it may cause a substantial prevention or lessening of competition (negative effect) or have a pro-competitive (positive) effect; and it may have a positive or a negative public interest effect. Only if the negative considerations are weightier than the positive considerations should the merger be prohibited. They submit that the Tribunal must make a "*balancing consideration … between the competition assessment and the public interest assessment*".[1052]

1125. The dtic submits that a merger that has no anti-competitive effects may still require conditions that remedy adverse public interest effects caused by the merger (or may be prohibited if conditions are insufficient to address such effects), and vice versa a merger that has anti-competitive effects may nevertheless be approved, with or without conditions, if it would result in positive public interest effects. With regard to the latter, it submits that a balancing or

[1050] *Mediclinic* (Constitutional Court) para 71.
[1051] Transcript p 4318 lines 12 – 18.
[1052] Transcript p 4475 line 19 to p 4476 line 1.

weighing-up exercise is to be carried out by the Tribunal. Because of its limited role in this matter, the dtic however does not suggest or make submissions to the Tribunal of whether the public interest commitments outweigh any negative competition effects.[1053]

1126. We concur that the Act requires us to do a balancing or weighing-up exercise of the anti-competitive effects of the proposed merger and the positive public interest commitments as far as they are merger-specific.

1127. Regarding merger-specificity and substantiality of the public interest effects, the Commission submits that the merger parties' tendered public interest commitments are either not merger-specific or not sufficiently material to outweigh the extensive adverse competition effects at many levels (both horizontal and vertical) and the resultant negative impacts that the proposed merger will have on South African consumers due to a loss in competition.

1128. The merger parties submit that the proposed merger has an overwhelmingly positive effect on the public interest in that it brings substantial public interest benefits to the telecommunications industry, it has positive effects for SMMEs, employees as well as broad based ownership. Further that the proposed transaction will contribute significantly to narrowing the "digital divide".

1129. We have above referred to Mr Reynolds's Figure 13 that shows the average effective mobile price per gigabyte by MNO, for the period 2018-2022. This shows that Vodacom's average prices are [redacted] in the MNO sector.[1054] It therefore is inconsistent that Vodacom in this transaction argues its commitment to narrowing the gap in the digital divide.

1130. We note that Prof Theron limits her public interest assessment to the "*likely <u>Transaction-specific</u> efficiencies that would arise even without any conditions*".[1055] (Own emphasis) She lists two aspects as merger-specific: (i)

[1053] Transcript p 4319 lines 14 – 27.
[1054] Reynolds EWB p 546 Figure 13.
[1055] Theron EWB p 565 para 9.3.

accelerated fibre deployment; and (ii) better access to, and use of, Vodacom's fibre assets.[1056] We have already dealt with the latter issue under efficiencies.

1131. As indicated, the dtic submits that it refrains from making definitive submissions as to the final results of the weighing-up exercise and that it will abide the Tribunal's findings in that regard. It however submits that the public interest commitments that it negotiated with the merger parties, which culminated in the merger parties' final tendered public interest conditions, are considerable and on the upper end of the continuum of substantiality.

Our assessment

1132. The first step in the assessment of any public interest effects resulting from a merger - both positive and negative - is to determine if they are merger-specific, considering *inter alia* the relevant counterfactual(s). Effects are not regarded as "merger-specific" if they are not related to or as a result of the proposed transaction and/or if they will likely occur regardless of or absent the proposed transaction. We emphasise that the requirement of merger-specificity applies to both positive and negative public interest effects.

1133. We concur with the dtic's submission that the public interest effects, which can be both quantitative and/or qualitative in nature, must be merger-specific by reference to the appropriate counterfactual. The competition, investment and roll-out counterfactuals (see paragraphs 282 to 344 above) are all highly relevant to the assessment of the public interest effects of this proposed transaction, specifically in relation to the merger-specificity of the effects.

1134. In *Coca-Cola*[1057] the Constitutional Court cited with approval[1058] the Tribunal judgment in *BB Investment Company (Pty) Ltd v Adcock Ingram Holdings (Pty)*

[1056] Theron EWB p 565 and 566 para 9.5.
[1057] *Coca-Cola Beverages Africa (Proprietary) Limited vs Competition Commission and FAWU* CCT 192/22) [2024] ZACC 3; 2024 (6) BCLR 771 (CC); [2024] 7 BLLR 665 (CC); (2024) 45 ILJ 1507 (CC); 2024 (4) SA 391 (CC) ("***Coca-Cola***").
[1058] At para 62.

Ltd.[1059] The Constitutional Court notes that the consideration "*… includes, as part of the test, examination of the "pre-merger counterfactual",[1060] that is, what would have happened if the merger had not taken place; and whether the impugned decision-making was "sufficiently closely related to the merger*"."[1061]

1135. The Tribunal's decision in *BB Investment* in relevant parts states:

> "*55. What does merger specific mean?*
>
> *56. It means conceptually an outcome that can be shown, as a matter of probability, to have <u>some nexus associated with the incentives of the new controller</u>.*
>
> *57. But firms are dynamic institutions. Not every change that results post-merger is necessarily attributable to the merger. Such an approach is far too mechanistic. Thus, we can conceive of changes in a firm's behaviour even post-merger <u>that would have happened in any event and can be thought of as not being merger specific</u>.*
>
> *…*
>
> *66. In competition analysis in mergers <u>we typically compare the pre-merger counterfactual with that of the post-merger scenario</u>. Such an approach seems equally sound in evaluating the public interest provided any inferences sought to be drawn are arrived at carefully.*
>
> *67. On this approach, <u>pre-merger management plans in operation already or proposed may be useful to compare to the plans the firm has post-merger if available</u>. If the differences are stark, and particularly if the change in plans takes place within a short period of time, then it is reasonable to infer that the post-merger plans of the acquirer reflect a different set of incentives to those of the pre-merger management and hence can be considered merger specific*". (Own emphasis)

[1059] *BB Investment Company (Pty) Ltd v Adcock Ingram Holdings (Pty) Ltd* [2014] 2 CDLR 451 (CT) ("***BB Investment***").
[1060] *BB Investment* at para 66.
[1061] Ibid at para 64, citing *Walmart Stores Inc v Massmart Holdings Limited* [2011] ZACT 429 ("***Walmart***").

1136. Once the Tribunal has determined which (positive and negative) public interest effects are merger-specific, it then has to determine whether those merger-specific effects are so substantial that the merger can or cannot be justified on public interest grounds.

1137. The dtic submits that one should consider each public interest ground separately and also cumulatively. Thus, even if one or more public interest effect may be regarded as trivial, they may collectively be substantial. We concur that one should assess the public interest effects individually and first determine if each is merger-specific or not, and then in the balancing exercise decide if those effects that are merger-specific collectively outweigh any competition harm associated with the proposed merger.

1138. The Act does not give a defined outline on what substantial means in the public interest context. In *Distillers Corporation (SA) Limited/Stellenbosch Farmers Winery Group Ltd*,[1062] the Tribunal held that the determination of what is substantial would depend on the context.[1063] The Tribunal notes that beyond requiring that public interest grounds be "*substantial*" before they qualify for assessment, the legislation offers no criteria as a yardstick for their evaluation, unlike with the competition evaluation, where criteria are enumerated in section 12A(2).[1064]

1139. We note that any public interest commitment, like any other remedy, must be measurable and capable of being effectively monitored by the Commission and enforced by the competition authorities.

1140. We deal in turn with each of the factors listed in section 12A(3) of the Act.

Effects on a particular industrial sector or region (section 12A(3)(a))

[1062] *Distillers Corporation (SA) Ltd and Stellenbosch Farmers Winery Group Ltd* (08/LM/Feb02) [2003] ZACT 15 (19 March 2003) ("***Distillers***").
[1063] *Distillers* para 240.
[1064] *Distillers* para 236.

1141. The Commission submits that the effects of this merger on the telecommunications sector will lead to adverse and permanent structural changes, as well as negative price effects for consumers in the relevant markets, to the detriment of both future competition and South African consumers.

1142. The merger parties, on the other hand, submit that the proposed transaction has particular benefits for the telecommunications sector as a whole. Recall that Mr Reynolds identifies accelerated fibre deployment as the primary consideration that the Tribunal could focus on (see paragraph 965 above). The merger parties submit that the proposed merger will lead to more homes being passed at the FTTH level, as well as an acceleration of the pace at which these homes are passed. They tender that Vumatel will pass one million homes in lower income areas within five years from 1 April 2025.[1065] They argue that this will not be achieved without the merger as Maziv will not otherwise have the funding to do so. The merger parties rely on Mr Uys's evidence that "*Maziv cannot continue* [redacted]*. Such an investment will enable Maziv, and in particular Vumatel, to undertake much needed capital expenditure in new infrastructure build in the short to medium term, and this will have significant public interest benefits as further capital expenditure will mostly be directed to lower LSM communities as part of the "Vuma Reach" and "Vuma Key" products*".[1066]

1143. The dtic submits that the proposed merger will, as a result of the merging parties' capital expenditure and infrastructure roll-out commitments, have a direct substantial positive effect on the telecommunications fibre industry; regions comprising lower income areas (the so-called Reach and Key Areas); and underserviced areas.

Our assessment

[1065] Uys FWB p 487 – 488 paras 60 – 62, as updated by Exhibit CB containing the proposed revised conditions with a start date for this commitment of 1 April 2025.
[1066] Uys FWB p 489 para 65.

