COMPETITION TRIBUNAL OF SOUTH AFRICA

Case NO: 12/LM/Jan08

In the matter between

Vodacom Service Provider Company (Pty) Ltd	Primary acquiring firm
And	
Global Telematics South Africa (Pty) Ltd	Primary target firm

Panel	: D Lewis (Tribunal Member); Y Carrim (Tribunal Member) and N Manoim (Tribunal Member)
Heard on	: 12 March 2008
Decided on	: 20 March 2008
Reasons Issued	: 8 April 2008

Reasons for Decision

Approval

[1] On 20 March 2008 the Competition Tribunal issued a Merger Clearance Certificate unconditionally approving the merger between Vodacom Service Provider Company (Pty) Ltd and Global Telematics South Africa (Pty) Ltd. The reasons appear below.

Parties

[2] The primary acquiring firm is Vodacom Service Provider Company (Pty) Ltd ("VSP"), a wholly owned subsidiary of Vodacom (Pty) Ltd ("Vodacom"). The shareholding of Vodacom is shared equally between Telkom SA Ltd ("Telkom") and Vodafone Holding SA (Pty) Ltd ("Vodafone").

[3] VSP sells and distributes cellular handsets and accessories, as well as prepaid starter packs, cellular airtime contracts, vouchers, airtime and mobile data to distribution channels and directly to customers. VSP also acts as a franchisor of franchised businesses. Vodacom (Pty) Ltd is a cellular network operator.

[4] The primary target firm is Global Telematics South Africa (Pty) Ltd ("GTSA"), a wholly owned subsidiary of Thales SA, a public listed company incorporated in accordance to the

laws of France. Its largest shareholders are the French government with 26.59% and Alcatel-Lucent with 20.83%.

[5] GTSA is involved in providing vehicle telematics and fleet management solutions for professional and consumer markets. GTSA is also a fully licensed service provider for Vodacom (Pty) Ltd in South Africa. GTSA contracted the provision of certain Vodacom cellular services and products to Glocell Service Provider Company (Pty) Ltd ("Glocell"). In terms of the agreement between Glocell and Global Telematics – referred to as the Glocell Super Dealer Agreement - Glocell entered into agreements with dealers or subscribers relating to registration of subscribers on the Vodacom network for a minimum period of 24 months, as well as registering subscribers who will utilise or have access to the Vodacom network by purchasing prepaid airtime. Thus through Glocell, the target company GTSA operates in the cellular telecommunications industry, providing a wide variety of products, services and solutions.

Transaction

[6] GTSA had been an exclusive service provider for Vodacom in terms of a Vodacom Service Provider licence. The licence agreement was due to terminate on 31st March 2008. Vodacom had indicated that it did not intend to renew this agreement but intended to acquire, through its wholly owned subsidiary, VSP, GTSA's subscriber base, that is, GTSA's business relating to the registration of contract and prepaid subscribers of the Vodacom network. Given, GTSA's arrangement with Glocell, the proposed transaction consists of two interlinked steps, both of which were filed simultaneously. The first step ("the Glocell Transaction") entails the cession, transfer and assignment by Glocell to Global Telematics, of all of Glocell's rights and obligations in respects of its agreements with dealers and subscribers which relate to the registration of subscribers by Glocell on the Vodacom network in terms of the Super Dealer Agreement. On completion of this step, Global Telematics will, therefore, control the cellular business of Glocell. The second step ("the Vodacom transaction") is interlinked and conditional upon the first step. This entails the cession, transfer and assignment by GTSA to VSP of all agreements concluded between Global Telamatics/Glocell and their customers relating to the registration of both contract and prepaid subscriber on the Vodacom network.

