



DECISION AND REASONS DOCUMENT ON THE OUTCOMES OF AN INVESTIGATION IN TERMS OF SECTION 36(1)(C) OF THE SWAZILAND COMMUNICATIONS COMMISSION ACT 2013 IN RESPECT OF THE JOINT VENTURE AGREEMENT BETWEEN SHAREHOLDERS OF SWAZI MTN LIMITED PERTAINING TO THE CONDUCT PREVENTING COMPETITION IN THE ELECTRONIC COMMUNICATIONS SECTOR BETWEEN THE BUSINESS OF SWAZI MTN LIMITED AND ESWATINI POST AND TELECOMMUNICATIONS CORPORATION; MARKET ALLOCATION BETWEEN SWAZI MTN AND EPTC.

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DRAFT DECISION ON THE OUTCOMES OF AN INVESTIGATION IN TERMS OF SECTION 36(1)(C) OF THE SWAZILAND COMMUNICATIONS COMMISSION ACT 2013 IN RESPECT OF THE JOINT VENTURE AGREEMENT BETWEEN SHAREHOLDERS OF SWAZI MTN LIMITED

1. INTRODUCTION

1.1. On 28th of June 2018 the Eswatini Communications Commission (“ESCCOM” or “the Commission”) initiated an investigation under Section 36(1)(c) of the Swaziland Communications Commission Act, 2013 which allows the Commission to investigate and make determination on an apparent contravention of the current legislative framework.

1.2. The investigation centered around the Joint venture Agreement (“JVA”) entered into between the Swaziland Post and Telecommunications Corporation (as it was then, and now referred to as Eswatini Post and Telecommunications Corporation, “EPTC” hereinafter), Swazi MTN Limited (“Swazi MTN”), Mobile Telephone Networks Holdings (Pty) (“MTN Holdings”) and Mobile Telephone Networks Africa (Pty) Ltd (“MTN Africa (Pty) Ltd”) and Swazi Empowerment Limited (“Swazi Co”).

1.3. The Commission had earlier requested a copy of the JVA from the parties in an effort to understand the nature, provisions and scope of the agreement. Upon assessment of the JVA, as well as the licenses awarded to EPTC and Swazi MTN, both parties to the agreement, the Commission established that:

1.3.1. The JVA, which was entered into and concluded between the shareholders of Swazi MTN Limited on the 31st July 1998, regulates conduct between the entities who are shareholders of Swazi MTN in respect of the activities

of said shareholders as separate entities and as shareholders. In effect, the JVA operates as a shareholders' agreement between the parties.

1.3.2. there exists an acute need for an investigation of the JVA and any other business arrangements which may have been concluded by the licensees as they undertake their respective business ventures. This is necessary in order to ensure continuous compliance with the prevailing legislative frameworks applicable to the electronic communications sector.

1.4. Thus, the decision for this investigation is premised on section 36(1)(c) of the SCCOM Act of 2013. *“The Commission shall establish procedure for the investigation of any alleged contravention by any licensee of a law or terms and conditions of a license which the Commission is entitled to administer and which contravention has been brought to the attention of the Commission either ... ex officio.”*

1.5. In arriving at its decision to launch the investigation, the Commission considered:

1.5.1. that it had established a reasonable concern with regards to the licence conditions of EPTC and Swazi MTN respectively, as well as a need to safeguard competition and protect the interests of end users.

1.5.2. that it sought to ensure that services provided by licensees are not limited, except when strictly necessary.

1.5.3. its mandate to protect the interests of end users in the communications market, including the introduction of different types of products and services in line with licences issued to operators as well as the prevention of and the withdrawal of products and services from the market and the hands of end-users.

1.5.4. the fact that technology-neutral licenses were issued to both EPTC and Swazi MTN respectively. The licences granted the parties the right to roll out any type of infrastructure and provide any product and/or service to end-users allowing the licensees to extend any electronic communication services using any type approved infrastructure to the market without inhibition.

2. MANDATE AND POWERS OF THE COMMISSION

A. SECTOR SPECIFIC

2.1. In undertaking the investigation, the Commission considered the legislation governing the communication sector including in the Swaziland Communications Commission Act, 2013 and in particular, the following sections

2.2. Section 6 provides that the Commission is to;

(d) *“promote the development of innovative, secure, modern and competitive communications infrastructure and the delivery of related services”*

(e) *“ensure freedom of provision of communication services and further ensure that those services are not limited, except where strictly necessary”*

(f) *“ensure a wide range and variety of communication services”*

(k) *“administer certain aspects of the Competition Act, 2007 as they relate to the sectors regulated by the Commission”*

2.3. Section 7 mandates the Commission to *“ensure fair competition in all communications services, products, operations, and activities which the Commission regulates”*.