1144. The Constitutional Court in *Mediclinic* made it clear that the Tribunal must consider the context in which a merger occurs and the effects of the merger within that context. In this case that context includes the market characteristics and developments as we have described in the previous sections.

1145. The Court explained that the Tribunal must have regard to the purpose of the Act to determine the context.[1067] It quotes the preamble to the Act in its entirety. It reads:

"*The people of South Africa recognise:*

> *That apartheid and other discriminatory laws and practices of the past resulted in excessive concentrations of ownership and control within the national economy, inadequate restraints against anti-competitive trade practices. and unjust restrictions on full and free participation in the economy by all South Africans.*
>
> *That the economy must be open to greater ownership by a greater number of South Africans.*
>
> *That credible competition law, and effective structures to administer that law are necessary for an efficient functioning economy.*
>
> *That an efficient, competitive economic environment. balancing the interests of workers, owners and consumers and focused on development will benefit all South Africans.*

IN ORDER TO−

> *provide all South Africans equal opportunity to participate fairly in the national economy;*
>
> *achieve a more effective and efficient economy in South Africa;*
>
> *provide for markets in which consumers have access to, and can freely select, the quality and variety of goods and services they desire;*
>
> *create greater capability and an environment for South Africans to compete effectively in international markets;*

[1067] *Mediclinic* (Constitutional Court) at para 5.

restrain particular trade practices which undermine a competitive economy;

regulate the transfer of economic ownership in keeping with the public interest;

establish independent institutions to monitor economic competition; and

give effect to the international law obligations of the Republic."

1146. The Court advises that "*The equalisation and enhancement of opportunities to enter the mainstream economic space, to stay there and operate in an environment that permits the previously excluded, as well as small and medium-sized enterprises, to survive, succeed and compete freely or favourably, must always be allowed to enjoy their preordained and necessary pre-eminence. …. To achieve that noble and just objective, it bears emphasis that sight should never be lost of the need to pay special attention to the preceding realisable imperatives of our national economy. The merger that is the subject-matter of this application must thus be approached with due regard to what would help achieve these goals and* <u>*thus be in the best interests of the public — to approve or not to approve*</u>".[1068] (Own emphasis)

1147. The Constitutional Court's decision means that the consideration in any merger should include an assessment of the interests of the public in approving or refusing a merger. The best interests of the public are determined with reference to the context and evidence in a particular case, and the purpose of the Act, interpreted in accordance with the Bill of Rights in the Constitution of the Republic of South Africa, 1996 (the "Constitution").

1148. The merger parties submit that when we consider the effects of the merger on the sector, we should adopt the same approach as we did in *Mediclinic* – a decision which was ultimately upheld by the Constitutional Court.[1069] This includes considering the impact on the people within that sector, in that case the

[1068] *Mediclinic* (Constitutional Court) paras 7 – 8.
[1069] Mediclinic Southern Africa (Pty) Ltd v Matlosana Medical Health Services (Pty) Ltd [2019] 2 CPLR 805 (CT) paras 455 – 456, and quoted with approval by the Constitutional Court para 76.

effects were on patients in a context where tariffs would go up after the merger.[1070] The Court in its judgement highlights "*… the constitutional right of access to health care services, regard being had to the ever-increasing costs in the private health care industry and the impact thereof on the interests of the public*".[1071] (Own emphasis)

1149. We also take the CAC's guidance in its *Mediclinic* judgement that the public interest is concerned with people not abstractions, where it held "*The appellants' counsel argued that s 12(3)(a) required the Tribunal 'to consider the effect of the merger upon a sector or region as self-standing phenomena, rather than the effect upon competitors or consumers in a particular sector or region' (emphasis in the heads of argument). I reject that submission. The public interest is concerned with people, not abstractions* …".[1072]

1150. The Tribunal articulated its approach in *Mediclinic* as follows: "*The competition effects of any hospital merger should be considered in the context of the private health care sector as a particular industrial sector or region contemplated in section 12A(3)(a) of the Act. We concur with the Commission that this sector serves an essential public good, which the Constitution protects under section 27. The proposed transaction will have a significant effect on the health care costs of both insured and uninsured patients living in a specific region — the rural Potchefstroom/Klerksdorp region, given that the target hospitals have significantly lower tariffs than Mediclinic. Moreover, the uninsured patients in this area, which are a vulnerable group, will have less choice of cheaper hospitals post-merger and this will adversely affect their ability to switch between cheaper options. The merging parties themselves submitted that it is trite that there are serious concerns about private health care inflation in South Africa, and that there is a need to curb escalating costs. They however submitted that there is substantial debate as to precisely what the drivers are of such escalations*"[1073] (Own emphasis). This was quoted with approval by the Constitutional Court.[1074]

[1070] See paras 73 to 77.
[1071] At para 74.
[1072] *Mediclinic Southern Africa (Pty) Ltd v Competition Commission* [2020] ZACAC 3 para 139.
[1073] See paras 455 and 456 of the Tribunal's decision.
[1074] At para 76 of the Constitutional Court's judgement.

As Mediclinic was concerned with patients and how the proposed merger would affect them, this matter ultimately concerns end-consumers of data/internet services in South Africa, services of great public importance.

1151. We have to in this matter essentially weigh up the benefits of the 5-year roll out of FTTH in lower-income areas (as tendered by the merger parties), insofar as they are merger-specific, which will benefit certain consumers, and any negative competition effects of the proposed transaction on all consumers of these services, including the future costs of data/internet services in the medium to longer term because of the competition concerns.

1152. As indicated above, we must do our assessment having regard to the purpose of the Act that is foremost to "*promote and maintain competition in the Republic*" in order to *inter alia* promote the efficiency, adaptability and development of the economy; to provide consumers with competitive prices and product choices; to promote employment and advance the social and economic welfare of South Africans; ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons.

1153. It is trite that the proposed transaction impacts an extremely important component of the consumer basket – access to affordable internet/data services and the future costs of these services. It is common cause that the demand for internet connectivity continues to grow throughout South Africa as the economy becomes increasingly digitalised. Consumers in all areas, whether in urban areas, secondary towns, townships, suburbia, or rural areas, require affordable connectivity now and in the future.[1075]

1154. As indicated above, the Commission conducted a market inquiry into data services, commencing in 2017 and ending in 2019. In its final report it notes: "*Data is becoming a more important part of the telecommunications industry and*

[1075] Motlekar FWB p 9 para 6.

the lives of people in South Africa. Access to affordable data services is key for the economic inclusion of individuals and small businesses alike. When considering the changing environment and the future impact of the fourth industrial revolution, addressing the affordability of data becomes critical".[1076] (Own emphasis)

1155. In 2023, the Bureau for Economic Research states that "*fibre access – if ubiquitous, unfettered and cheap – may lower unemployment and poverty, increase consumption, and improve health and education outcomes. Establishing affordable fibre networks can help uncover economic potential, especially in areas where capped, expensive mobile broadband is the only alternative*".[1077] (Own emphasis)

1156. The economic experts agree that access to affordable data/internet services is important for accessing information and participating in the South African economy;[1078] which in turn facilitates the vindication of constitutional rights, most directly, access to information.[1079] The right to access (affordable) information enables[1080] the vindication of additional rights like, in this case, right to education,[1081] access to social security[1082] and the freedom of trade.[1083]

1157. Moreover, the implications for the public arising from this proposed merger are far-reaching in that they flow well beyond just the telecommunications sector itself since the end-customers that require access to affordable data/internet services, and the medium and longer term future costs of these services, affect the millions

[1076] DSMI Final Report p 33 para 59.
[1077] *Bureau for Economic Research* (2023) 'Could fibre access improve economic outcomes for low and middle-income households in South Africa?' p 24. Theron EWB p 332 para 73.
[1078] Joint Expert Minute opening paragraph.
[1079] Section 32 of the Constitution.
[1080] In Brümmer v Minister for Social Development and Others (CCT 25/09) [2009] ZACC 21; 2009 (6) SA 323 (CC); 2009 (11) BCLR 1075 (CC) (13 August 2009), writing for a unanimous Court, Ngcobo J says: "*Apart from this, access to information is fundamental to the realisation of the rights guaranteed in the Bill of Rights.*" (para 63) "*Section 32(1) of the Constitution guarantees the right of access to information 'that is required for the exercise or protection of any rights*'" (para 75).
[1081] Section 29 of the Constitution.
[1082] Section 27 of the Constitution.
[1083] Section 22 of the Constitution.

of South African consumers and all sectors of the economy that make use of such services.

Merger-specificity of the sector-related commitments

1158. As the first step in the analysis, we have to consider whether or not the positive (i.e. the merger parties' commitments) as well as any negative public interest issues are merger-specific, considering *inter alia* the relevant counterfactuals.

1159. The merger parties' tendered commitments include capital expenditure commitments for five years, roll-out commitments for five years and supply-chain commitments to be achieved within [redacted]. As indicated above, this must be assessed having regard to the relevant counterfactual(s).

