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Mr. Stanley Shanapinda,
Chief Executive Officer
Communications Regulatory Authority of Namibia
Communications House
56, Robert Mugabe Avenue
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BY HAND

Dear Sir,

MTC SUBMISSION FOR PURPOSE OF GENERAL NOTICE NO. 62, 20 MARCH 2012, IN TERMS OF SECTION 78 OF THE COMMUNICATIONS ACT, 2009.

MTC respectfully submits its comments on General Notice No.62, 2012 regarding the determination of licensees which may hold a dominant position in relevant parts of the market in Namibia, a subject of high importance to all stakeholders.

In order to prepare this contribution, MTC has appointed Analysys Mason to prepare an independent report, which you will find annexed hereto.

MTC fully supports the conclusions of this report, which we synthetize below for the different steps of the market analysis process, while also making use of this opportunity to add some additional considerations:

1. Market definition

The "service and technological neutral market definition" approach (Approach 1) suggested by CRAN leads to the identification of a single relevant market (which is unprecedented according with Analysys Mason benchmark countries).

We do not believe this approach to be appropriate, as it would not support CRAN in adapting regulation to the specificities of the Namibian telecommunications market. In fact, with such a broad concept of a single relevant market (as in Approach 1) CRAN will not achieve its objective to lessen the burden on the Operators and on itself. Instead the opposite effect will be reached, as this approach will lead CRAN to keep imposing regulations, which will result in higher regulatory costs not only for the Operator but for the Regulator itself (for example, requiring more resources for purposes of enforcement, compliance verification and periodical control and revision).

Among the other approaches considered by CRAN, the "demand-side and supply-side substitutability" (Approach 4) appears the most appropriate as it would allow CRAN to adapt regulation to the specific situation of each relevant market (appropriately defined).

Such an approach does not necessarily lead to a very large number of relevant markets. Overall, all regulators in Analysys Mason's benchmark (EU countries and 6 relevant African countries) have identified between 5 and 10 relevant markets using this approach.

At the very least, we would like to propose for consideration that the minimum understanding of 'market definition' is segmented into: "Retail versus Wholesale", "Fixed and Mobile Networks", and "Mature versus Nascent Emerging".

- The rationale of "Retail versus Wholesale" is simply because some remedies applicable to the first mentioned do not make sense to the second. The report by Analysys Mason presents several examples. Notwithstanding that, we would like amplify one clear Namibian case: that of internet broadband wholesale whereby MTC, to this day, rents international internet access from TN and ITN.
- By using the differentiation of "Fixed versus Mobile Networks" CRAN could avoid the conditioning of an infrastructure investment. Analysys Mason presents a critical example of what will be an undesirable non-investment outcome. If a dominant mobile operator wanting to expand into fixed, takes cognisance of the imposed obligations from the start of their interest, they would not continue with their investment. Conversely, this would be true for a dominant fixed line operator avoiding to expand into mobile.
- "Mature versus Emerging Services" is unreasonable when considering dominant positions in nascent markets, because the dominate position is not yet defined by services that are launched in the first 2 to 3 years or whether a usage growth of three digits per year is achieved. A good example is the Mobile Data 3G, and the soon to be launched event of 4G LTE, and all the improvements to explore the Internet access represented an investment of over N$ 500 million (WACS, National Fibre Backbones, and 3G and 4G) in this nascent market of mobile data despite that MTC has rented international access from other Operators until now.

2. Market analysis

In most countries, dominance implies the capacity to behave independently from competitors and, ultimately, from clients. This is also what Section 78(4) (a) mentions in Namibia: "A share of the market in the class of telecommunications services in question, *such that the operator is able to act independent of its competitors*".

By "definition", the number of dominant operators should be limited to one player in each relevant market (single dominance) with the exception of "joint dominance" where several operators can be all declared dominants (in the same relevant market) if it can be demonstrated that they all behave like a single entity. In this context, given the Namibian regulatory framework set by the 2009 Act, a way to address this inconsistency could be the application of Section 78(5), which should be detailed in order to correctly reflect that a dominant "*operator is able to act independent of its competitors*".

3. Remedies

When CRAN considers imposing (or refining) a remedy, it should apply a justification and proportionality test to ensure that the suggested remedy (automatic or additional) is adapted to the market conditions, aims to address potential market issues, promotes competition for the benefits of customers, while being as little burdensome as possible for the dominant operators.

Should Telecom Namibia, MTC and Leo be declared all "dominant" on the "telecommunications services" market, the automatic (wide) remedies included in the 2009 Act, would probably not pass such a justification and proportionality test because unnecessary regulation would be imposed on operators in areas where they have low market power, and could act as a barrier to investment.

Another impact of such a wide variety of remedies and broad relevant market definition as suggested by CRAN, is that it can jeopardise the predictability, proportionality and certainty of regulation in Namibia. With so many undefined remedies, and also being allowed to impose other remedies not included in the Act, CRAN will remain in an ample margin of discretion that may not be questioned, even in a court of law, because the latter shall focus its analysis on procedural aspects and not on the merits of the decision. This is the exact opposite of the European Regulatory Framework – see. n°3, article 4° of the Framework Directive.

Regarding the imposition of infrastructure remedies, it is important that in any context of evolution and infrastructure development, CRAN does not neglect the obligation to be cautious with the expected return of any investment made by the dominant players, as is consecrated by the Regulatory Framework. In addition, from our perspective and supported by Analysys Mason, it is apparent that there is a need of clear criteria of proportionality and reasonability. Using a simple "compilation" of measures to promote competition only because it is mentioned in the Act, it is certain that CRAN will have a null (or even harmful) effect and not the desirable increase in competition that will foster the welfare of consumers.

4. In Conclusion

Given the Namibian regulatory framework set by the 2009 Act, ways to address such issues include:

- Defining relevant markets that are narrower than a single overall telecommunications market in order to ensure that remedies only apply to the provision of a well-defined list of services (on which the dominant operator is indeed able to behave independently from its competitors).

- Refining the precise content of each remedy (automatic or additional) so that they are designed to be focused to the real market issues and be as little intrusive and burdensome as possible for the dominant operator.

I would like to insist on the importance to address these issues in order to define an efficient regulatory framework that will promote the development of the telecommunications and broadcasting sectors in Namibia, to the benefits of consumers and businesses. We hope that CRAN shall understand and revisit the pertinent issues as Noticed. We appreciate that CRAN affords MTC a presentation in the Hearing where we will emphasize all of the aspects of our submission.

Yours faithfully,

Miguel Geraldes
Managing Director