2.4. Section 5 mandates the Commission to carry out the above functions *“in an objective, transparent, proportionate and non-discriminatory manner”*.

B. COMPETITION LAW ENFORCEMENT / ADMINISTRATION

2.5. The Commission is also mandated to administer certain aspects of the Competition Act, 2007. In pursuance thereof, Section 30(1) of the Competition Act provides that;

(1) “any category of agreements, decisions, or concerted practices which have as their object or effect, the prevention, restriction or distortion of competition to an appreciable extent in the country or in any substantial part of it”.

(2) “any enterprises engaged on the market in rival or potential rival activity shall not engage in practices enumerated in Section 5 where such practice limits access to market or otherwise unduly restrains competition”.

2.6. Section 5 *“for purposes of subsection 1, the Act specifically prohibits market or customer allocation agreements”*.

2.7. Market allocation is a situation where competitors agree to not compete with each other in specific markets, by dividing types of products, types of customers or in some cases, geographic areas. The relationship between EPTC and Swazi Mobile in this case is a horizontal one – and the activity affected by the JVA and being investigated is competition in the mobile retail market. In most markets globally, in terms of economic and competition regulation, horizontal market allocations are illegal per se. The effect of market allocation is to reduce

competition and prevent customers from reaping the benefits of it – increased quality, choice of services and better prices.

3. SPECIFIC FACTORS CONSIDERED IN THE PRELIMINARY ASSESSMENT

3.1. The Commission assessed clauses 18, 20, 21 and 22 of the JVA as pertinent to the matter under consideration (See Annex A – Confidential)

3.2. Apart from or in addition to the specific clauses of the JVA considered, the Commission also considered whether, broadly speaking, the continued existence of the JVA was consistent with the prevalent legislative dispensation. The Commission is cognizant of the fact that the JVA was entered into twenty years ago and under a different legal and factual dispensation.

3.3. Due consideration was also paid to existing Court judgments relating to the matter. However, the Commission also noted that the existing judgements did not consider the then recent promulgation of the Electronic Communications and Swaziland Communications Commission Acts, which came into effect in 31st July 2013, and prior to the full and functional establishment of the Swaziland Communications Commission. Consequently, there has been a significant change to the legislative and factual background underpinning those judgements. Thus, the statutes referred to presented an appreciably different regulatory environment, both from a licensing perspective as well as the prevalent economic or market considerations to be considered in revisiting those decisions in so far as the question of the JVA's continued alignment with the law is concerned.

3.4. On consideration of the agreement, the Commission had formed the *prima facie* opinion that some clauses contained in the JVA were inconsistent with the existing legislation and have the effect of stultifying competition in the sector, in addition to creating conditions for the violation of or non-compliance with the terms and conditions of the licences issued to the EPTC and Swazi MTN.

3.5. Applying competition principles in accordance with the Competition Act, the Commission was of the initial view that the JVA inhibits competition and may promote discrimination and allocation of markets between SPTC and Swazi MTN Limited much against the provisions of standing legislation.

3.6. This then led the Commission to its investigation into the matter which included:

3.6.1. Letters by Commission to all parties concerned to show cause why the Commission should not proceed on the basis of its preliminary view; and

3.6.2. An opportunity for the parties to make written submissions to the Commission to put on record relevant factors to be considered by the Commission in finalizing its view on the JVA.

Written submissions

3.7. As part of its investigation, the Commission invited the licensed parties to the JVA to make submissions on the issues highlighted in the Commission's preliminary views on the continued validity of the JVA. To that end, the Commission received written submissions from:

3.7.1. Eswatini Post and Telecommunications Corporation on the 11th of July 2018; and

3.7.2. Swazi MTN Limited on the 20th of July 2018.

Public Hearing

3.8. The Commission decided to conduct the public inquiry on an inquisitorial approach rather than an adversarial approach, in order to establish facts which would enable it to make a decision. The parties were called upon to make submission on, why the Commission should not;

3.8.1. Determine and issue a directive relating to apparent non-competitive practices of the parties to the Joint Venture Agreement.

3.8.2. Direct that SPTC be allowed to establish any network to support the provision of electronic communications services as allowed under their operating license issued by the Commission in line with the Electronic Communications Act, 2013 and the Electronic Communications (Licensing) Regulations, 2016.

3.8.3. Impose an administrative fine, and/or alternatively, withdraw or suspend authorization to operate, which decision will be determined by the Commission, for the contravention, with particular consideration made to the duration and impact of the contravention on the market and on end-users.

3.8.4. Issue an order to effect the reimbursement of payments received or to make compensation payments to end-users who have suffered losses as a result the market allocation acts in contravention of the law.