Vodacom's tendered capital commitment

1160. Vodacom SA Group, in terms of capital expenditure, commits to spend R60 billion in South Africa in capex over a five-year period, including for the roll out of no less than 564 5G sites in South Africa on average per annum.[1084]

1161. Vodacom had already publicised its pledge of April 2023 to invest R60 billion in South Africa over the next five years, that represents R12 billion per year. Mr Joosub testifies that the "[R]*60 billion is spent on the entire network*";[1085] "… *the undertaking was so that we don't slow down investment into <u>the mobile network</u> and there was concerns raised about that and we reiterated the commitments that we made at InvestSA that <u>we will invest 60 billion</u>*"; [1086] and "… *so we have to invest in our mobile network and so <u>the 60 billion is based on our current business</u>. The 14 to 19 billion investment into Maziv is an additional investment over the 60 billion*."[1087] (Own emphasis). Furthermore, Vodacom Reviewed

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[1084] Clause 9.1 of the Conditions. The five-year period starts from the Implementation Date.
[1085] Transcript p 1914 lines 7 and 8.
[1086] Joosub Transcript p 1922 line 15 to p 1923 line 1.
[1087] Joosub Transcript p 1923 lines 18 – 21.

Annual Results 2024 show that Vodacom undertook annual capex spend of over R11.1 billion per annum for the past two years.[1088]

1162. Mr Joosub testifies that the R60 billion investment relates to maintaining Vodacom's market position and "*multiple forums*": "… *what are we going to do with 60 billion and we can't invest in – so that's the one part and so you have to – and we've made undertakings that <u>we won't fall behind competition</u> as by more than 20% in a particular area. We've also made undertakings that if someone builds before us, <u>we'll close the gaps</u> and so on and so on. So, I mean there's a number of undertakings that also provide that, but the 60 billion investment <u>is being made in multiple forums</u>, including the investment part, the invest in South Africa part* …"[1089] (Own emphasis)

1163. Thus, Vodacom's tendered capital expenditure of R60 billion is not merger-specific, it is Vodacom's planned expenditure without the proposed transaction.

Vodacom's tendered 5G rollout

1164. As indicated above, Vodacom's capex undertaking of R60 billion (that is not merger-specific) includes the rollout of no less than 564 5G sites in South Africa on average per annum over a five-year period.[1090]

1165. To determine the merger-specificity of Vodacom's 5G commitment, one must determine whether the commitment would result in more sites than what would

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1088 Vodacom Reviewed Annual Results 2024 p 17.
1089 Transcript p 1660 lines 1 – 9.
1090 Clause 9.1 of the Conditions. The period starts from the Implementation Date. During each year until 31 March 2030, it shall also roll out 200 5G sites annually in Underserviced Areas. "*Underserviced Areas*" means areas listed in Annexure A of the Under-serviced Area Definitions Regulations, 2012 and as contemplated in Vodacom's radio frequency spectrum licence No.: IMT/AMD/RF0002/November/2023.

be the case absent the proposed deal. The factual evidence demonstrates that this commitment fails on this test because Vodacom's spectrum licence requires the same commitment - if not more roll out - than what the tendered conditions provide for. Furthermore, Vodacom's own internal documents show that it will, absent the proposed transaction, roll out more 5G sites than contained in the commitment.

1166. Vodacom's Spectrum Licence,[1091] effective from 1 July 2022, is valid for 20 years from the date of issue. Vodacom's spectrum licence coverage obligations are to deploy IMT 700MHz band mobile broadband coverage within five years: (i) first to 'Batch 3' underserviced areas as defined in the Underserviced Area Definitions Regulations then to 'Batch 2' Municipalities then to major cities and towns of South Africa ('Batch 1') (the outside-in approach); (ii) expand coverage at a minimum of 97% of the population; and (iii) use of the outside-in approach to achieve 92% population coverage across all Batch 2 and Batch 3 underserviced areas.

1167. Vodacom's spectrum licence obligations also require Vodacom to: (i) achieve a minimum downlink single user throughput of 5Mbps at the edge of the cell (particularly in Batch 3 municipalities) within five years of the licence date (or date of the digital migration process completion, if later); (ii) zero-rate all the mobile content of Public Benefit Organisations; and (iii) connect specified public service institutions (including specified schools, clinics and hospitals) within 36 months.

1168. Vodacom's coverage obligations attached to its abovementioned newly acquired spectrum involves the construction of [redacted] new sites and the modernisation of [redacted] existing sites in aggregate over the [redacted] period.[1092] We further note that part of Vodacom's business case for the additional spectrum in the recent auction was 5G FWA.

[1091] Vodacom's Radio Frequency Spectrum Licence No.: IMT/RF0002/April/2022, Bundle M p 10221 – 10230.
[1092] Bundle M p 5894.

1169. Furthermore, Mr Maduray of Vodacom indicates that Vodacom forecasts to roll out an average of [redacted] sites per annum for 5G, which is more than double the merger parties' tendered commitment in the conditions.[1093]

1170. Dr Van den Bergh confirms the stark difference between Vodacom's planned number of 5G sites by 2029 and its tendered commitment over the five-year period:

> "*ADV MUVANGUA: … Vodacom aims to reach* [redacted] *sites by 2029. Would you dispute that?*
> *DR VAN DEN BERGH: No, I won't. No, that sounds about right, actually, ja*."[1094]

1171. Dr Van den Bergh was then questioned by the panel about the seemingly low commitment in terms of 5G rollout in the tendered conditions over a five-year period compared to the numbers, also for a five-year period, contained in Vodacom's internal documents. He did not adequately explain the stark differences in the numbers. He responds as follows: "*I was not directly involved in formulating <u>this low number</u>. I know conceptually the high level how they got to the* [redacted] *and basically it was a long-term projection of traffic growth, of how much of the population you want to cover, where those sites are*".[1095] (Own emphasis)

1172. In conclusion, Vodacom's tendered roll-out commitments in terms of 5G sites do not improve on the counterfactual as these would likely happen absent the proposed merger. This rollout was [redacted] Vodacom's plans and its strategic documents show that its commitment to 5G services are [redacted] than the rollout commitments made in terms of sites. We therefore conclude that Vodacom's roll-out commitments with respect to 5G are not merger-specific.

Schools, police stations and health care facilities to be passed

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[1093] Maduray FWB p 422 para 45.
[1094] Transcript p 2309 lines 10 – 14.
[1095] Van den Bergh Transcript p 2368 line 7 to p 2370 line 22.

1173. Maziv Group tenders that it shall for a period of [redacted] continue to provide [redacted] uncapped access to Wholesale FTTH Services for every public or private school[1096] it passes.[1097] Vodacom SA shall further provide mobile broadband access to the 15 police stations listed in Appendix "D" as well as to 1,573 Healthcare Facilities[1098] and 210 libraries <u>on the terms contemplated in the Vodacom 2024 Spectrum Licence</u>[1099] through FWA router/s with a bundle of 500GB zero-rated data free of charge, subject to the fair usage restriction contained in the applicable terms and conditions, as soon as practically possible but in any event by no later than two years after the Implementation Date, in the case of the 15 police stations and, in the case of the Healthcare Facilities and libraries, within the period contemplated in the Vodacom 2024 Spectrum Licence.[1100]

1174. The formulation of the merger parties' above commitments already make it clear that they relate to Vodacom's spectrum licence and therefore are not merger-specific.

1175. The merging parties however argue that this is incremental to the existing obligation because the proposed merger will allow Maziv to increase the rate and area of expansion of its network which means it will pass more schools than it would absent the merger and therefore more schools will benefit from the free services obligation than would be the case absent the merger.

1176. We note that the commitment in relation to free FTTH services for every public or private school is furthermore not specific to this merger because it is in line with existing obligations imposed by the Tribunal in the Vumatel/CIVH merger.[1101]

[1096] "*School*" includes: (i) pre-primary school which forms part of and resides on the property of a qualifying primary school; (ii) primary school; (iii) high school; and (iv) special needs school.
[1097] Clause 16.2.1 of the Conditions. The period applies from the Implementation Date.
[1098] I.e., Government clinics and Government hospitals.
[1099] Clause 1.3.5 of Radio Spectrum Licence No.: IMT/AMD/RF0002/November/2023.
[1100] Clause 9.4 of the Conditions.
[1101] *CIVH/Vumatel*, see condition 7.2. of the conditions imposed by the Tribunal.

1177. Furthermore, Vodacom's Spectrum Licence (under Social Obligations) requires Vodacom to contribute to connectivity targets that are shared among the licensees as follows: 18,520 public schools, 3,967 government clinics, 1,764 government hospitals, 567 unconnected police stations, 8,241 traditional authority offices.

1178. Regarding the incrementality of these commitments, Mr Joosub confirms that the spectrum commitments are actually more onerous than those provided in Exhibit M. He testifies: "… *the spectrum commitments <u>it goes one step further and concretises it even more. It requires that you have to achieve a minimum coverage, basically covering almost the entire country or the entire country and a minimum speed that has to be delivered</u> on so that you have a period in which you have to deliver it on and then you also have a further commitment of schools that you have to connect. So, I think that was 6 500 schools that we have to deliver as part of those commitments and 50% of that commitment has to be delivered this year*."[1102] (Own emphasis)

1179. We note that Mr Coetser for the dtic during his questioning requested the merger parties to provide the details of any incremental benefits.[1103] Mr Joosub however never provides such information.

1180. We conclude that the factual evidence suggests that the commitments in regard to schools, police stations and health care facilities passed, are not merger-specific. The merger parties have not demonstrated or quantified any alleged incremental benefits that would result from this proposed transaction over and above what is contained in their licencing obligations and the previous remedies imposed by the Tribunal.

