

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.: LM109Jul18

In the matter between:

Community Investment Ventures
Holdings Proprietary Limited

Primary Acquiring Firm

And

Vumatel Proprietary Limited

Primary Target Firm

Panel	: Norman Manoim (Presiding Member)
	: Yasmin Carrim (Tribunal Panel Member)
	: AW Wessels (Tribunal Panel Member)
Heard on	: 8;12;15; 25 April 2019
Decided on	: 29 April 2019

ORDER

Further to the recommendation of the Competition Commission in terms of section 14A(1)(b) of the Competition Act, 1998 ("the Act") the Competition Tribunal orders that -

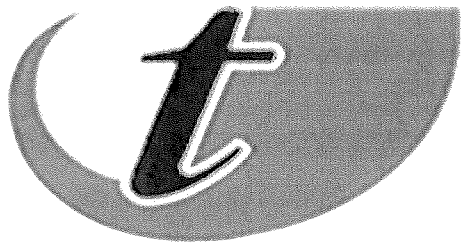
1. the merger between the abovementioned parties be approved in terms of section 16(2)(b) of the Act subject to the conditions attached hereto marked as **Annexure A**; and
2. a Merger Clearance Certificate be issued in terms of Competition Tribunal rule 35(5)(a).



Presiding Member
Mr. Norman Manoim

29 April 2019
Date

Concurring: Ms. Yasmin Carrim and Mr. AW Wessels



competitiontribunal
south africa

Notice CT 10

About this Notice

This notice is issued in terms of section 16 of the Competition Act.

You may appeal against this decision to the Competition Appeal Court within 20 business days.

Contacting the Tribunal

The Competition Tribunal
Private Bag X24
Sunnyside
Pretoria 0132
Republic of South Africa
tel: 27 12 394 3300
fax: 27 12 394 0169
e-mail: ctsa@comptrib.co.za

Merger Clearance Certificate

Date : 29 April 2019

To : Cliffe Dekker Hofmeyr Inc

Case Number: LM109Jul18

Community Investment Ventures Holdings Proprietary Limited
and Vumatel Proprietary Limited

You applied to the Competition Commission on **25 June 2018** for merger approval in accordance with Chapter 3 of the Competition Act.

Your merger was referred to the Competition Tribunal in terms of section 14A of the Act, or was the subject of a Request for consideration by the Tribunal in terms of section 16(1) of the Act.

After reviewing all relevant information, and the recommendation or decision of the Competition Commission, the Competition Tribunal approves the merger in terms of section 16(2) of the Act, for the reasons set out in the Reasons for Decision.

This approval is subject to:

☐ no conditions.

☒ the conditions listed on the attached sheet.

The Competition Tribunal has the authority in terms of section 16(3) of the Competition Act to revoke this approval if

- a) it was granted on the basis of incorrect information for which a party to the merger was responsible.
- b) the approval was obtained by deceit.
- c) a firm concerned has breached an obligation attached to this approval.

The registrar, Competition Tribunal:

ANNEXURE A

**COMMUNITY INVESTMENT VENTURES HOLDINGS PROPRIETARY LIMITED
AND
VUMATEL PROPRIETARY LIMITED
CASE NUMBER: LM109Jul18**

NON-CONFIDENTIAL CONDITIONS

1. Definitions

The following expressions shall bear the meanings assigned to them below and cognate expressions bear corresponding meanings –

- 1.1. **"Accounting Officer"** means a person holding the position of director or otherwise having and exercising management authority in the firm;
- 1.2. **"Acquiring Firm"** means CIVH;
- 1.3. **"Act"** means the Competition Act No. 89 of 1998;
- 1.4. **"Approval Date"** means the date referred to in the Tribunal's merger Clearance Certificate (Form CT10);
- 1.5. **"Business Day"** has its meaning as contemplated in section 1(1)(A) of the Act.
- 1.6. **"CIVH"** means Community Investment Ventures Holdings Propriety Limited, the Acquiring Firm;
- 1.7. **"Commission Rules"** mean the Rules for the Conduct of Proceedings in the Commission;
- 1.8. **"Commission"** means the Competition Commission of South Africa;
- 1.9. **"Conditions"** mean these conditions;
- 1.10. **"Confidential Information"** and **"Commercially Sensitive Information"** mean trade, business or strategic, industrial information that has particular economic value including but not limited to current and/or future network expansion plans, and is not publicly or generally available to or known by others;
- 1.11. **"Dartcom"** means Dartcom SA Proprietary Limited;
- 1.12. **"DFA Services"** means the metropolitan and/or backhaul fibre products which will be provided by the Merged Entity following the Implementation Date;