3.9. The hearings were held on 5 October 2018 at the Happy Valley Hotel and Conference Centre.

4. EPTC SUBMISSIONS

4.1. EPTC submitted a detailed written submission as well as an oral submission; full transcripts of the oral submission are available. EPTC furthermore submitted supporting documentation (summarized in Annex B and deemed Confidential). The arguments summarized in this part of the Decision are not exhaustive - it merely highlights some of the salient points raised by EPTC that informed the Commission's findings.

4.2. In their submission, EPTC submitted that the impugned clauses of the JVA amounted to an allocation of markets and were anti-competitive. The EPTC stated that the JVA was entered into at a different time relative to the current legislative and regulatory framework and that, viewed against the prevailing conditions, the clauses should not pass legal muster.

4.3. EPTC further argued that should the Commission make any findings that differed from the Court rulings, there would be no need to set aside the Court rulings in light of the prevailing legal framework and the powers of ECCOM. EPTC explained at length that a Decision of ECCOM would be binding, although it remained unclear why the licenses issued to EPTC (equally in the Commission's view, a Decision of the Commission) which support technology neutrality and thus the provision of mobile services by EPTC, could not therefore be implemented with immediate effect.

4.4. EPTC acknowledged that its participation in the affairs of Swazi MTN as a shareholder was not ideal for a number of reasons including:

4.4.1. The restriction on EPTC's ability to introduce new products and services both on a wholesale and retail level, thus leading to improved service offerings and a growth of the revenue base. The restrictions imposed by

the JVA have the effect of prohibiting EPTC from introducing new products and services for the benefit of the consumers/end-users.

4.4.2. Compliance with the current legislative and regulatory framework. The JVA prevents EPTC from being able to fully discharge its licence obligations and to fully exploit its rights in terms of the licence, leading to reduced participation in the market. As a result, EPTC is not able to provide any service on any network in accordance with the technology neutral licensing framework enabled by the ECA.

4.5. EPTC further made a submission that despite the fact that they were arguing the anti-competitive nature of the JVA, to which they are a party, it would not be proper or ideal for the Commission to impose penalties if one takes into account the genesis of the JVA. However, it was conceded that the continued existence of the JVA has a limiting effect to the EPTC's ability to fully and properly serve the needs of the citizens of the Kingdom in discharge of the EPTC's licence obligations.

4.6. EPTC also conceded that the market evolution since the JVA was entered into have created a new and differently structured electronic communications market which necessitates the revisiting of the JVA and the continued validity of its provisions as against current legislation.

4.7. The existing court orders emanating from litigation between the parties has made it costly for EPTC to explore further litigation between the parties in an effort to free itself from the provisions of the JVA.

5. SWAZI MTN SUBMISSION

5.1. Swazi MTN submitted a detailed written submission as well as an oral submission; full transcripts of the oral submission are available. The arguments summarized in this part of the Decision are not exhaustive.

Preliminary points raised by Swazi MTN at the hearing

5.2. Prior to addressing the Commission, Swazi MTN raised a number of preliminary matters including:

5.2.1. They were not provided with a copy of the “hearing guidelines”;

5.2.2. The draft Licence Renewal Report that they were provided a copy of on 3 October 2018 appeared to contain a conclusion on the subject matter of the hearings; and

5.2.3. Swazi MTN had a reservation with inclusion of a member of the Competition Commission on the panel of the Commission and requested for a recusal of the member owing to:

5.2.3.1. Pending litigation between the Competition Commission and Swazi MTN; and

5.2.3.2. The Competition Commission had provided an advisory opinion on the subject matter of the investigation, leading to an apprehension of bias of the member and ultimately, the Commission.

5.3. The Commission considered Swazi MTN’s submissions and made the following decision:

5.3.1. The failure to provide the hearing guidelines was an oversight. The Commission unreservedly apologized for the error. However, it was noted that the contents of said guideline is what was read at the beginning of the

hearing and related to house rules and procedural matters for the day and nothing material was raised therefrom.

5.3.2. The draft Licence Renewal Report was circulated to Swazi MTN for discussion and no decisions had been taken by the Commission in terms of the report. It was in fact presented to Swazi MTN specifically for the purpose of obtaining comments.

5.4. In respect of the recusal of the member from the Competition Commission:

5.4.1. the Commission considered the value to be added by the expertise of the member whose recusal was sought. In Swazi MTN's written submission, a number of highly technical aspects relating to the application of the Competition Act were put forward, including the two-stage application of Section 30 and a proper interpretation of the "Common Entity" argument.

5.4.2. In addition, the Commission considered the fact that the Competition Commission was authorized to provide non-binding opinions as part of its statutory obligations.