The competition analysis

[7] We should immediately note that this is not the first transaction of this nature that has come before us. It appears that a significant portion of Vodacom's products – essentially

contracts and pre-paid airtime on the Vodacom network – had been marketed through independent service providers as well as through VSP, the acquiring firm and Vodacom's in-house service providers. As is characteristic of many distribution arrangements of this type, Vodacom supplies its products to the downstream service providers at a discount, a portion of which was retained by the service provider with the remainder passed on to the end-customer. This provides for at least the possibility of competition between the various downstream providers of Vodacom products. While it is generally accepted that this mode of competition (referred to as 'intra-brand' competition) is not as important as 'inter-brand' competition (which, in this instance, refers to competition between different telecommunications networks), the prospect of a diminution of intra-brand competition in consequence of a merger demands the attention of merger regulators, the more so in markets characterised by weak inter-brand competition.

[8] Other transactions of this type involving the Vodacom Group that have come before us are the acquisition of GSM[1], Teljoy Holdings[2], Smartcall[3], Tiscali[4] and Africell.[5] We have also adjudicated a transaction of this nature in which the service provider owned by MTN, Vodacom's largest competitor in the provision of network services, acquired Cell Place.[6] In short, by systematically declining to extend the contracts of the independent service providers, Vodacom has taken in-house an increasing share of the distribution of its products, and by acquiring the erstwhile service providers it has ensured the retention of the subscriber base of those independent service providers. This has occurred in relatively small increments which has, for obvious reasons, rendered the competition evaluation complex because of the requirement to show that a '<u>substantial</u> lessening of competition' results from the transaction before us. In other words while no single transaction – including the one presently before us – may have passed the test of substantiality, the sum of the six transactions that have, over time, come before us may well have resulted in a substantial diminution of intra-brand competition for Vodacom services.

[9] On each occasion that these transactions were examined, the impact on intra-brand competition was queried by the competition authorities, both at the investigative stage by the Commission and at the adjudicative stage by the Tribunal. This was done not only because

[1] Case NO: 10/LM/Nov04
[2] Case NO:13/LM/Nov99
[3] Case NO: 68/LM/Dec03
[4] Case NO: 87/LM/Oct04
[5] Case NO: 48/LM/04
[6] Case NO: 83/LM/Sep05

a negative impact on intra-brand competition is worthy of examination in its own right, but also because there are considerable grounds for doubting the strength of inter-brand competition in the highly concentrated, oligopolistic market for mobile telecommunications services. However on each occasion we were assured that competition between the service providers was weak at best and that their discounting practices did not effectively differentiate their respective service offerings. We were repeatedly assured that Vodacom's objective in assuming responsibility for the distribution of its product (thus diminishing intra-brand competition) was driven by its desire to ensure the more effective distribution of its product (in other words, to strengthen its hand in inter-brand competition). We were also assured that it mirrored a global trend in the distribution of this product.

[10] The examination of this transaction followed the established pattern. Which is to say that in the course of the Commission's investigations concerns were again raised regarding the impact of the transaction on the ability of the remaining service providers to negotiate meaningful discounts from Vodacom given that an increasing share of its product was distributed through its in-house provider, VSP, the acquiring party in this transaction. The Commission's enquiries elicited objections from two prominent telecommunications companies. One submitted in a letter to the Commission that the reduction in the number of independent service providers weakened the ability of those remaining to negotiate "SP discounts" with the network operators.

[11] The other submitted that the elimination of another service provider in the market diminishes its ability to attract larger discounts. Both submitted that the effects of precious Vodacom and MTN mergers with their service providers has been a lessening of competition among service providers and a reduction of discounts provided to them.

[12] However, the merging parties responded in familiar vein. They argued that discounts provided by service providers to dealers are not passed on to consumers, and hence that that even if discounts were reduced post-merger, this would have no effect on final consumers. In its competitiveness report VSP repeated the familiar rationale for the transaction:

> "*The declining growth of the service provider market discussed more fully in 8.3 below and the desire by Vodacom to consolidate its service delivery chains in line with worldwide trends in order to have management over the delivery of a more uniform consistent service to its customers.*"

[13] For its part, GTSA submitted that the rationale for the transaction is that the Vodacom Service Provider license with Global Telematics expires on the 31st March 2008 and the agreement makes no provision for the license to be extended beyond that date. The termination of the Vodacom Service Provider license held by Global Telematics will result in the termination of the Glocell Super Dealer Agreement with Global Telematics terminating and Glocell will therefore be unable to provide services to its customers and dealers.