Maziv's capital commitment

[1102] Transcript p 1914 line 10 to p 1915 line 5.
[1103] Transcript p 1914 line 20 to p 1915 line 5.

1181. Maziv commits to cumulatively spend at least R10 billion[1104] in capex over a period of five years provided that where capex is used to acquire one or more businesses, such businesses should be of the kind that will enhance localisation in South Africa. Of this amount no less than R[redacted] will be spent on the rollout of new FTTB, FTTH and FTTS projects - <u>or the acquisition of businesses by the Maziv Group</u>.[1105]

1182. The first issue to note regarding the commitment to spend no less than [redacted] on the rollout of new FTTB, FTTH and FTTS projects, is that it includes "*the acquisition of businesses by the Maziv Group*". Mr Uys concedes "*And then the 10 billion includes if we do acquisitions, yes*".[1106] He does not explain what these planned acquisitions are. These acquisitions because they relate to FTTB, FTTH and FTTS will likely lead to further concentration in the hands of the largest fibre incumbent, Maziv.

1183. To assess whether the roll out of new FTTB, FTTH and FTTS projects is truly as a result of this merger, one must reckon budgeted spend by DFA and Vodacom on their FTTB assets, Vumatel and Vodacom on their FTTH assets, and DFA's projected spend on FTTS assets. This is done with a view to determine whether the cumulative anticipated capex spend by all of these business units would or would not have amounted to more than the approximate R[redacted] per annum spend in terms of the tendered conditions.

1184. Budget projections were prepared in consideration of Maziv's strategic goals and growth plans. The documentary evidence in Maziv's budget plans indicates that Maziv planned to spend R[redacted] in capex from the financial year 2022 to 2030. Vumatel, DFA and Herotel are expected to take the [redacted] share of the total capex.[1107]

1104 Including capitalised internal costs and maintenance capex.
1105 Clauses 16.5.1 and 16.5.2 of the Conditions. The period starts from 1 April 2022.
1106 Transcript p 1355 line 21.
1107 Bundle M p 12323 and following and p 11354 and following.

1185. The budget plans also show that between FY2023 and FY2024, Maziv spent R[redacted] in capex within this two-year period. The Commission describes this as a defensive move to secure the land grab in case this deal was not approved, and Vodacom then found an alternative partner for its FibreCo. The Commission submits that competition would deliver real public interest benefits in the longer-term interest of the sector.[1108]

1186. We note that Vumatel rolled out [redacted] Reach homes in two years, FY2023 and FY2024 since 1 April 2022.[1109]

1187. In terms of future capex plans, as highlighted in Mr Hodge's export report, Maziv planned to reduce its capex spent over time from 2022 to 2030.[1110] However, Maziv's commitment to spend R10 billion over a period of five years starting from 1 April 2022 is far lower than its planned capital expenditure, its budget plans for the same period show that Maziv has planned to spend R[redacted] (excluding Herotel) and R[redacted] (including Herotel). Therefore, as outlined in Mr Hodge's expert report, this commitment is less than the actual planned capex spend absent the merger.[1111]

1188. The investment counterfactual is relevant to this assessment (see paragraphs 307 to 325 above). That counterfactual is that finding a new external investor could delay the capex associated with the planned rollout by Maziv by three years.

FTTH rollout

1189. In terms of FTTH rollout, Maziv commits that its capex spend will result in at least one million homes being passed with infrastructure on a cumulative basis in Lower Income Areas (i.e., Reach and Key Areas) within a period of five

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[1108] Hodge EWB p 165 para 317 and 318.
[1109] Transcript p 1350 lines 12 – 14.
[1110] Hodge EWB p 168 para 329.
[1111] Hodge EWB p 184 para 383.

years.[1112] In terms of the tendered conditions, of the abovementioned one million homes to be passed, at least [redacted] homes will be in Key Areas.[1113]

1190. The rollout of the Key product has commenced with approximately [redacted] homes passed in 2024.[1114] Maziv claims that it is the only FNO that has thus far expressed an interest to roll out fibre at scale in these areas.

1191. We note that the commitments relate to homes 'to be passed' and not actual connections. We have explained under the market characteristics that the average penetration rate for FTTH in South Africa is relatively low (see paragraphs 248 to 264 above), which means that the number of homes actually connected would be much lower than the number of homes passed. Furthermore, we note that where a block of flats is passed, the number of homes passed shall be counted as the number of flats in the block.[1115]

1192. In addition, we highlight that there is no price commitment tendered in terms of connecting the homes to be passed in these areas.

1193. The Commission contends that although the merger parties commit to network rollouts, rollout by competing firms would likely yield better competitive outcomes than rollout by a single vertically integrated entity.

1194. The Commission further submits that the rollout remedies do not address the main issue that there would be greater competition without the merger as Vodacom would rollout and compete for customers against Maziv Group, for the ultimate benefit of South African customers.

1195. We have above analysed the investment and fibre roll-out counterfactual and found that the rollout of fibre to low-income areas will continue even if the proposed transaction does not take place (see paragraphs 326 to 343 above)

1112 Clause 16.5 of the Conditions. Period starts from 1 April 2025.
1113 Clause 16.5.6 of the Conditions.
1114 Mare Transcript p 2845 lines 5 – 18.
1115 Clause 16.5.11.

given the market characteristics that include – competition *for* the market, the land grab phenomenon and significant first mover advantages (see paragraphs 22738 to 247 above). As we have further noted, it is common cause that this is a growing sector and market, in relation to mobile, FWA and fibre. The second land grab in FTTH has moved to the lower income areas of South Africa since the high-income areas are saturated. This means that all players, out of their own commercial interests (noting that consumers will still pay for access), now have their eyes on the lower income areas where they want to get a first mover advantage.

1196. Mr Van der Merwe of Frogfoot submits that competition drives the land grab and in Frogfoot's experience access to capital is no barrier to investment where opportunities exist. Firms such as Vumatel, Herotel, Octotel and Frogfoot are relatively new firms yet have managed to oversee a rapid expansion of fibre infrastructure in just ten years. Even now significant fibre investments in what were thought of as less attractive areas continue to be made. He points out that access to capital was not a barrier to Frogfoot's investments in lower income areas even with an innovative business model.[1116] We have dealt with the evidence regarding competition *for* the market in the Reach areas and how active competitors are in rolling out FTTH in the Reach areas (see paragraphs 326 to 342 above).

1197. With regard to Maziv's commitment of [redacted] homes that will be passed in Reach Areas, we conclude that, because of the market characteristics and dynamics, the rollout in the Reach areas will happen because of competition *for* the market and the other market characteristics regardless of the proposed transaction (see paragraphs 225 to 280 above that deal with the key market characteristics for FTTH).

1198. As indicated above, CIVH has funded significant FTTH rollout during the Commission's investigation period in order to secure the land grab. It has furthermore invested in Herotel (see paragraph 316 above) and has a further

[1116] Van der Merwe FWB p 40 para 33.

Herotel transaction pending before the competition authorities (see paragraph 9 above). Having regard to CIVH in the past continuing with its FTTH rollout, even when this deal was being investigated by the Commission, and the key market characteristics, specifically competition *for* the market, the land grab phenomenon, and significant first mover advantages, Maziv as the largest incumbent is set to lose market share to its competitors if it does not for a significant period of time roll out FTTH. In our view Maziv, as the largest incumbent, is unlikely to sit back and let its competitors gain market share at its expense by securing the land grab (and the associated first mover advantages) without responding. Therefore, Maziv will be significantly incentivised absent the proposed transaction to seek additional funds and/or an external investor(s).

1199. With regard to the commitment of [redacted] homes that will be passed in Key Areas, based on the available evidence, there is no evidence that other players would at this stage target this market segment at this scale. There are however a number of smaller players active in this market segment with offerings. We regard this rollout as a merger-specific benefit of the proposed transaction that we shall consider in the weighing-up exercise.

1200. The merger parties submit the total capex associated with the Key homes passed and their installations over the five-year period in the commitment to be approximately R[redacted][1117] assuming a [redacted]% penetration of homes passed. The Commission correctly indicates that this assumed penetration rate is high in terms of connection rates that have been achieved in South Africa.[1118]

Local procurement

1201. The merger parties' supply chain commitments include that the Maziv Group undertakes to increase its procurement spend on goods manufactured and assembled in and services provided in South Africa from the Benchmark Ratio

[1117] Merger parties' email to the Tribunal of 11 October 2024.
[1118] Cheadle Thompson & Haysom Inc. letter to the Tribunal dated 16 October 2024.

of [redacted]% (of approximately R[redacted] to at least [redacted]% within a period of [redacted].[1119]

1202. Although the markets concerned are growing, and therefore local procurement will pro-rata increase absent the proposed transaction, we shall regard the abovementioned [redacted]% increase in local procurement as merger-specific. It is however not substantial in itself. We shall consider this in the weighing-up exercise.

Head Office

1203. Maziv undertaking for a period of seven years to remain incorporated and headquartered in South Africa and place operational and strategic responsibility in the hands of local management in South Africa and to remain a tax resident of South Africa[1120] is the status quo and is therefore immaterial or negligible for purposes of the balancing exercise. We shall not discuss this any further.

