COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM115Oct24

In the matter between:

Tario 892 Proprietary Limited	Primary Acquiring Firm
and	
RSAWEB Proprietary Limited	Primary Target Firm

Panel:	I Valodia (Presiding Member) T Vilakazi (Tribunal Member) G Budlender (Tribunal Member)
Heard on:	03 February 2025
Decided on:	03 February 2025
Reasons issued on:	27 February 2025

REASONS FOR DECISION

Introduction

[1] On 03 February 2025, the Competition Tribunal ("Tribunal") unconditionally approved a large merger in which Tario 892 Proprietary Limited ("Tario 892") intends to acquire 55% of the shares in RSAWEB Proprietary Limited ("RSAWEB") through the exercise of a call option. Post-merger Tario 892 will exercise sole control of RSAWEB.

Parties to the transaction and their activities

Primary acquiring firm

[2] The primary acquiring firm is Tario 892, a private company incorporated in accordance with the laws of the Republic of South Africa. Tario 892 does not currently provide any products and/or services.

[3] Tario 892 is jointly controlled by IDEAS Infrastructure II GP Proprietary Limited ("IDEAS") and STOA S.A ("STOA").[1] A non-controlling minority shareholding in Tario 892 is held by Thebe Investment Corporation Proprietary Limited ("Thebe"), a private company incorporated in accordance with the laws of the Republic of South Africa.[2]

[4] IDEAS is a domestic private infrastructure fund managed by African Infrastructure Investment Managers ("AIIM"), a private equity fund manager. AIIM is in turn controlled by Old Mutual Alternative Investments Holdings Proprietary Limited ("OMAIH"). OMAIH is ultimately controlled by Old Mutual Limited ("OML").[3] OML is a public company listed on the Johannesburg Stock Exchange and as such it is not controlled by any individual person or firm.

[5] Of relevance to the proposed transaction are the activities of, IDEAS and STOA which jointly control the following firms:

5.1. MetroFibre Networx Proprietary Limited ("MetroFibre"), a Fibre Network Operator ("FNO") and Internet Service Provider ("ISP") that owns and manages an open access carrier class ethernet infrastructure, providing fibre connectivity;

5.2. Octotel Proprietary Limited ("Octotel") which operates an open access fibre network. Its activities include building, owning, maintaining and leasing of fibre networks, with a focus on providing fibre to the home ("FTTH") and fibre to the business ("FTTB").

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[1] STOA is a joint stock company (société anonyme) duly incorporated and registered in accordance with the laws of France. STOA is an impact fund controlled by the Caisse des Dépôts et Consignations ("CDC") and the Agence Française de Développement ("AFD"). CDC and AFD are not controlled by any firms.

[2] Thebe is owned 50% by Batho Batho Trust, a community trust established in 1992 to support the efforts of historically disadvantaged persons, with the balance of the 50% shares owned by management and staff.

[3] OMAIH is controlled by Old Mutual Investments Proprietary Limited ("OMI"), which is in turn controlled by Old Mutual Emerging Markets Proprietary Limited ("OMEM"). OMEM is controlled by Old Mutual Group Holdings (South Africa) Proprietary Limited ("OMG"), which is ultimately controlled by Old Mutual Limited.

[6] Tario 892 controls Main Street 1789 Proprietary Limited (“Main Street 1789”). Tario 892, all the firms controlled by it and its controlling firms are collectively referred to as the “Acquiring Group”.

Primary target firm

[7] The primary target firm is RSAWEB. RSAWEB is a downstream ISP, which primarily focuses on the provision of retail FTTH and FTTB services. It also provides cloud infrastructure, enterprise connectivity and mobile data management.

[8] RSAWEB is jointly controlled 55% by its two founders RGTI Proprietary Limited (“Gilmour SPV”) and Main Street 1802 Proprietary Limited (“Slingsby SPV”). As set out above, the remaining 45% shares in RSAWEB are held by Main Street 1789. Main Street 1789 is controlled by the primary acquiring firm Tario 892.

[9] RSAWEB does not control any other firm.

Proposed transaction and rationale

Transaction

[10] In terms of a Call Option Agreement, Tario 892 intends to acquire the 55% currently held by Gilmour SPV and Slingsby SPV in RSAWEB through the exercise of a call option. The exercise of the call option will result in Tario 892 increasing its indirect shareholding (through Main Street 1789) from 45% to 100%. Post-merger Tario 892 will exercise sole control over RSAWEB.

Rationale

[11] From the Acquiring Group’s perspective, the proposed transaction provides an opportunity to gain control of RSAWEB. This acquisition will enable the combined entity to achieve greater scale, enhance its competitive position

against larger ISPs in South Africa, and foster industry expertise and best practices, ultimately improving the customer experience across the network.