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- 1.13. **"DFA"** means Dark Fibre Africa (Pty) Ltd;
- 1.14. **"FTTB"** means fibre to the business;
- 1.15. **"FTTH"** means fibre to the home; a form of fibre-optic communication delivery that reaches premises in residential areas;
- 1.16. **"Implementation Date"** means the date, occurring after the Approval Date, on which the merger is implemented by the Merging Parties;
- 1.17. **"ISP"** means Internet Service Provider;
- 1.18. **"Merged Entity"** means CIVH (and its subsidiaries) as at Approval Date and Vumatel;
- 1.19. **"Merger"** means the acquisition of control by CIVH of Vumatel, as notified under Commission case number 2018Jun0032;
- 1.20. **"Merging Parties"** means CIVH and Vumatel;
- 1.21. **"Network"** means any fibre optic telecommunications infrastructure and/or networks that have been and will be installed by the Merged Entity;
- 1.22. **"New GX and Dartcom Conditions"** means conditions imposed in the New GX and Dartcom merger;
- 1.23. **"New GX and Dartcom merger"** means the transaction between New GX and Dartcom, notified to the Commission under case number 2016Oct0554 and conditionally approved on 19 January 2017;
- 1.24. **"New GX"** means New GX Capital Holdings (Pty) Ltd;
- 1.25. **"SADV"** means SA Digital Villages (Pty) Ltd;
- 1.26. **"Target Firm"** means Vumatel;
- 1.27. **"Third Party FTTH ISPs"** means bona fide ISPs that provide FTTH services to end consumers and which comply with all applicable laws, regulations and appropriate industry standards;
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- 1.28. **"Third Party FTTH Providers"** means bona fide providers of FTTH access (i.e. similar to Vumatel Services) and which comply with all applicable laws, regulations and appropriate industry standards;
- 1.29. **"Transfer Pricing"** means the Merged Entity's internal transfer pricing to its internal FTTH operation (previously conducted by Vumatel or SADV) for accessing the Merged Entity's backhaul fibre infrastructure, where such infrastructure relates to those elements of the Merged Entity's backhaul fibre network that connect a point-of-interconnection to a FTTH provider's point-of-presence in a suburb, and does not apply to fibre self-supplied by the Merged Entity's FTTH operation between two points-of-presence
- 1.30. **"Tribunal"** means the Competition Tribunal of South Africa;
- 1.31. **"Vumatel Services"** means the FTTH access provided by Vumatel, to Third Party FTTH ISPs and, subject to 3.4 below, which will be provided by the Merged Entity following the Implementation Date; and
- 1.32. **"Vumatel"** means Vumatel Proprietary Limited, the Target Firm.

2. Duration

- 2.1. The obligations imposed on the Merged Entity in these Conditions will apply for a period of 10 (ten) years unless otherwise specified.

3. Open Access

- 3.1. The Merged Entity must not refuse access to:
- 3.1.1. DFA Services to any Third Party FTTH Provider if it is objectively, reasonably capable of rendering such DFA Services in the ordinary course of the Merged Entity's business, or
- 3.1.2. Vumatel Services to any Third Party FTTH ISP if it is objectively, reasonably capable of rendering such Vumatel Services in the ordinary course of the Merged Entity's business;
- 3.1.3. Provided that, should the Merged Entity assert an inability to provide access to DFA Services or Vumatel Services it shall provide detailed and specific written reasons on request to the

affected customer and the Commission within 14 (fourteen) Business Days of receiving the request from the customer.