1204. In conclusion on merger-specificity, the merger-specific sector benefits that the proposed transaction brings are limited and in essence are: the rollout of FTTH to [redacted] Key homes to be passed (not connected) and the employment and other ancillary benefits associated with that rollout (such as SMME connectivity in the Key areas), as well as a [redacted]% increase in local procurement by the Maziv Group within a [redacted]period. The Enterprise and Supplier Development Fund commitments are dealt with below under the section 12A(3)(c) assessment and are also regarded as merger-specific.

Other sector effects: further consolidation and concentration

1205. One of the contested issues before the Tribunal is if this proposed merger will likely change the structure of the South African telecommunications market if

[1119] Clause 16.6.3. of the Conditions. Period starts from the Implementation Date.
[1120] Clause 15 of the Conditions.

implemented, specifically if the proposed transaction would likely lead to further consolidation and higher concentration levels in the sector.

1206. The merger parties contend that it would be inapposite and misplaced in these proceedings to consider a possible future merger between MTN and Openserve. They submit that if in the future, an MTN/Openserve merger was notified it would need to be assessed on its merits. This is what the law requires. No such transaction has been notified and the potential of such a deal is pure speculation. The merger parties add that a speculative merger is not a relevant consideration in the current proceedings.

1207. We concur that the merits of another deal cannot be considered in these proceedings. However, what the Tribunal should consider are the implications of the Maziv/Vodacom deal for other market players and how they say they would react to this deal, as the competition authorities do in the ordinary course, which could affect the sector going forward. As we have indicated, merger assessment is forward looking. A transaction between the largest MNO, the largest dark fibre provider, as well the largest FTTH FNO, read with the widespread concerns raised during the Commission's investigation about the deal, and during these proceedings by Telkom, Frogfoot, MTN and Rain, mean that competitors would have to position themselves to effectively compete after the Maziv/Vodacom deal and this in our view will likely lead to further consolidation and concentration in the sector. Indeed, the competitors' evidence is that it will significantly affect their post-merger ability to compete. This would change the structure of markets in the sector.

1208. From Mr Joosub's evidence one can also infer that the Maziv/Vodacom proposed transaction will likely trigger further deals: "*And I think you probably find someone investing into Openserve and a similar context being pursued*".[1121]

1209. The evidence from MTN's strategic documents is clear in that it would seek to pursue [redacted] in order to [redacted] after this deal. Recall that MTN at the

[1121] Transcript p 1767 line 22 to p 1768 line 1.

start of this hearing makes its position known that in its view consolidation of the industry is an inevitable and even desirable feature of the national landscape. The evidence shows that in order to respond to the Maziv/Vodacom deal, MTN would seek to [redacted] in order to [redacted] after the deal.[1122] This is not speculative in nature, but documentary evidence confirmed further by the oral evidence.

1210. The internal documents of MTN show a direct and almost immediate response to this transaction – MTN convenes a Board meeting to consider its options in responding to the transaction[1123] and in its internal documents clearly strategises about how it could respond to the deal.

1211. In an MTN strategy document titled *MTN SA – FTTX Way Forward: Role of Fibre and Options to Consider* it, after the proposed Maziv/Vodacom deal becomes known, considers what it is to do and concludes "*MTN must therefore <u>urgently look at</u>* [redacted] *to* [redacted] *and* [redacted][1124]. Under cross-examination Mr Nunes concedes that its strategy document articulates that MTN responses include "*Option 2, large mergers and* [redacted] <u>*as a possible*</u> [redacted] *to acquire a* [redacted] *and* [redacted] *that can effectively compete with Vodacom CIVH and then the last option is three,* [redacted]."[1125] (Own emphasis) He also confirms that these were options that MTN looked at as credible responses to the Maziv/Vodacom deal within the context in MTN's strategy document.[1126]

[1122] See Bundle O p 253 – 268 - *MTN SA – FTTX Way Forward Role of Fibre and Options to Consider* dated December 2021,

[1123] Mr Nunes states that the relevant documents contained in the record appear to be group strategy documents and that he has not "*been permissible to these documents*". See Transcript p 643 lines 7 – 9.

[1124] Bundle O p 2 – 12: *MTN SA – FTTX Way Forward Role of Fibre and Options to Consider* dated December 2021.

[1125] Nunes Transcript p 644 line 22 to p 645 line 14.

[1126] Nunes Transcript p 642 line 14 to p 647 line 20.

1212. Furthermore, in relation to Option 1 set out in the strategy document, Mr Nunes under cross-examination does not contest that MTN needs to [redacted] products to compete:

"MS MSIMANG: … at page 262 … MTN then discuss the implications of building its own footprint. So, they discuss that option 1. One of those – do you see that?

MR NUNES: Yes, I see that.

MS MSIMANG: One of the implications is that MTN will need to [redacted] *fibre is being rolled out* [redacted]*. Do you see that?*

MR NUNES: I see that."[1127]

1213. In July 2022 MTN then announces that it was in talks with Telkom in pursuit of what it called 'Project Zanzibar'.[1128] Mr Hodge notes that MTN estimates that a merger with Telkom would have given it a national market share of 29% in the FNO market, placing it second from Maziv/Vodacom who would have a market share of approximately more than 40% if this merger is approved.[1129] This would mean that the two largest MNOs who collectively control approximately 70% of the mobile services market in South Africa would also control approximately 70% of the fibre services in South Africa – this national, vertically integrated telco duopoly would therefore dominate the South African mobile and fibre markets. This would be a significant structural change.

1214. It is clear to us that MTN was contemplating a deal with Openserve meaning that the two largest MNOs in the country would conceivably become the two largest players in fibre. This provides important, evidence-based context that we are required to consider.

1215. Mr Hodge further suggests, based on the MTN strategy documents, that even if the Openserve deal does not materialise, a similar share outcome can be

[1127] Transcript p 645 line 15 to p 647 line 20.
[1128] Hodge EWB p 130 para 203. See for instance the press reports at the time, e.g. https://techcentral.co.za/breaking-mtn-in-talks-to-buy-telkom/213227/ (accessed 25 March 2025).
[1129] Hodge EWB p 131 para 204.

secured through multiple transactions by MTN, as it indicated in its strategic documents as one of its strategies to compete after this deal.[1130]

1216. MTN's talks with Telkom however failed in October 2022 and the acquisition did not proceed.[1131] Following the discontinuation of talks between MTN and Telkom regarding Project Zanzibar, MTN started "*evaluating options for* [redacted]".[1132] This [redacted] fell back on the original option 3, namely to look at the [redacted] and [redacted] (other than Openserve). At this Board Update, specific [redacted] opportunities for [redacted] and [redacted] were discussed in more detail.

1217. Following the Tribunal's prohibition of the Maziv/Vodacom transaction, Telkom South Africa in November 2024 publicly announced that it has suspended plans to sell part of its fibre business, as the fixed broadband service, offered by Openserve, helped drive the company's half-year income.[1133] Its CEO Mr Serame Taukobong highlighted the importance of fixed broadband in supporting the company's strategy and South Africa's digital transformation.

1218. Given the magnitude of the proposed transaction, and the concerns raised by various parties about it (during the Commission's investigation period and during the hearing), we conclude that it is likely that other market players would need to respond to effectively compete, that would lead to further concentration of the sector. The implications of other MNO's also taking up (larger) shares in FNOs after this proposed merger in order to compete, would open the industry up to conflicts of interest on a grander scale and may further reduce competitive interaction. Importantly, this happens at the point when both fixed and mobile services are expanding to deliver broadband on a much wider scale to the

[1130] Hodge EWB p 131 para 204.
[1131] See news reports, e.g. https://www.news24.com/fin24/companies/mtn-calls-off-talks-with-telkom-due-lack-of-exclusivity-20221019 (accessed 25 March 2025).
[1132] MTN SA BOARD: Plan B Update (February 2023), Slide 3. Item 021.1 (Question 22.1) of MTN's Discovery.
[1133] See for example: https://www.reuters.com/business/media-telecom/south-africas-telkom-posts-18-fall-interim-profit-2024-11-18/ (accessed 25 March 2025).

benefit of lower-income consumers and smaller towns. The competition authorities would consider any notified transaction on its own merits.

Effects on smaller players in the sector

1219. As indicated above, the purpose of the Act is to "*promote and maintain competition in the Republic*" in order to *inter alia* ensure that SMMEs have an equitable opportunity to participate in the economy. We should therefore consider both the potential positive and negative impact of the proposed transaction on smaller participants in the sector. This is relevant to both the assessment of section 12A(3)(a) and 12A(3)(c), dealt with below.

1220. Unfortunately, the small FNOs that operate in South Africa and other small players in the sector, including small ISPs, were not called by any party to testify. However, the ISPA,[1134] that currently has 204 members, raised concerns during the Commission's investigation. ISPA's view of the proposed transaction is that it will change the structure of the fibre market in South Africa and constitute a material risk to the ability of its members to compete in the retail market for the delivery of internet access and related services.

1221. ISPA submits that DFA, Vumatel and Vodacom are significant large players in their own respective sub-segments of the broader broadband services market and supply value chain and what is being contemplated is a merger between dominant players in the fixed and mobile markets. The ISPA members submit that the competition authorities should prohibit the proposed transaction given the significant competition law concerns. Members have expressed concerns that the horizontal and vertical effects of the transaction would have dire consequences for smaller ISPs who are dependent on Vumatel and DFA in respect of fibre connectivity. ISPA also submits that the proposed transaction will make coordination among competitors more likely (i.e., it may make tacit coordination or explicit cartel behaviour more likely).[1135]

[1134] ISPA describes itself as a recognised internet industry representative body.
[1135] See Commission Report paras 1154 and 1155; Letter from ISPA to the Commission dated 23 March 2022.