[12] From RSAWEB's perspective, the proposed transaction offers RSAWEB a strategic opportunity to expand its service offerings, particularly in the SMME sector. Moreover, this aligns with RSAWEB's overarching growth strategy, enabling it to leverage the MetroFibre network infrastructure to provide more innovative and tailored services, thereby delivering greater choice and competition to both consumers and businesses.

Competition assessment

Areas of overlap

[13] The Commission found that the proposed transaction results in a horizontal overlap in the national market for the retail of internet access services to homes and businesses. This is because both the Acquiring Group (through MetroFibre) and RSAWEB are active in the national retail supply of ISP services to homes and businesses.

[14] In addition, the Commission found that the proposed transaction will result in a vertical overlap as the merging parties are active at different levels of the supply chain. The Acquiring Group (through MetroFibre and Octotel) and RSAWEB own and operate fibre optic infrastructure which is an input into the ISP services provided by RSAWEB. Other ISPs require the services provided by MetroFibre and Octotel in order to provide FTTH and FTTB services.

[15] In their merger filing, the merging parties considered a national geographic market for retail ISP services (home and business) and wholesale fibre services (FTTH and FTTB). However, the Commission found it unnecessary to define the precise geographic market for wholesale FTTH and FTTB, as the target firm is not active in this segment. While previous cases[4] indicate that competition

[4] 2024/095842/07 (South Africa) (Pty) Ltd and Main Street 1800 (Pty) Ltd LM004Apr24; Community Investment Ventures Holdings (Pty) Ltd ("CIVH") And Vumatel (Pty) Ltd LM109Jul18

occurs in localized markets, pricing patterns suggest a national market. The Commission did not reach a conclusion on the relevant market.

[16] For the vertical overlap assessment, the Commission evaluated the wholesale fibre services market on a national level. Similarly, the market for ISP services has been defined nationally, in line with prior decisions. [5]

[17] Taking the above into account, the Commission assessed the effects of the proposed merger in the following markets, the:

17.1. upstream national market for the wholesale of FTTH / FTTB; and

17.2. downstream national market for the retail of ISP services to homes and businesses using fibre.

[18] We found no evidence to conclude that the market definition should be broader or narrower, nor that we should depart from our previous decisions for the purposes of our assessment.

Market analysis

<u>Assessment of the horizontal overlap in the national market for ISP services to homes and businesses using fibre</u>

[19] In determining the market shares in the market for the retail of ISP services, the Commission relied on the Africa Analysis[6] data and market share estimates provided by market participants, including the merging parties. For purposes of determining the relative size of the merged entity in the overlapping market, the Commission assessed separate market shares for the provision of ISP services to (i) homes and (ii) businesses.

[5] 2024/095842/07 (South Africa) (Pty) Ltd and Main Street 1800 (Pty) Ltd, Case No.: LM004Apr24.
[6] Africa Analysis FTTH Market Tracking Programme June 2024

[20] The Commission found that the merged entity will have a combined estimated post-merger market share of less than 5% with an accretion of less than 2% in the retail of ISP services to homes using fibre.

[21] The Commission further noted that there was no readily available market share information for the retail of ISP services to businesses using fibre. In determining the market shares of the merging parties and other ISPs in the retail of internet access services to businesses, the Commission relied on estimates provided by market participants.

[22] Based on the merging parties' estimated market shares for the retail of ISP services to businesses, the merged entity will have a combined post-merger market shares of less than 3% with an accretion of less than 2%.

[23] The Commission further found that the ISP layer in South Africa is estimated to have more than 200 operating ISPs. The above market share estimates indicate that the merged entity will continue to compete with numerous other ISPs in the retail of ISP services to businesses.

[24] Based on the above and given the presence of numerous other alternative ISPs in South Africa, we find that the proposed merger is unlikely to substantially prevent or lessen competition in the national market for ISP services to homes and businesses using fibre.

<u>Assessment of the vertical overlap between the activities of the merging parties</u>

[25] As noted above, the proposed transaction results in a vertical overlap. The Commission considered the upstream market for the wholesale of FTTH / FTTB and the downstream market for the retail of internet access services using fibre in South Africa. The Acquiring Group is active in the upstream market, while RSAWEB is active in the downstream market.

The national market for the wholesale of FTTH

[26] In determining the market shares in the national market for the wholesale of FTTH, the Commission relied on the Africa Analysis data (for quarter ending: June 2024) which was provided by the merging parties and relied on by third parties contacted during the investigation.

[27] The Commission found that the Acquiring Group has an estimated market share of less than 15% in the national market for the wholesale of FTTH. Within this market, the Acquiring Group competes with larger firms such as Vumatel Proprietary Limited ("Vumatel"), Telkom Group (Openserve) and other FNOs such as Hero Telecoms Proprietary Limited ("Herotel'), Frogfoot Networks (Pty) Ltd ("Frogfoot").