5.4.3. Lastly, the fact of a pending litigation on an unrelated matter was considered to be an irrelevant factor as such should not imply that the Competition Commission would then not be able to execute its function simply by virtue of an existing pending matter. Drawn out to its logical conclusion, any party wishing to circumvent the jurisdiction of the Competition Commission could simply initiate litigation against the Competition Commission and then claim that a reasonable apprehension of bias was held by virtue of such litigation. In any event, litigation against the Competition Commission is not personal and cannot be a source of a reasonable apprehension of bias simply by the existence of an unrelated factual and/or legal dispute.

5.5. The Commission then read the following ruling into the record:

5.5.1. Having deliberated on the matter, the Panel has arrived at the following decision. We have deliberated on the request for the recusal of the member and arrived the following decision.

5.5.2. Section 31 of the SCCOM Act, enjoins or allows the commission to consult with other competent authorities responsible for competition issues, amongst other things.

5.5.3. The functions of the Competition Commission are set out in section 11(2) (d), (k) and (g).

5.5.4. The outstanding litigation highlighted appears to have any impact on the current proceedings.

5.5.5. Under the circumstances, the panel is of the view that there is no reasonable apprehension of bias and shall not accede to Swazi MTN's request for the recusal of the member.

Substantive submissions

5.6. Swazi MTN highlighted its obligations to its shareholders to protect shareholder value. They argued that the JVA is an instrument that protects the shareholders' value in the company and Swazi MTN is duty bound to protect the continued shareholder interests in the Company.

5.7. Swazi MTN further made submissions which in essence have the effect of arguing that: *a contract that is voidable, remains valid until such time that it has*

been determined otherwise and consequently, its provisions remain binding on the parties to the agreement. In Swazi MTN's view, the provisions of the JVA have not yet been set aside by a competent authority and as such, they remain enforceable. Swazi MTN's view was that should EPTC be allowed to compete with itself (in terms of the provision of mobile services) **whilst still a party to the Joint Venture**, then such would be unfair and in violation of the agreement between the parties. **(our emphasis)**

5.8. Swazi MTN also cautioned against an incorrect application of section 30 of the Competition Act which, in their view, required both a legal and factual enquiry in its application. This test requires that impugned conduct must first be appropriately assessed and categorized to establish whether it fits into the type of conduct regulated by section 30, and once that is confirmed, then to assess, by way of amongst others a market study, whether such conduct violates section 30.

5.9. However, Swazi MTN indicated that EPTC would be free to compete with Swazi MTN once EPTC disposes of its shares in Swazi MTN.

5.10. In Swazi MTN's view, the continued existence of the JVA in the context of a common entity (with Swazi MTN) being a common entity between the shareholders, ensured that the JVA did not fall foul of the provisions of the Competition Act and in particular, Section 30. Section 30(1) provides that "*any category of agreements, decisions or concerted practices which have, as their object or effect, the prevention, restriction or distortion of competition to an appreciable extent in the country or in any substantial part of it are prohibited.*" Section 30(2) states that "*Enterprises engaged on the market in rival or potential rival activities shall not engage in the practices enumerated in subsection (5) where such practices limit access to markets or otherwise unduly restrain competition.*" And MTN argues that section 30(3) applies, which states that "*Subsection (1) shall not apply where enterprises are dealing*

with each other in the content of a common entity wherein they are under common control or where they are otherwise not able to act independently of each other.”

5.11. Thus, it can be understood that MTN argues that the JVA contains clauses (clause 18) that allocates markets, but this is not prohibited due to the common entity nature of the relationship.

5.12. Consequently, according to Swazi MTN the provisions of the JVA had to remain applicable until such time that the shareholders exited from the common entity in order to ensure that the parties do not find themselves competing with a company they remain shareholders to.

5.13. Similar to EPTC’s submission, Swazi MTN conceded that the legislative and regulatory landscape had shifted significantly since the execution of the JVA. However, they submitted that the JVA remains valid and the parties were required to follow due process in divesting EPTC’s share in Swazi MTN in order to protect shareholder value.

6. COMMISSION’S ANALYSIS OF THE JVA

6.1. The Commission notes that the submissions received and summarized above, dealt mainly with arguments with respect to the impact of the JVA on competitors who are signatories thereto, namely EPTC and Swazi MTN, rather than on *competition, consumer interest and compliance with the statutory and licence obligations of licensees*. However, the Commission’s interest in investigating the JVA is ultimately to ensure the existence of effective competition in the various markets in the Kingdom and execution of the mandate in so far as the regulated aspects of the Licensee’s businesses are concerned. As such, in addition to the issues around the limitation of specific licensees’ rights and the allocation of

markets, the Commission is concerned with the impact of same on consumer choices, delivery of the industry specific mandate and, generally, competition within the sector.

6.2. In addition to limiting the rights of parties to the agreements, the JVA appears to have a broader impact on competition in the mobile market in the Kingdom. The submission made by EPTC and the evidence provided (Annex B) made it clear to the Commission that there are instances wherein third-party competitors that provide mobile licenses and consumers are impacted by the implementation by the parties of clauses of the JVA – in this particular case in so far as distribution channels and access to competing mobile services are concerned.