- 3.2. The Merged Entity must provide such DFA Services and Vumatel Services on terms and conditions, including prices, which are:
- 3.2.1. Transparent, in that key component elements of the DFA Services, including the rate card and data sheet as contained in the product catalogue, provided by the Merged Entity, or Vumatel Services provided by the Merged Entity are set out separately in terms of rate cards and, where applicable, reflected in Transfer Pricing so that it is possible to compare terms and conditions applied to FTTH Providers, or FTTH ISPs that operate within, or are controlled by, CIVH versus those applied to third parties;
 - 3.2.2. Non-discriminatory, in that such terms and conditions are no worse (including in respect of pricing, requisite quality, and timeliness and security of delivery) for the supply of DFA Services than those granted to the Merged Entity's FTTH operation; and
 - 3.2.3. Non-discriminatory, in that such terms and conditions are no worse (including in respect of pricing, requisite quality, and timeliness and security of delivery) for the supply of Vumatel Services than those granted to the Merged Entity's ISP operation.
- 3.3. These Conditions shall not be interpreted to create any obligation on the Merged Entity to supply DFA Services or Vumatel Services to any third party who refuses or fails to adhere to the objectively reasonable commercial terms subject to which the services are offered or who commits a breach of the terms subject to which the services are rendered. Furthermore, nothing in these Conditions shall be interpreted to create an obligation on the Merged Entity to build infrastructure or make investments outside of its normal course of business to facilitate access to specific third parties.
- 3.4. These Conditions do not apply to future Vumatel Services in lower income areas of a similar nature to those referenced in clause 7 (being suburbs or areas where the average household income is less than R200,000 per annum as per the most recent published data of Statistics South Africa) and that require a different business model or product offering to that used by Vumatel at the Approval Date.

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- 3.5. If the Merged Entity provides DFA Services or Vumatel Services to a competitor of the Merged Entity, the conditions in clause 3 (and its sub-clauses) will not apply if such competitor refuses to offer equivalent access, infrastructure or services to the Merged Entity on a reciprocal basis, where it is objectively, reasonably capable of doing so.

4. Expansion plans

- 4.1. The Merged Entity must publish all relevant information (comprising live, work in progress and planned routes) about its fibre infrastructure network expansion programmes relating to DFA Services on its website at least twice weekly, without providing this information to its own FTTH or ISP entities prior to publication on the website.

5. New GX/Dartcom

- 5.1. Notwithstanding the New GX and Dartcom Conditions (which are envisaged to lapse in 2020), New GX shall, subject to 5.2, continue to comply with the New GX and Dartcom Conditions for a period of 2 (two) years from the Implementation Date, or until New GX no longer controls Dartcom (whichever occurs first).
- 5.2. If New GX ceases to control CIVH, whilst still controlling Dartcom, New GX will only be required to comply with the New GX and Dartcom Conditions until the Dartcom Conditions lapse in 2020 or CIVH ceases to control Dartcom (whichever occurs first).

6. Information exchange

- 6.1. The Merged Entity undertakes to use Commercially Sensitive Information obtained by the Merged Entity from any Third Party exclusively for the purpose of servicing such Third Party. For the avoidance of doubt, the Merged Entity undertakes not to use Commercially Sensitive Information in the advancement of its own competing business, including but not limited to the Merged Entity's expansion plans.
- 6.2. The Merged Entity will procure that any Confidential Information it receives from a Third Party, including in particular but not limited to current and/or future expansion plans, is not divulged to any employee, representative or member of a division or entity within the Merged Entity that is in competition with that Third Party.

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- 6.3. Furthermore, in order to comply with the obligation in 6.2, the Merged Entity will specifically procure that each employee, representative or member of a division or entity contemplated in 6.2, as the case may be, signs a confidentiality agreement in terms of which that person will agree that they will maintain confidentiality over Commercially Sensitive Information which has come to their attention as a result of servicing a Third Party.
- 6.4. The Merged Entity must ensure that the respective planning departments of DFA and Vumatel will not be integrated with one another and will be ring-fenced from each other and the rest of the Merged Entity's business in order to ensure that no Commercially Sensitive Information is shared.

7. Public interest

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- 7.2. The Merging Parties must continue to provide 1 Gbps free uncapped access to Vumatel Services for every public or private, primary or high school it passes (i.e. where the Merged Entity has capability to connect that school to Vumatel Services in a service area and where new service activation will require only the installation and/or connection of a drop cable from the school's passed point (e.g. fibre-pedestal, manhole, chamber, utility-pole) to the school, and the installation of subscriber equipment at the school. This excludes schools that cannot be connected without further installation of substantial fibre infrastructure such as feeder and distribution fibre cables to reach the school).