[28] Based on the above and given the availability of alternative FNOs in the market, we find that the proposed transaction is unlikely to substantially prevent or lessen competition the national market for the wholesale of FTTH.

The national market for the wholesale of FTTB

[29] In determining the market shares of the Acquiring Group and other FNOs in the wholesale of FTTB, the Commission relied on estimates provided by market participants, including the merging parties.

[30] Based on the merging parties' market share estimates, the Acquiring Group has an estimated market share of less than 4% in the market for the wholesale of FTTB. The Commission found that the merging parties will continue to compete against the larger firms such as Telkom, Dark Fibre Africa ("DFA") and other FNOs such as Frogfoot, Liquid Telecommunication South Africa Proprietary Limited t/a Liquid Intelligent Technologies ("Liquid Telecoms") and Link Africa (Pty) Limited, amongst others.

[31] A competitor of the merging parties also provided the Commission with their estimated market shares relying on the BMIT SA Wholesale Telecom Report 2023 ("BMIT Report"). There was a significant difference in the market shares estimates provided by the merging parties and this competitor. However,

despite the discrepancies, both market share estimates indicate that the Acquiring Group competes with relatively larger FNOs in the wholesale of FTTB, including Telkom, DFA, Link Africa and other players such as Liquid Telecoms and Frogfoot, amongst others.

[32] Considering the above and the availability of alternative FNOs in this market, we conclude that the proposed transaction is unlikely to raise competition concerns in the national market for wholesale of FTTB.

Input foreclosure

[33] The Commission assessed whether the merged entity would have the ability and incentive to foreclose rival upstream FNOs by restricting their access to RSAWEB.

[34] The Acquiring Group holds a relatively small position in the wholesale FTTH market, with an estimated 14.1% market share and it competes with larger key players. In the wholesale FTTB market, the Acquiring Group's market share is estimated to be between 3% and 10%, facing competition from Frogfoot, Africa Link, Telkom, and DFA, among others.

[35] Given these market shares and the presence of alternative FNOs, the Commission found that the Acquiring Group is unlikely to have the ability to foreclose downstream ISPs' access to critical fibre infrastructure. Furthermore, the merging parties will continue competing with other vertically integrated FNOs that operate in both the wholesale FTTH/FTTB and ISP markets, including Vumatel, Herotel, Frogfoot, Openserve/Telkom Retail, MTN, and Link Africa/Dimension Data.

[36] Regarding incentives, the Commission assessed whether the merging parties (MetroFibre and Octotel) would have incentives to engage in input foreclosure or preferential treatment post-merger. It found that MetroFibre and Octotel rely on multiple third-party ISPs for revenue, with MetroFibre generating [redacted]% of its revenue from ISPs other than RSAWEB, while Octotel's third-party ISP

revenue share was [redacted]%. Given this reliance, the Commission determined that the merged entity would not have a strong incentive to foreclose competing ISPs, as doing so would result in significant revenue losses.

[37] Concerns were raised, which are discussed in more detail below, by MWEB and DFA regarding the potential preferential treatment, citing past pricing advantages for MetroFibre ISP. DFA proposed transparency conditions to prevent discrimination. The merging parties denied these claims, stating that they operate an open-access model. The Commission noted that MetroFibre and Octotel hold less than 15% of the market, competing with larger firms. Given their market position and commitment to open access, the Commission concluded that the merger is unlikely to lead to significant foreclosure or price discrimination concerns.

[38] Based on the above, we conclude that the merged entity is unlikely to have an incentive to implement an input foreclosure strategy.

Customer foreclosure

[39] The Commission considered whether the merged entity would have the ability and incentive to deny rival upstream FNOs, access to RSAWEB.

[40] The Commission found that RSAWEB is a small customer to its third-party FTTH and FTTB network services providers, accounting for less than 2% of their network business.

[41] Additionally, multiple alternative ISPs operate in the downstream retail market for internet services. Given this competitive landscape, the Commission found that RSAWEB is unlikely to exercise market power in the downstream market for the retail of internet access services to businesses.

[42] Regarding incentives, RSAWEB's total FTTH and FTTB network spend, [redacted]% was directed to the Acquiring Group and [redacted]% to other FNOs. This suggests that RSAWEB is not exclusively reliant on the Acquiring Group for network

services and has access to alternative suppliers, reducing the risk of foreclosure. Additionally, the substantial expenditure directed towards other FNOs indicates a competitive market where multiple players remain viable options for ISP service providers.

[43] Based on the above, we conclude that the proposed transaction is unlikely to result in customer foreclosure, as RSAWEB remains a relatively small player in the market with sufficient alternative suppliers and competitors.