6.3. The Commission has directed that written notice of all instances of conflicts or challenges arising from or caused by the implementation of clauses of the JVA are submitted to it. It may, at its discretion, institute investigations into each of the activities on a case-by-case basis applying the relevant provisions of the Competition Act and/ or the Electronic Communications and SCCOM Acts.

6.4. With respect to the common entity concept which is central to Swazi MTN's argument, the Commission believes that a proper enquiry under the Competition Act is indispensable and the Commission is unable, at this time, to take the argument further, save for expressing reservations without making findings.

6.5. Consequently, whilst it may be possible that the arrangement in terms of the JVA may pass legal scrutiny in so far as the Competition Act may be concerned, such an approach to the examination of the issue does not deal with obligations arising from the regulatory ecosystem.

6.6. Within the ICT Sector as regulated through the Commission, the Commission highlights the National Information, Communications and Infrastructure (NICI) Policy, 2005 which envisaged a liberalized, competitive and regulated electronic

communications Sector. True to its aspirations, the Swaziland Electronic Communications Act was passed in 2013 establishing an independent regulator, being the Commission. Further, the Electronic Communications Act was promulgated to provide a legal framework for the development of electronic communications and services in the country.

6.7. In 2016, the Electronic Communications Regulations were passed, amongst which were the Electronic Communications (Licensing) Regulations, 2016, which provide for the licensing of electronic communications service providers to foster competition and liberalize the sector. The Licensing Regulations introduced a new licensing regime due to the convergence of technology and provide for the Commission to issue technology neutral licences. Technology neutrality is the freedom of licensees to choose the most appropriate technology adequate to their needs and requirements for development in providing telecommunications services.

6.8. The Commission then issued converged licences both to Swazi MTN and EPTC in terms of which they were to provide communications services and networks on a technology-neutral basis. This meant that EPTC could, on the strength of the licence, rollout any service it deems fit. However, the provisions of the JVA serve to curtail this very purpose for which the licences were issued.

7. FINDINGS

7.1. At the time the JVA was concluded in 1998, the regulatory framework consisted of the Swaziland Posts and Telecommunications Corporations Act as the statute creating the now EPTC and also empowering it with the powers of a regulatory authority.

7.2. Since then, the legislative framework has changed to include the following legislative, regulatory and policy framework:

7.2.1. Legislation

The Kingdom has since enacted the Swaziland Communications Commission Act (2013), The Electronic Communications Act (2013), The Swaziland Competition Act (2007), amongst others. Some of the key features of the legislation includes the creation of separate industry regulatory bodies include the Communications Commission and the Competition Commission amongst others. This is in line with international best practice, especially in alignment with the Model Regulatory Toolkit as developed by the International Telecommunications Union, to which the Kingdom is a member.

7.2.2. Policy

An integrated Communications Policy, the National Information, Communications and Infrastructure (NICI) Policy, 2005 has been adopted by the legislature. The purpose of the policy is to set the policy objectives that the legislative and regulatory framework ought to give effect to when setting goals for the sector.

7.2.3. Regulations

Since its existence, the Commission has developed a number of regulations to govern certain key areas of the telecommunications industry including the Electronic Communications (Licensing) Regulations of 2016.

Apart from the Sector specific regulatory changes, there were other developments in the Kingdom which included the regulation of competition in the Kingdom. These further included the development of economic principles and market regulatory theories consistent with the dynamic global society and international best practice.

7.2.4. The Commission has considered all of the foregoing and applied these to its consideration of the issues as arising out of the evaluation of the JVA and the issues raised in the submissions by the Parties.

7.3. Having considered the written and oral submissions, the legislative provisions as applicable, the ECS and ECN licence conditions, regulations applicable to the parties, the history relating to the creation and existence of the JVA, the Commission makes the following findings:

7.3.1. The JVA was crafted at a time when there was no independent regulation of the then-telecommunications market. The Swaziland Posts and Telecommunications Corporation, at the time, played a joint role of monopoly operator and regulator. The prevalent market conditions at the time warranted to use of EPTC's licence rights and infrastructure to enable the creation of a new entity to provide mobile telephony services.

7.3.2. Given that context, the Joint Venture Agreement was necessary at that time to protect the interests of the parties entering into the specific arrangement for the specific purpose as enunciated.