1222. We conclude that the proposed transaction will negatively affect the small sector players for the reasons that they advance, which are consistent with the competition concerns that we have found to be associated with the proposed transaction.

Effects on employment (section 12A(3)(b))

1223. The Commission makes no negative findings on the impact of the proposed transaction on employment and the merger parties submit that the proposed merger will not give rise to any retrenchments. Nevertheless, in terms of employment commitments, the merger parties give a moratorium[1136] and a headcount commitment.[1137] Given that there is no evidence that the proposed transaction will negatively affect employment, these remedies are not responsive to any negative finding and the merger parties' commitments confirm that. As is common cause both the mobile and fibre sectors are growing and thus employment would be expected to increase.

1224. As indicated above, the CWU, which represents Vodacom employees, made submissions and in relation to the merger parties' tendered moratorium period, submits that should the proposed transaction be approved, a condition should be imposed "*in perpetuity*" that neither Vodacom nor Maziv can retrench any employees. The merger parties did not accede to this proposal from the union. The union further proposed that a condition must be imposed that should there

[1136] Clause 14.1.1 of the Conditions: Maziv Group and Vodacom SA Group shall not retrench any Affected Employee as a result of the merger for a period of five years from the Implementation Date. Affected Employees are defined in clause 1.1: "Affected Employees" means (i) in the case of Vodacom SA, Employees of Vodacom SA who will be relocated within Vodacom SA as a result of the Merger, being Vodacom SA Employees currently associated with the Vodacom FTTH business and the Vodacom Transfer Assets who will be redeployed to other divisions within Vodacom SA; and (ii) in the case of Maziv means all Employees of Vumatel and DFA and their respective wholly-owned subsidiaries at the Implementation Date.
[1137] Clause 14.2.1 of the Conditions: Maziv shall ensure that Maziv Vumatel and DFA and their wholly owned subsidiaries shall maintain the total aggregate number of all Employees of Vumatel and DFA and their wholly owned subsidiaries as at the Approval Date, for a period of five years from the Approval Date.

be retrenchments, the merging parties must prove that such retrenchments are not associated with the proposed transaction.[1138]

1225. In response to a question from the dtic on employment effects should this transaction not eventuate, Mr Mare indicated that there is pressure already at this point. He however could not quantify the impact "*… I can't quantify that how many, but there will be an impact definitely*."[1139] In our view this claim has not been substantiated in light of *inter alia* the land grab and other market characteristics, as discussed above, which means that other market participants will roll out in the Reach areas, and furthermore the mobile sector is also growing.

1226. In terms of other employment commitments, the Maziv Group undertakes, that within [redacted] 10,000 direct or indirect employment opportunities shall be created or enabled through the introduction of an Internet Retailer distribution model for services in Lower Income Areas.[1140] It does not commit to any specific number of direct employment opportunities. A commitment regarding indirect jobs (in this case opportunities) from our experience in other cases are difficult to measure and enforce since it is not in the hands of merger parties.

1227. The merger parties further submit with regard to third-party building contractors, that the rollout of fibre to low-income areas will create work for the third-party building contractors to be appointed by Maziv, meaning employment opportunities and job security for the employees of these contractors. They argue that these benefits will not exist if Maziv does not receive the funding through Vodacom's investment.

1228. We have dealt with the investment and fibre roll-out counterfactuals and that it is common cause that the markets concerned, mobile, FWA and fibre, are all growing markets. As we have noted, all the fibre markets relevant to this transaction are poised for substantial growth, as FTTH enters a second 'land

[1138] CWU's written submissions filed with the Tribunal on 22 March 2024 para 25.
[1139] Transcript p 2769 lines 2 – 3.
[1140] Clause 16.4.2 of the Conditions. The period applies from the Implementation Date.

grab' for secondary cities/towns and lower income areas, FTTB through business broadband extension to outlying business areas and secondary cities/towns, FTTS to support the rollout of 5G on mobile networks and metro fibre backhaul to support all of these initiatives.

1229. Mr Otty quantifies the growth in mobile as follows: "… *what we see in mobile networks in South Africa and indeed everywhere else in the world is the traffic continues to grow* <u>*at a pretty fast rate*</u>*. So, even in western development – highly developed countries where you've got very high fibre penetration we're still seeing growth in mobile traffic of something like 30% a year. So, while it's true to say you might lose a little bit of traffic around the home,* <u>*people are still using their mobile phones more and more outside the home*</u> *and the – it's mainly driven by video* …".[1141] (Own emphasis) Thus, the anticipated growth of the mobile sector will drive job creation regardless of the proposed transaction and is not specific to this transaction.

1230. On the fibre side, job creation will be created by third-party building contractors appointed by players other than Maziv, specifically in relation to the Reach areas as competition in the second land grab unfolds. The factual witnesses have confirmed that the Reach areas in South Africa are now the focus of all the FNOs given that the Core areas are saturated. Furthermore, FNOs do not tend to overbuild and given the second land grab, job creation will be facilitated by other FNOs absent the proposed transaction. In our view a counterfactual of competition would deliver on land grabs with ancillary benefits including employment creation by other FNOs. That counterfactual highlights the anti-competitive consequences of this merger.

1231. Furthermore, considering the relevant investment counterfactual (see paragraphs 307 to 325 above), there would, at worst absent the proposed transaction, be a delay in the future rollout by Maziv and the ancillary job creation as it is significantly incentivised to partake in the land grab.

[1141] Otty Transcript p 1953 line 16 to p 1954 line 1.

Effects on the ability of small and medium businesses or firms controlled by historically disadvantaged persons ("HDPs") to enter, participate and expand in the market (section 12A(3)(c))

1232. We have above dealt with the submission of ISPA on behalf of its 204 members, of which some may qualify as SMEs. They have raised serious concerns with the proposed merger (see paragraphs 122020 and 122121 above).

1233. The merger parties submit that because Vumatel makes use of small and medium sized building contractors to build its fibre network and the merger will result in the rollout of fibre to Reach and Key areas at scale and at pace, this will also benefit these small to medium sized building contractors. To substantiate this, they put up an estimate, i.e., a FY2022 forecast, of the employment opportunities that are created by using small and medium sized building contractor firms. The estimate for local employment for deployment projects by [redacted][1142] is however outdated since it is a forecast for FY2022.

1234. We have above explained that in the counterfactual other FNOs will continue the rollout in the Reach areas since that is now the focus and they will make use of small to medium sized building contractors.

1235. Mr Hodge points out that the commitment to work with local contractors and distributors is not merger-specific as the FNOs have found that working with local contractors gives them more buy-in from the community and thus is still likely in the counterfactual to the proposed transaction.[1143] This is not disputed. Mr Mare, for example, testifies that it makes sense to use contractors with their own wayleaves in an area: "… *what we saw is a lot of the building contractors then had their own wayleaves. So, in Rustenburg a contractor would come to you, he said listen, I've got the wayleave there, I'll build the networks for you, so*

[1142] Bundle M p 406. BritelinkMCT is a full-service optical fibre company that specialises in planning, implementing, maintaining and repairing fibre optic telecommunications infrastructure for network operators.
[1143] EWB p 178 para 359.

we built the networks through different building contractors".[1144] Other FNOs would do the same and make use of local contractors with wayleaves.

1236. At the FNO level, we note that there are an estimated 29 small FNOs operating in South Africa.[1145] These small FNOs will likely be negatively impacted by the proposed deal given the vertical foreclosure concerns associated with the proposed transaction that cannot be effectively remedied and effectively enforced. They also are employers in local areas.

1237. The merger parties further submit that cognisance must be taken of the impact of connectivity on SMMEs in the Reach and Key areas. We have dealt with the investment and fibre roll-out counterfactual above and the same principles would apply here. Importantly, one must not only consider the positive effects on SMMEs in terms of rollout but also future negative (price and non-price) effects as a result of the competition concerns associated with the proposed transaction. In our view many more SMMEs stand to be adversely affected (through the negative competition affects) than positively affected (through the defined rollout in the Key areas).

1238. In terms of using HDP suppliers, Maziv Group shall for a period of [redacted] *inter alia* and on a non-exclusive basis, use HDP suppliers for network build contracts, if HDP suppliers offer the requisite network build contracts at the appropriate quality standards and on reasonably competitive commercial terms.[1146]

1239. In relation to local procurement commitment, Maziv shall maximise where reasonable, and practically feasible, having regard to the technical nature of the goods and services required, the procurement of goods and services from SMEs and HDPs in South Africa.[1147]

[1144] Mare Transcript p 2590 lines 7 – 11.
[1145] Hodge EWB p 84 para 105.
[1146] Clause 16.6.1 of the Conditions.
[1147] Clause 16.6.4 of the Conditions.

1240. We note that both Vodacom and Maziv already utilise HDP suppliers and the commitment to 'where reasonable, and practically feasible' use SMEs and HDPs is not quantified and therefore could not be monitored by the Commission and enforced by the competition authorities.

