



**ESWATINI COMMUNICATIONS COMMISSION DECISION 1/2019**

**DECISION IN TERMS OF SECTION 37 OF THE ESWATINI COMMUNICATIONS  
COMMISSION ACT NO 10 OF 2013**

**INVESTIGATION INTO THE JOINT VENTURE AGREEMENT BETWEEN MTN  
ESWATINI AND THE ESWATINI POSTS AND TELECOMMUNICATIONS  
CORPORATION**

**05 February 2019**

## 1. INTRODUCTION AND BACKGROUND

- 1.1. On 21 December 2018, the Eswatini Communications Commission ("the Commission") published its proposed decision on the outcomes of an investigation in terms of Section 36(1)(c) of the Eswatini Communications Commission Act 2013 (No. 10 of 2013, hereinafter referred to as the "ESCCOM Act"), in respect of the Joint Venture Agreement ("the JVA") between shareholders of Swazi MTN Limited (hereinafter referred to as "MTN Eswatini") pertaining to conduct preventing competition in the electronic communications sector between the business of MTN Eswatini and Eswatini Post and Telecommunications Corporation ("EPTC") as well as market allocation between MTN Eswatini and EPTC. `
- 1.2. In accordance with Section 36 of the ESCCOM Act, detailed information was requested from the parties to the JVA prior to and during the public hearing conducted by the Commission as set out fully in the Proposed Decision.
- 1.3. The Commission, as per the provisions of Section 32 of the ESCCOM Act, made its proposed decision publicly available as a consultation document by way of General Notice No 13 of 2018 ("the consultation document") in terms of which the Commission afforded interested parties, as well as the public at large the opportunity to comment on the Proposed Decision by 21 January 2019.
- 1.4. The Commission's analysis and reasons thereof have been made available on the website of the Commission.
- 1.5. The Commission only received one written submission from MTN Eswatini on 21 January 2019. The Commission places it on record that the submission from Eswatini MTN's was received late after the closing time on the closing day for submission of comments. Nonetheless, the Commission decided to consider the submissions due to the potential impact of the decision on Eswatini MTN's continued business interests and in the interests of transparency.

1.6. Section 37 of the ESSCOM Act requires a decision that is issued by the Commission to be made in writing and for it to state the reasons upon which the decision is based. The Section also requires for the decision to be published. Further, Section 37 gives the Commission discretionary powers to determine an earlier effective date for the coming into effect of the decision, where circumstances demand.

## **2. FURTHER CONSIDERATIONS**

2.1. The Consultation Document set out the Commission's analysis and findings with respect to the matter at hand. Since the publication of the Consultation Document which sets out the Proposed Decision, the Commission has further applied its mind to the issues raised and considered the further submissions made by Eswatini MTN in particular, that:

2.1.1. MTN Eswatini and EPTC had previously agreed on EPTC's exit from MTN, but had been prevented from implementing same;

2.1.2. The exit by EPTC would have occurred had the unbundling of EPTC in accordance with Section 53 of the Eswatini Electronic Communications Act, 2013 been implemented;

2.1.3. MTN Eswatini cannot determine when EPTC will exit as a shareholder as this is a matter between the Government and EPTC.

2.2. Whilst the Commission is alive to the complexity that arises with the implementation of its decision given the role players, it cannot simply accept MTN Eswatini's views that the parties are unable to take any action whatsoever in respect of the divestiture. The divestiture of EPTC from MTN Eswatini's shareholding is a necessity in the regulated environment where legislation has evolved to recognize the difference in roles played by the respective industry

players, being licensees, the regulator, government and the judiciary, amongst others. The history that MTN Eswatini seeks to emphasize existed at a time prior to the establishment of the current legislative regime, the regulatory frameworks and development of economic regulatory principles, including the very competition regulatory frameworks that MTN Eswatini highlighted repeatedly in their submissions.

Consequently, it would be remiss of the Commission to fail to acknowledge its mandate to evolve the regulation of the sector and to ensure that licensees conduct themselves in a manner consistent with modern jurisprudence and regulatory policies.