7.3.3. Since the signing of the agreement in 1998, the legislative landscape has evolved to recognize the need for independent regulation, resulting in the creation of the Commission. Equally, it has evolved to recognize the need for and benefits of competition. Furthermore, the understanding of economic and competition regulatory principles have, over time, evolved to recognize the need for regulation of competition both for consumers/end-users and for market players. This culminated in the creation of the Commission in its current form and the Competition Regulatory Framework (including establishment of the Competition Commission), the promulgation of the ECA and the SCCOM Act, the adoption of the NICI Policy 2005 and

prescribing of the regulations by the Commission, amongst other developments

7.4. Without looking at specific provisions of the JVA, the Commission first sought to consider the continued existence of the agreement *in toto* and found it at odds with the current legislative and regulatory framework for a number of reasons including the following:

Compliance with Licence terms and conditions (technology neutrality) and Mandate of the Commission (development of sector).

7.4.1. The JVA restricts the ability of shareholder parties to fully discharge their regulatory obligations and exploit the benefits of their converged and technology neutral licences and to provide a greater number of services to consumers. This is against the Commission's statutory obligation to ensure a diversity of services and products on the market.

7.4.2. The parties are licensed separately and expected to compete in the market, leading to efficiencies which should ultimately translate to more choice, better quality of services, and reduced prices for consumers. The JVA prevents this through the restrictions it places on the parties to exploit certain markets, to roll out certain technologies, and to diversify their product and service offerings at retail level.

7.4.3. The regulatory framework puts an obligation on licences to provide a plurality of services across all networks and technologies, which the parties have expressly indicated the willingness to do, save for the restrictions imposed by the JVA.

Access to sensitive commercial information by the parties.

7.4.4. As a shareholder of Swazi MTN, EPTC has access to Swazi MTN's sensitive commercial information by virtue of appointing Board Members to the Board of Swazi MTN, creating the potential for collusion and price fixing, undercutting the power of market to positively impact prices.

7.4.5. Given the detailed framework for applying section 30 of the Competition Act, the Commission, at this point, will not be in a position to interrogate whether the JVA in toto or some of its provisions will withstand scrutiny in terms of the Competition Act. As correctly pointed out by MTN in its written submission, the enquiry is both a factual and legal one.

7.4.6. That enquiry will have to consider, amongst other things, the genesis of the JVA and the evolution of the legislative and economic landscape within which the JVA exists.

7.4.7. In addition, that evaluation will also have to include the definition of a relevant market and the economic analysis associated therewith, and will have to look at the fact that the parties **also** operate in a regulated environment that comes with licence conditions and secondary legislation primarily in the form of regulations. It is this latter aspect that the Commission will concentrate its efforts.

7.5. With respect to the specific JVA clauses, having considered the written and oral submissions of the parties and in particular, the evolution of the JVA, the Commission is of the view that the JVA clauses have the effect of restricting the ability of the parties to fully exploit their licences and to offer a diversity of services to consumers; this in turn creating an environment where the licensees are unable to or restricted from fulfilling their regulatory mandate. In particular, these include:

- 7.5.1.1. Sections 4(2)(a) of the Electronic Communications Act
- 7.5.1.2. Sections 6(d) – (g) and (j) of the Swaziland Communications Commission Act
- 7.5.1.3. Section 7(g) and (t) of the Swaziland Communications Act,
- 7.5.1.4. Clauses 1.1.3, 1.1.4 and 18.1 of the Licence conditions issued to both Swazi MTN and the EPTC.
- 7.5.1.5. Clause 23.5 of the Licence Conditions.

COMMON ENTITY PRINCIPLE

- 7.6. In so far as the Commission considered arguments made in terms of section 30 of the Competition Act and specifically relating to the common entity argument that MTN put forward in its defense, the Commission has decided not to explore this argument any further.
- 7.7. Whilst in terms of the Competition Act, a decision to not compete amongst parties who appear to ordinarily be competitors may perfectly lawful under a set group of facts or circumstances, the Commission is confronted with the additional fact that the parties in this instance are **also** subject to a regulatory mandate, which is not ordinarily the situation with parties entering into such agreements.
- 7.8. Consequently, the Common entity argument may be a perfectly lawful defense for the validity of similar agreements amongst unregulated entities, it is, in the Commission's view, not the end of the inquiry when dealing with regulated entities subject to an additional set of rules regulating their conduct and creating specific sector defined obligations in light of the regulated nature of the sector those entities exist in. It is furthermore, in this case dealing with the crux of the provision of competitive services by these regulated entities.

7.9. Whilst the existence of an agreement in the nature of the JVA would not ordinarily be a *per se* prohibition in terms of Section 30 of the Competition Act, the fact of the licensing of both EPTC and MTN requires the analysis of the JVA from a regulatory perspective, over and above an analysis from the Competition Regulation framework. Whilst the arrangement may pass scrutiny in terms of the tests required in the application of Section 30, it does not automatically create an unqualified assessment from the sector-specific regulatory framework.