1241. Importantly, the Commission found that there is likely to be a negative impact on HDP suppliers as numerous Vodacom HDP suppliers would have their contracts terminated as they overlap with Maziv HDP suppliers.[1148] No remedy is offered to deal with this.

1242. Maziv shall also establish an Enterprise and Supplier Development Fund and contribute a total amount of R300 million to such a fund over a period of [redacted][1149] The Commission submits that this amount to be contributed to the fund is trivial when compared to the size of Maziv's business (see paragraph 12545 below).[1150] We concur with this observation regarding substantiality of the commitment and will consider this in the weighing-up exercise.

The ability of national industries to compete in international markets (section 12A(3)(d))

1243. The dtic submits that Messrs Uys and Joosub have testified that in conjunction with Vodacom, CIVH will be pursuing ventures in other African countries.[1151] We have dealt with some of this evidence under post-merger incentives.

1244. The dtic submits that Maziv will, under a cooperation agreement, provide technical and commercial support to a CIVH subsidiary, CIVH Africa, that has been established to roll out fibre on the African continent. The intention is to use the South African developed product and network designs to create fibre products to service the rest of the continent.[1152]

[1148] Bundle M p 4638 para 4.5: Letter from DLA dated 15 June 2022.
[1149] Clause 16.3.1 of the Conditions. At a rate of R[redacted] per annum.
[1150] Hodge EWB p 178 para 358.
[1151] Uys Transcript p 1276 lines 3 – 5; Joosub p 1717 lines 11 – 19; p 1729 lines 7 – 22.
[1152] Bundle M p 6538 – DLA Piper letter of 21 October 2022 to Mr Coetser of Werksmans (representing the dtic).

1245. We do not regard the above as merger-specific since the merger parties do not put up evidence that this cannot happen without the proposed Maziv/Vodacom transaction. They do not present evidence that shows that any co-operation on the continent involving them could not be achieved, for example, through a JV absent the proposed transaction. Mr Joosub concedes that the Tanzania anticipated three-way deal with CIVH is independent of this transaction and thus not merger-specific.[1153] Mr Otty testifies that "*If there's a business case to rollout fibre like in Tanzania and you can make it work in a way that – by doing it as a joint venture in Tanzania, we then keep it off-balance sheet and you can make a profitable business out of it, then it works. Even in Germany we're doing joint ventures in order to rollout fibre in some places where we don't have cable coverage*".[1154]

1246. In conclusion, the merger parties have made out no case that this merger will improve the ability of national industries to compete in international markets.

Effects on the promotion of a greater spread of ownership, particularly for HDPs and workers (section 12A(3)(e))

HDP ownership

1247. In terms of HDP ownership, the merger parties submit that the proposed transaction will result in the percentage of HDP ownership of Maziv and its subsidiaries remaining substantially similar.[1155] While there are slight reductions in the percentages of black economic interest and voting rights, they argue that the value of Maziv will increase and the broad-based nature of the HDP ownership of Maziv will be enhanced. They further submit that the broad-based nature of the HDP ownership of Maziv will be enhanced through the proposed transaction because of the HDP ownership derived by Vodacom from

[1153] Transcript p 1729 lines 17 – 18.
[1154] Otty Transcript p 2049 lines 3 – 8.
[1155] As measured in terms of the ICT Sector Codes read with the Ownership Regulations.

YeboYethu Limited, a listed B-BBEE company, which has a substantial broad base of public Black shareholders, including Vodacom employees.

1248. In terms of tendered conditions, the merger parties tender that the B-BBEE Ownership Status in Maziv shall not be less than [redacted]%;[1156] for a period of [redacted], or for as long as Vodacom SA and CIVH are shareholders of Maziv, they shall ensure that the Maziv MOI will require every Maziv shareholder to achieve and maintain a B-BBEE Ownership Status of at least [redacted]% measured in terms of the ICT Sector Codes (but excluding the modified flow through principle).[1157] Maziv shall also improve its current B-BBEE Score Card rating in terms of the ICT Sector Codes from its current level four to a level two B-BBEE Score Card rating within [redacted] and thereafter maintain such rating for a period of at least [redacted], subject thereto that the ICT Codes are not amended to make the achievement of such level more onerous than as at the Approval Date.[1158]

1249. The dtic submits that the proposed merger will result in only a negligible reduction in the levels of ownership by HDPs.

1250. Mr Uys confirms that the Black empowerment ownership in Maziv will post-merger drop by one percent from approximately 44% to 43%.[1159]

1251. The merger parties themselves state that CIVH is also subject to industry-wide legislative obligations that apply to all telecommunications companies. These obligations (that are not specific to CIVH) include that all telecommunications companies: (i) require a 30% empowerment shareholding; and (ii) have to attain level four rating within specific periods, pursuant to the B-BBEE Act.[1160]

1252. The Commission submits that the percentage ownership by HDPs within Maziv and its subsidiaries will remain substantially similar post-merger at a c.[redacted]% level

[1156] Clause 16.1.1.1 of the Conditions. The commitment applies on the Implementation Date.
[1157] Clause 16.1.1.2 of the Conditions.
[1158] Clause 16.1.6 of the Conditions.
[1159] Uys Transcript p 1529 lines 10 – 22. For details on the HDP ownership, see Bundle M p 6535 and p 6543 to 6545.
[1160] Commission Report p 417 – 418 para 418.

which is required of individual licensees in terms of the ICASA Ownership Regulations. The Commission correctly points out that these commitments are not merger-specific as they are already required in terms of Maziv's ICASA-imposed licence obligations and therefore must be complied with irrespective of the proposed merger. Indeed, the transaction was designed to ensure that B-BBEE requirements were met. Commitments have been made to retain this level which is effectively a commitment to comply with existing regulations.

1253. We conclude that the merger parties' HDP ownership-related commitments do not appreciably promote attainment of a greater spread of ownership by HDPs in terms of the Act and are largely required by the abovementioned regulatory obligations absent the proposed transaction.

Worker ownership

1254. In terms of worker ownership, Maziv commits to within [redacted] establish and implement an Employee Benefit Scheme.[1161] This scheme involves c.[redacted] employees, funded in the amount of R[redacted]per employee. The total amount (R[redacted]) will be used by an SPV to notionally subscribe for Maziv shares, based on a similar valuation used in respect of the valuation for the merger. As and when Maziv declares and pays dividends to its shareholders, the SPV will receive from Maziv its pro rata share of notional dividends which will be distributed to the participating employees equally.

1255. The Commission asserts that in the context of a Maziv valuation of c.R45 billion at the time of the negotiation (more now)[1162] and a transaction value of c.R[redacted] billion (for 30%) or c.R[redacted] billion (for 40%) this scheme is trivial in size.

1256. Mr Uys confirms that the proposal is to establish a "phantom scheme" and not a direct share ownership scheme as envisaged in section 12A(3)(e) of the Act.[1163]

[1161] This will be in accordance with certain key design principles set out in Appendix C of the Conditions, see clause 16.7.1.
[1162] Part A of the Record p 1238.
[1163] Uys Transcript p 1531 lines 5 – 14.

In his words: it is a "… *phantom share scheme. It's not real shares that we're giving* …".[1164] In terms of this phantom scheme, [redacted] to [redacted] employees would not receive any shares in Maziv but would receive dividends from the company as and when declared.

1257. The Communications Workers Union submits that it finds it disheartening that the merger parties are proposing a Participatory Phantom Scheme as a vehicle to be used to comply with the provisions of section 12A(3)(e) of the Act, which requires a greater spread of ownership.[1165]

1258. It notes that with a Participatory Phantom Scheme, no actual shares are given to employees directly or indirectly. As a result, the employees cannot claim to be owning the company with the consequential rights of ownership i.e. participating in the affairs of the company as shareholders. The union says that the employees in phantom schemes absolutely have no say in the affairs of the company and submits that this is not what is envisaged by the Act and the B-BBEE legislation. Basically, a phantom scheme is an incentive bonus scheme or loyalty programme rather than an equity-based empowerment scheme.[1166]

1259. The union further submits that if the Tribunal is minded to approve the proposed transaction, such approval must be subject to a condition that an actual Employee Share Ownership Plan/Scheme ("ESOP") must be established for all the qualifying employees of the primary target firm, including its subsidiaries. Such ESOP must be housed in a Trust to be formed and must hold equity ownership of at least 10% of the entire issued share capital of the target firm or Newco.[1167] It also proposes certain design principles for the ESOP.[1168] The merger parties did not accede to this ESOP proposal of the union.

1260. We find that the employee benefit scheme is a notional (phantom) scheme that does not promote a greater spread of ownership, in particular to increase the

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[1164] Uys Transcript p 1608 lines 13 – 14.
[1165] CWU's written submissions filed with the Tribunal on 22 March 2024 para 32.
[1166] CWU's written submissions filed with the Tribunal on 22 March 2024 para 34.
[1167] CWU's written submissions filed with the Tribunal on 22 March 2024 para 35.
[1168] CWU's written submissions filed with the Tribunal on 22 March 2024 para 36.

level of ownership by workers in firms as envisaged in section 12A(3)(e) of the Act.

1261. However, the phantom scheme holds benefits for the c.[redacted] employees through dividend payments, which is a benefit arising from the proposed transaction. This benefit will be considered in the weighing-up exercise, considering that it is limited in that it does not promote actual worker ownership as envisaged in section 12A(3)(e).