### **3. FINDINGS**

Taking into account the foregoing discussion, the Commission finds as follows:

- 3.1. It should be noted that the Commission did not apply Section 30 of the Eswatini Competition Act, 2007 and has not made any findings on whether or not EPTC and MTN Eswatini are common entities, which if it were correct, would have the effect of lifting the prohibition on the clauses in the JVA which appear to allocate markets. Notwithstanding whether the clauses in and of themselves are anti-competitive in terms of Section 30, the Commission has found that the effect of clause 18.2 of the JVA is to limit the ability of the parties to fully execute their mandate in terms of the sector-specific regulatory frameworks and specifically the execution of their obligations in terms of their licences.
- 3.2. The Commission recognizes that the JVA is a commercial agreement between the parties as shareholders of MTN Eswatini. In an ordinary commercial setting, the JVA would be valid and lawful in a number of scenarios. However, the parties, who are licenced entities by the Commission have a number of obligations towards consumers in the market and the public at large. In addition, the licences afford the parties the privilege of exploiting a guaranteed market

to the exclusion of other licenced entities who may very well want to explore the provision of services similar to those licenced entities ought to provide and to generate the types of revenues only accessible through the possession of a licenced issued by the Commission. This has the effect of distorting the market.

- 3.3. The Commission will not, at this time, make an assessment of whether the JVA violates any of the principles sought to be regulated through the Competition Act. However, the Commission will monitor the behaviour arising from the enforcement of the JVA and will pursue the investigation of any behaviour or trade practices arising therefrom and make findings and decisions on same in terms of the prevailing legislative and regulatory provisions.

#### **4. DECISION**

In light of the findings set out above, the Commission has decided as follows:

- 4.1. To afford EPTC and Eswatini MTN, as licensees, a period of six (6) months from the effective date of this decision to ensure divestiture of EPTC's shareholding in MTN Eswatini ("the Implementation Period").
- 4.2. The Commission hereby orders EPTC to take any and all actions as may be necessary to ensure it divests its ownership in MTN Eswatini within the Implementation Period.
- 4.3. The Commissions hereby orders MTN Eswatini to take any and all necessary steps to assist EPTC in implementing the divestiture.
- 4.4. In the event the parties fail to ensure the divestiture on the lapse of the Implementation Period, the Commission shall convene a hearing to establish whether any party is at fault and, in the event fault can attributed to any of the parties, consider an appropriate penalty to be imposed.

- 4.5. That the parties are ordered to ensure that the restraint period provided for in clause 18 of the JVA is waived in the interest of the introduction of competition. The waiver is suspended for a period equivalent to the Implementation Period, after which the waiver shall become effective in the event the parties fail to ensure divestiture of EPTC's shareholding into Eswatini MTN.
- 4.6. That until such time that the parties have completed the divestiture, any disputes between the parties arising from the enforcement of the JVA, and specifically clauses 18, 20, 21 and 22, shall be reported to the Commission. The Commission shall evaluate these on a case by case basis and take such action as may be appropriate.
- 4.7. The Commission orders EPTC and MTN Eswatini shareholders to submit to the Commission separate reports on the implementation of the decision at the end of the Implementation Period. For avoidance of any doubt, the Commission expects to receive the implementation reports on or before **7 August 2019.**
- 4.8. With respect to penalties to be imposed for non-compliance with legislation, the licence conditions set out herein, the Commission has decided that in light of its findings, it would be inappropriate to impose a penalty as the current situation is not completely of the wrong-doing of the parties. The Commission was also cognizant of the previous efforts by EPTC to rid itself of the constraints imposed by the JVA agreement.

## 5. CONCLUSION

- 5.1. The Commission is cognizant of the sensitive nature of the decision and the need to avoid the erasure of investment and shareholder value created through the existence of the licenced entities.
- 5.2. This, of course, necessitated that the Commission balance the foregoing against its mandate as the sector-regulator and its responsibility, ultimately, to the citizens of the Kingdom.
- 5.3. The Commission is of the firm view that the findings contained herein enable the licensees to implement the decision within the timeframes set by the Commission to ensure they pave the way for unlimited competition in the ICT sector for the benefit of the consumers and, ultimately, the greater ICT Market in the Kingdom.
- 5.4. In light of the foregoing this decision shall come into force on **07 February 2019.**

Date of Decision : 05 February 2019

Effective date of Decision : 07 February 2019

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**CHIEF EXECUTIVE**