8. PROPOSED DECISION ON THE JVA

8.1. The Commission recognizes that the resolution of the matter dealt with in this Decision needs to recognize its mandate to promote investment and should thus be sensitive to the shareholder value created through the existence of the JVA. However, the Commission also recognizes its mandate as the sector regulator and its responsibility, ultimately, to the citizens of the Kingdom:

8.1.1. Based on the submissions received and arguments made at the hearings, the Commission did not apply section 30 of the Competition Act and has not made any findings on whether or not EPTC and Swazi MTN 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 is to limit the ability of the parties to fully execute their mandate in terms of the sector-specific Regulatory Framework and specifically the execution of their obligations in terms of their licences.

8.1.2. The Commission recognizes that the JVA is a commercial agreement between the parties, and in an ordinary commercial setting, the JVA can be valid and lawful in a number of scenarios. However, the parties are also licenced entities in a regulated environment that has 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 at the exclusion of other un-licensed entities who may very well want to explore the provision of services similar to those licensed entities ought to provide and to generate the types of revenues only accessible through the possession of a licence issued by the Commission. This has the effect of distorting the market.

8.1.3. In so far as the JVA is to be considered in terms of the Regulatory Framework administered by the Commission, it is the Commission's considered view that the JVA contravenes and is inconsistent with the following provisions of the Electronic Communications Act:

8.1.3.1. Sections 4(2)(a) which provides that *"the Commission shall regulate electronic communications under this Act and enforce this Act and ensure the provision of a wide range of public electronic communications networks and services"*

8.1.3.2. Sections 6(d) which provides that the Commission's functions are to *"promote the development of innovative, secure, modern, and competitive communications infrastructure and the delivery of related services"*;

8.1.3.3. Section 6 (e) which mandates the Commission to *"ensure freedom of provision of communications services and further ensure that those services are not limited except when strictly necessary"*

8.1.3.4. Section 6 (f) which mandates the ensuring of *"a wide range and variety of communications services"*

8.1.3.5. Section 6(g) which mandates the Commission to *"ensure that all communications services are provided in a manner that will best promote economic and social development"*

- 8.1.3.6. Section 6 (J) which provides that the Commission shall “*promote efficient management and human resource development within the communications industry*”
- 8.1.3.7. Section 7(g) which mandates the Commission to “*grant any authorization for the carrying out of any operation or activity relating to any matter within the remit of the Commission*”
- 8.1.3.8. Section 7(t) which enjoins the Commission “*to determine issues concerning monopoly and discriminatory practices*”.
- 8.1.3.9. Clauses 1.1.3, 1.1.4 and 18.1 of the Licence conditions issued to both Swazi MTN and the EPTC.
- 8.1.3.10. In addition, it is the Commission’s view that, construed properly, an agreement by the licensees to limit their rights as afforded in terms of the Act and the licences amounts to a cession of such rights without the prior approval of the Commission as required in terms of clause 23.5 of the licence Conditions. In this regard and considering that the parties have not reviewed the JVA from the time it was concluded, if the parties wish to perpetuate their initial arrangement, it is necessary for the parties to lodge the agreement with the Commission for evaluation and approval through considering the relevant regulatory frameworks now applicable.
- 8.1.4. The Commission cannot, 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 behavior arising from the implementation of the JVA and will pursue the investigation of any behavior or trade practices arising therefrom and make findings and decisions on same in terms of the prevailing legislative and regulatory provisions.

8.1.5. In light of the findings set out above, the Commission has decided:

- 8.1.5.1. to afford EPTC as a licensee and the shareholders of Swazi MTN, a period of six (6) months from the date of this ruling to ensure divestiture of EPTC's shareholding in Swazi MTN, failing which, the Commission shall convene a hearing to consider an appropriate penalty to be imposed for the contravention of the provisions of the Statutes and Licence conditions as set out above.
- 8.1.5.2. that the restraint period provided for in clause 18 of the JVA should be waived in the interest of the speedy introduction of competition.
- 8.1.5.3. That until such time that the parties have completed the divestiture, any disputes between the parties arising from the implementation of the JVA, and specifically clauses 18, 20, 21 and 22, must be notified to the Commission for an investigation and ruling in terms of the legislative and regulatory framework. These investigations shall be conducted and addressed during the 6-month period to dealing with the shareholding issue.
- 8.2. 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 shackles of the JVA agreement.
- 8.3. Regarding the compensation of customers, the Commission notes that neither of the submissions addressed the impact of the JVA or the behaviour it encourages on consumers. The Commission has decided that any consumer complaints will be dealt with on a case by case basis in terms of the existing regulations.

Annex A: Specific clauses of the JVA

“18.1 For purposes of this clause 18, ‘restraint period’ shall mean in the case of any of the Shareholders in the Company, or any of the parties which controls a shareholder of the Company, 12 months from the date that it ceases to be a shareholder in the Company or it ceases to be a shareholder in the Company or it ceases to control such shareholder”.