Weighing-up exercise

1262. As indicated above, the Tribunal has to weigh up or balance the anti-competitive effects and the merger-specific public interest benefits. The economic experts agree that to the extent that a merger results in substantial harm to competition in the provision of data services, this is likely to worsen the terms of access to data services and will harm South African consumers. On the other hand, to the extent that a merger results in fibre being deployed faster and more extensively in the market as a whole than without the merger, particularly to low-income areas, this would be likely to benefit consumers.[1169] The Tribunal must in this case determine whether or not the merger-specific public interest benefits outweigh the competitive harm.

1263. We take guidance from the Constitutional Court in *Mediclinic* that we must consider the interests of the public in approving or refusing a merger. The public interest is concerned with people and not abstractions and in the final analysis the effects of the proposed transaction on *inter alia* consumers must be considered. The best interests of the public are determined with reference to the context and evidence in a particular case, and the purpose of the Act, interpreted in accordance with the Bill of Rights in the Constitution. The subject matter involves a very important service – data/internet services and their future costs to millions of South African consumers. Our decision bears heavily on us since

[1169] Joint Expert Minute opening paragraph.

it has implications for the millions of South African consumers that now and increasingly in the future require access to affordable data and internet services.

1264. We do the balancing exercise in the context of the purpose of the Act that is foremost to "*promote and maintain competition in the Republic*" in order *inter alia* to provide consumers with competitive prices and product choices; to promote employment and advance the social and economic welfare of South Africans; ensure that SMMEs have an equitable opportunity to participate in the economy; and promote a greater spread of ownership, in particular to increase the ownership stakes of HDPs.

1265. On the evidence before us, some consumers will benefit from the proposed transaction through faster FTTH rollout, specifically in the Key areas where there has not been FTTH rollout at scale, and all of its associated benefits (such as job creation in the Key areas and increased access by SMMEs in the Key areas), whilst many other consumers will be affected by the anti-competitive effects, with the main concern being higher prices due to a loss in competition after the proposed transaction.

1266. In the weighing-up of the interest of the public, we consider (i) the duration of the merger-specific positive public interest commitments and the duration of the harm from the loss in competition as a result of the proposed transaction; and (ii) the number of consumers/SMMEs/HDPs/employees that will benefit from the merger-specific advantageous public interest commitments versus the number of consumers/small FNOs/SMMEs/HDPs affected by the anti-competitive effects.

1267. We summarise our findings on merger-specificity and then consider the merger-specific public interest benefits of the proposed transaction collectively.

1268. In terms of section *12A(3)(a)*, we have found that Vodacom's capital expenditure commitment is not merger-specific, its tendered roll-out commitments in terms of 5G sites do not improve on the counterfactual and therefore are not merger-specific, and its commitments in regards to schools, police stations and health care facilities to be passed are also not merger-specific and any incremental benefit as a result of the proposed transaction has not been quantified and demonstrated. Those alleged benefits therefore do not advance the public interest in terms of the Act.

1269. With regard to Maziv's commitment of [redacted] homes that will be passed (not connected) in Reach Areas, we concluded that competition in the Reach areas will deliver these benefits regardless of the proposed transaction because of the market characteristics and dynamics since competition *for* the market between the FNOs has moved to the Reach areas. The FNOs are now focussed on and actively competing in the Reach areas.

1270. With regard to Maziv's commitment of [redacted] homes that will be passed (not connected) in Key Areas, based on the evidence, although there are other small players active in these areas, there is no evidence that other players would at this stage target this market segment at this scale. We therefore find that this is a merger-specific benefit of the proposed transaction. With this comes the associated benefits of connectivity of SMMEs in the Key areas and certain job creation associated with the FTTH rollout to the [redacted] homes passed.

1271. The other merger-specific benefits include (i) the R300 million Enterprise and Supplier Development Fund over a period of [redacted], which we have found to be trivial when compared to the size of Maziv's business, but nevertheless is a merger-specific benefit; and (ii) Maziv will increase its procurement spend on goods manufactured and assembled in and services provided in South Africa by [redacted]% over a [redacted] period.

1272. The above must be balanced against the negative effects of the proposed transaction, through both horizontal effects in several markets and vertical foreclosure, also relating to several markets, on both small and large players in the sector, who have raised concerns, as well as the millions of South African consumers who now and in the future will make (increased) use of data and internet services.

1273. In terms of section *12A(3)(b)*, the employment effects are neutral in relation to job losses. The employment effects in relation to the rollout of FTTH in the Reach areas are similarly neutral since other FNOs will likely create jobs as they compete in the land grab to get first mover advantage. As indicated above, we accept that there will be merger-specific job creation through Maziv rolling out FTTH in the Key areas to [redacted] homes passed.

1274. In terms of section *12A(3)(c)* relating to effects on the ability of SMMEs or HDPs to enter, participate and expand in the market, the merger-specific benefits include the abovementioned Enterprise and Supplier Development Fund. The Commission however finds, and there is no evidence to doubt, that there is likely to be a negative impact on HDP suppliers as numerous Vodacom HDP suppliers would have their contracts terminated as they overlap with Maziv HDP suppliers. There is no commitment from the merger parties regarding the latter.

1275. As far as SMMEs are concerned, we must take into account both the positive and negative effects on SMMEs. We have referred to the submission representing 204 ISPA members that have collectively raised serious concerns with the proposed merger, and whose members may include SMEs. The issue of using small and medium sized building contractors in our assessment is neutral in relation to the Reach areas. On the positive side, as indicated, are the merger-specific benefits of SMMEs being connected through the rollout of FTTH in [redacted] homes to be passed in the Key areas. This has to be balanced against the millions of SMMEs (making use of FTTH, FTTB and FWA) likely affected through adverse competition effects.

1276. In terms of section *12A(3)(d),* the merger parties have not made out a case that this merger will improve the ability of national industries to compete in international markets.

1277. In terms of section *12A(3)(e)*, the proposed transaction does not appreciably promote HDP ownership. Although it does not promote worker ownership in Maziv as envisaged in this section of the Act, the merger-specific employee benefits are that c.[redacted] employees will receive dividends. The scheme involves c.[redacted] employees, funded in the amount of R[redacted] per employee.

1278. Therefore, a very large part of the benefits that the merger parties claim will result from the proposed transaction and their commitments, are, based on the factual evidence, in fact not merger-specific. Thus, the public interest benefits are substantially lower than claimed.

1279. We have dealt with the competition effects and concluded that the proposed transaction raises substantial competition concerns from both a horizontal and vertical perspective, relating to several markets. The merger parties, other than an FTTH infrastructure divestment (that is flawed in a number of respects, as explained) offer no remedies to deal with the horizontal concerns, specifically post-merger price effects. Given the horizontal and vertical concerns with the proposed deal, where the vertical foreclosure concerns cannot be effectively remedied and effectively enforced, the proposed merger will substantially lessen competition and is likely to lead to higher prices post-merger for millions of South Africans consumers making use of data and internet services.

1280. In our balancing of the merger-specific public interest benefits considered collectively (as summarised above), and the anti-competitive effects, we consider that the merger-specific commitments as identified end after five years (in the case of the merger-specific roll-out commitments to the Key areas) and up to [redacted] (in the case of certain other merger-specific commitments). In contrast, the effects of the proposed transaction will endure and the loss of competitive rivalry at several levels as a result of the proposed transaction, and the likely foreclosure of rivals that cannot be effectively monitored and effectively enforced, is permanent in nature (i.e., for as long as Vodacom has its 30-40% shareholding in Maziv).

1281. In terms of the collective numbers of consumers/SMMEs/HDPs/employees that will benefit from the merger-specific public interest benefits, they relate to the [redacted] households to be passed (not connected) with FTTH (and associated employment and SMME connectivity benefits that have not been quantified, but are related to the [redacted] homes in the Key areas). Furthermore, [redacted] employees will benefit from the phantom scheme that is not a worker ownership scheme, but the employees will receive benefits in the form of dividends. An unquantified number of SMMEs and HDPs will benefit through the Enterprise Development Fund (in our view a trivial fund amount in the context of this transaction) and the [redacted]% increase in Maziv's local procurement. This must be balanced against the millions of South African consumers that will be adversely affected through the anti-competitive effects associated with a loss in competitive rivalry as a result of the proposed transaction. Furthermore, many thousands of South African SMMEs and HDP firms that make use of data and internet services stand to ultimately be negatively affected through the adverse competition effects brought about by the proposed transaction.

1282. Given the duration of the adverse effects and the millions of South African consumers/SMMEs/HDPs that would be affected by this, we conclude that the nett effect of the proposed transaction on South African consumers/SMMEs/HDPs, and the sector as a whole, will be negative.

Conclusion

1283. Given the above, we conclude that the proposed transaction cannot be justified on substantial public interest grounds.

1284. The proposed transaction's anti-competitive effects will be permanent. The merger-specific public interest benefits of the proposed transaction, on the other hand, are limited in duration and do not outweigh its negative competition effects that relate to various relevant markets and that will ultimately impact millions of South African consumers that will increasingly in the future be making use of data/internet services.

CONCLUSION

1285. For all the above reasons, the Tribunal has prohibited the proposed transaction.

28 March 2025

Presiding Member
Andreas Wessels

Date

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Signed at:2025-06-24 11:53:15 +02:00
Reason:Witnessing Thando Vilakazi

Prof. Thando Vilakazi

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