Third Party Concerns

[44] The Commission received submissions from Vumatel and MWEB regarding the proposed merger, which we address below.

MWEB

[45] MWEB raised concerns about potential anti-competitive behaviour resulting from the proposed merger, particularly regarding open-access obligations and the preferential treatment of affiliated ISPs.

[46] MWEB argues that if Metrofibre FNO has historically favoured its ISP, there is a risk that, post-merger, these practices could extend to RSAWeb. This could reduce competition in areas covered by Octotel and Metrofibre, heightening market foreclosure risks.

[47] To mitigate these concerns, MWEB proposed that the ISPs (MFN ISP and RSAWeb) should be placed in one company and the FNOs (Octotel and MFN) in another to ensure a truly open-access environment, similar to the structure of Openserve and Telkom Retail.

[48] We considered these concerns, however given the (i) relatively small market share of the merging parties; (ii) the fact that the merging parties are likely to maintain open-access principles to ensure widespread use of their networks the concerns appear addressed; and (iii) that other FNOs operate in the key areas

where the merging parties are active in the Western Cape. We find that the conditions proposed by MWEB are not warranted.

<u>Vumatel</u>

[49] Vumatel raised concerns about the Commission's inconsistent approach to merger investigations, citing delays in the other mergers in similar markets. They argued that prolonged reviews could cause deals to fail due to shifting market dynamics. The Commission acknowledged these concerns and committed to timely investigations but maintained that the proposed transaction would not harm competition.

[50] We find that the concerns raised by Vumatel are not merger specific and do not warrant intervention in our assessment for the proposed transaction. Therefore, we see no reason to depart from the Commission's findings.

Public interest assessment

Employment

[51] The merging parties confirmed that the proposed transaction will not have any adverse impact on employment. In particular, there will be no retrenchments or job losses that will arise from the proposed transaction.

[52] Tario 892 does not have employees. The employees of RSAWEB are represented by an employee representative. The RSAWEB employee representative did not raise employment concerns as a result of the proposed transaction.

[53] In light of the above we find that, there are no employment concerns arising from the proposed transaction.

Promotion of a greater spread of ownership

[54] Tario 892 has an indirect shareholding of 32% by HDPs, the HDP credentials of RSAWEB are attributable to Tario 892. On the other hand, RSAWEB has an indirect 32% HDP shareholding attributable to Tario 892. The Commission found that no further interventions are required in the circumstances.

[55] We see no reason to depart from the Commission's findings. We conclude that the proposed merger raises no significant concerns regarding the spread of ownership.

Other public interest considerations

[56] The Commission received a concern raised by Vumatel. Vumatel's concerns relates to the consistency of the Commission's approach to public interest issues, the Commission maintains that each merger should be assessed on its individual merits. Vumatel argues that imposing selective and onerous public interest obligations could stifle competition in the developing South African FNO market.

[57] Vumatel proposed using the public interest obligations from the *Vodacom (Pty) Ltd and Business Venture Investments no 2213 (Pty) Ltd* ("*Vodacom/Maziv* merger")[7] as a standard for future FNO mergers to ensure consistency. Specifically, Vumatel advocates for the inclusion of obligations such as the establishment of a Monitoring Trustee to oversee compliance and commitments to provide network services to ISPs on open access and non-discriminatory terms.

[58] The Commission disagreed with the notion of imposing such remedies universally, noting that such obligations are unnecessary unless a merger raises significant competition or public interest concerns. We agree with the Commission's findings. We found no evidence found suggesting that this

[7] Vodacom (Pty) Ltd and Business Venture Investments no 2213 (Pty) Ltd, Case No.; LM148Dec21.

transaction would result in significant public interest issues. Consequently, there are no additional public interest concerns arising from the proposed merger.

[59] We find no evidence or submissions that the proposed transaction raises any other public interest concerns and we are satisfied that the merger will not have any negative effect on the factors set out in section 12A(3) of the Act.

Conclusion

[60] For the reasons set out above, we are satisfied that the proposed transaction is unlikely to substantially prevent or lessen competition in any relevant market. No other public interest issues arise.

[61] We, accordingly, approved the proposed transaction unconditionally.

Signed by:Imraan Valodia
Signed at:2025-02-27 14:10:39 +02:00
Reason:Witnessing Imraan Valodia

Imraan Valodia

27 February 2025

Presiding Member
Prof. Imraan Valodia

Date

Prof. Thando Vilakazi and Adv. Geoff Budlender SC concurring

Tribunal Case Manager:	Bobedi Seleke and Sinethemba Mbeki
For the Merging Parties:	Heather Irvine, Amanda Mfuphi, and Thandeka Masimla of Bowman Gilfillan Inc.
For the Commission:	Themba Mahlangu and Reabetswe Molotsi