“18.2 Each of the parties and MTNH reciprocally agrees and undertakes to the other parties that for as long as it is a direct or indirect shareholder in the Company, or directly or indirectly controls a shareholder of the Company, and during the restraint period, it will not”:

“18.2.1 directly or indirectly either on its own account or as a partner with or as an agent, employee, associate, adviser, consultant, financier, administer, shareholder or member of any other person or persons, firm, company or close corporation or in any other capacity whatsoever, carry on or be engaged, interested or concerned in any business or activity which operates a GSM network or GSM service provide, dealer or agent in the territory”;

“18.2.2 directly or indirectly, either for its own account or as a representative or agent of any third, persuade, induce, encourage any person employed by the Company or SPTC”;

“18.2.2.1 to become employed by or interested, directly or indirectly, in any manner whatsoever in any business which is in competition with the business carried on by the Company; or”

“18.2.2.2 to terminate his employment with the Company; or”

“18.2.2.3 to furnish any information or give any advice to any unauthorized person, if the knowledge of such information or the ability to give such advice was acquired by that employee in the course of his employment with the Company”.

“18.3 it is agreed that:

18.3.1 Notwithstanding the manner in which the restraint set forth in 18.2 above have been grouped together or linked grammatically, each of them constitutes a separate and independent restraint, severable from each of the restraints in regard to all aspects thereof including without limitation each capacity, each activity referred to in 18.2 above”;

“18.3.2 the restraints set forth in 18.2 above are fair and reasonable as to the subject matter, area and duration, are given and agreed to by each of the Shareholders respectively in favour of all the others of the parties to this agreement and are required to protect the proprietary interests of each of the parties”;

“18.3.3 the holding, by way of investment only, of not more than 5% of the issued shares of a company the shares of which are listed on a recognized stock exchange, even if that company is in competition with the Company, shall be deemed not to be in breach of any of the afore-going restraints”;

“18.3.4 the restraints set forth in 18.2 above shall inure also in favour of the successors in title of the business of the Company”;

“18.3.5 the restraints set forth in 18.2 above shall cease to apply in the event that the Company is finally liquidated...”

“20. Adherence to licence conditions and laws”

“20.1 The Shareholders of the Company shall refrain and shall procure that the Company shall refrain from any conduct that would violate either the conditions of the licence or any applicable laws or regulations in the territory or elsewhere or any agreements pertaining to the licence to which the Company may be bound”.

“20.2 Notwithstanding anything to the contrary in this agreement, no Shareholder may sell, alienate or otherwise dispose of its shareholding in the Company if such sale, alienation or disposal would result in the Company being in breach of the licence”.

“20.3 In the event that any restriction is placed on the extent or nature of foreign ownership of the Company in terms of the license or laws of the country then, subject to any shareholding by a foreign person acquired prior to the date of such restriction being imposed, notwithstanding anything to the contrary in this agreement, no sale, alienation or other disposal of shares in the Company by any other Shareholder of the Company (other than MTN) to any third party which is a foreign person or entity, shall be permitted or occur without the consent in writing, of all the Shareholders of the Company which consent may only be given if the acquisition by such foreign person or entity does not result in a breach of the license”.

“20.4 Without any prejudice to the generality of the above, the parties agree to procure that the Company shall at all times refrain from conduct which would be an offence in terms of the Prevention of Corruption Act 1958, as amended, of the Republic of south Africa...”

“21.1 The Shareholders shall at all times during the subsistence of this agreement and their relationship to the Company, bear to each other the utmost good faith as is required by law to be borne by partners, the one to the other...”

“22. The provisions of this agreement shall be binding upon and inure for the benefit of the successors in title and assigns of the parties”.

Annexure B: EPTC Confidential Submission

1. The Eswatini Posts and Telecommunication Corporation requested and subsequently made a confidential submission providing evidence of their inability to act on the liberties provided to them by their license due to the JVA.

2. EPTC submitted to the Commission a letter from Swazi MTN dated the 18th of October 2017 addressed to EPTC regarding the breach of the JVA. Swazi MTN made the following statements in the letter:
 - 2.1. EPTC has engaged in the distribution of competitor products that compete directly with Swazi MTN 's products.
 - 2.2. Swazi MTN evoked clause 21.2 of the JVA which prohibits the shareholders of Swazi MTN either directly or indirectly from being associated with any business or concern if such association will or might result in a conflict of interest arising.
 - 2.3. Swazi MTN requested that EPTC confirm in writing that they will cease to distribute competitor products in competition with Swazi MTN.
3. EPTC provided a copy of the agreement regarding the distribution of the above-mentioned products. The agreement is dated August 2017.