8. Monitoring of compliance with the Conditions

- 8.1. Where applicable, CIVH shall inform the Commission of the Implementation Date within 5 (five) Business Days of it becoming effective.
- 8.2. The Merged Entity must within 20 (twenty) Business Days of the Implementation Date submit a plan to the Commission detailing how the respective planning departments of DFA and Vumatel will not be integrated with one another and will be ring-fenced from each other and the rest of the Merged Entity's business.

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- 8.3. CIVH shall submit a compliance report on an annual basis to the Commission on the anniversary of the Implementation Date detailing compliance with the Conditions in the preceding 12 (twelve) months.
- 8.4. The report referred to above shall include the following information in relation to each product or service provided by the Merged Entity that are used by FTTH providers:
- 8.4.1. Where applicable, Transfer Pricing reflecting the internal price charged per product or service for access to the Merged Entity's backhaul fibre infrastructure. In addition, provide the prices charged for each Vumatel Service to the Merged Entity's ISP operation on an annual basis;
- 8.4.2. The pricing structure for each DFA Service and Vumatel Service supplied to third parties;
- 8.4.3. The names and contact details (including regional location) of any third parties who applied for access to DFA Services or Vumatel Services;
- 8.4.4. The names and contact details (including regional location) of third parties who were granted access to DFA Services and Vumatel Services pursuant to the formers' applications;
- 8.4.5. The terms and conditions, including the price and payment terms, for each DFA Service and Vumatel Service supplied to such third parties and where applicable to the Merged Entity;
- 8.4.6. Where applicable, detailed and specific reasons why the Merged Entity refused to grant any such third parties access to a DFA Service or Vumatel Service, including a description of the product or service requested by the third party, as well as the relevant geographic area;
- 8.4.7. The new schools provided with 1 Gbps access during the period of the report;
- 8.4.8. Updates on the implementation of the projects in clause 7 including the spend, challenges and progress during the period of the report; and
- 8.4.9. Any policies put in place to maintain confidentiality of information referred to in 6.
- 8.5. Each report submitted in terms of 8.3 shall be accompanied by an affidavit from the Accounting Officer of CIVH confirming the accuracy of the information contained in the report.
- 8.6. In the event that the Commission receives a complaint relating to a breach by the Merged Entity of any of these Conditions, the Commission is entitled to request the Merged Entity to provide further information pursuant to the complaint.
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- 8.7. Upon request and reasonable notice to provide such information (per 8.6), the applicable firm shall grant the Commission access to the relevant information as may be required by the Commission to enable it to analyse and investigate such a complaint.
- 8.8. The Commission may request any information that relates to these Conditions as may be reasonably required to monitor and confirm compliance.
- 8.9. The Merged Entity shall inform all existing Third Party FTTH Providers and Third Party FTTH ISP customers of the Merged Entity as at the Implementation Date of these Conditions in writing, within one month of the Implementation Date. Any new Third Party FTTH Providers and Third Party FTTH ISP customers of the Merged Entity, must be informed in writing of these Conditions within one month of becoming a customer of the Merged Entity. In addition, the Merged Entity must place, within one month of the Implementation Date, a non-confidential copy of these Conditions on its website.

9. Apparent breach

- 9.1. Subject to clause 8.8, in the event that the Commission receives any complaint in relation to non-compliance with the above Conditions or otherwise determines that there has been an apparent breach of any of the Conditions, the breach shall be dealt with in terms of Rule 39 of the Commission Rules.

10. Variation of the Conditions

- 10.1. On good cause shown, the Merged Entity or the Commission may apply to the Tribunal for the waiver, relaxation, modification and/or substitution of one or more of the Conditions. In considering such an application the following will also be taken into account:
- 10.1.1. the extent to which the Merged Entity has complied with the public interest conditions in 7.1 and 7.2; and
- 10.1.2. any complaints lodged against the merged entity from FTTH Providers and Third Party FTTH ISP customers.
- 10.2. For the purpose of this clause 'good cause' means any material change of circumstance, which could, *inter alia*, relate to:
- 10.2.1. market conditions;

10.2.2. the legislative or regulatory framework; or

10.2.3. a need for more effective monitoring and enforcement of the Conditions.

11. Correspondence

11.1. All correspondence in relation to the Conditions must be submitted to the following email address: mergerconditions@compcom.co.za.