[14] The Commission analysed the concerns regarding the discounts, or, expressed otherwise, the concerns regarding the transaction's impact on intra-brand competition. As we elaborate below it also requested additional internal documentation from the acquiring firm but it was not forthcoming. It ultimately concluded that because Vodacom had no intention of extending its agreement with Glocell/Global Telematics, the latter would, regardless of the decision on the merger, cease to be a competitive force. On this basis the Commission concluded that there was no necessity to decide whether discounts have indeed been passed on to the end users.[7] In summary the Commission concluded that opposing this merger would not make any difference, because both parties submitted that the service provider licence between Vodacom and GTSA will not be renewed and will terminate on 31 March 2008. The Commission therefore recommended that this transaction be approved unconditionally.

[15] After receiving the Commission's recommendations, the Tribunal wrote to the merging parties on 6th March 2008 requesting additional information. We directed that Vodacom make available to us all board minutes relating to the transaction/acquisition of Global Telematics and Glocell Service Provider. We also requested all documents, including board presentations, presentations made to any committee, strategy documents, correspondence and memoranda relating to the transaction. On 10th March 2008 Vodacom's attorneys filed the stipulated information. From GTSA we requested copies of the documents and/or presentations made at the strategy presentation meetings referred to in the minutes dated 11th August 2006 on page 170 of the record. On 7th March 2008 we received an email from GTSA's attorneys that no such documents were ever prepared or presented.

[7] Please also note that in the hearing the Commission intimated that these customer concerns and the effects of previous mergers would have amounted to a substantial lessening of competition were it not the case that the Service Provider agreement is terminating and that Vodacom would largely have accrued this market share absent the merger.

[16] A hearing was held on 12th March 2008. At the hearing the Commission informed us that in the course of its investigation it had, on two occasions, requested the information provided pursuant to our direction to Vodacom. However it was not provided – indeed the documents in question, those that had been provided pursuant to the Tribunal's direction, were only provided to the Commission on the day before the hearing. The merging parties' attorneys submitted that they were initially informed that all relevant documents had been filed with the Commission and that it was only after our request that the additional documents were discovered.

[17] While we have no reason to doubt the word of the acquiring party's attorneys, it is our firm belief that the documentation in question was intentionally withheld from the Commission by Vodacom. After all the key document provided to us (and withheld from the Commission) is entitled '*Proposed Acquisition of the subscriber base of Global Telematics South Africa ("GTSA") from the Thales Group".*[8] The title alone would reveal to a child – let alone the legal officers of a major corporation - the relevance of the document. But more than this, the content of the document exposes the falsehood – or, at best, the half-truth – contained in the Competitiveness Report. Under the heading 'strategic rationale for the acquisition', the document states that 'there are several strategic reasons for acquiring the GTSA subscriber base'. These, in marked contrast with the rationale articulated in the competitiveness report, are

- *'The transaction is in line with Vodacom's overall strategy to consolidate and own more of its subscribers thereby improving the operating margins of Vodacom and bringing it closer to the customer. Should this acquisition proceed, Vodacom will have acquired all purchasable service providers and there will effectively only be three Vodacom affiliated service providers left in the market, namely Vodacom Service Provider, Nashua and Autopage, the latter two having concluding new five year SP agreements with Vodacom, on a non-exclusive basis.*
- *Acquiring the GTSA business presents an opportunity of buying back margin by reducing the total commission payments that Vodacom would have had to make to GTSA on the existing GTSA base.*
- *GTSA is in direct competition with VSPC and the only differentiator that it can offer the market is increased discount rates. This result in an overall increase in discounts offered in the market as GTSA's competitors have to at least match these rates in*

[8] Our emphasis

order to compete for the same customers. The average retail rate offered by GTSA is 22% across their postpaid subscriber base, compared to Vodacom levels closer to 15%, and Vodacom will therefore have effectively removed the 'competitive quote' scenario in the market with the acquisition. Future profit growth will be enhanced by reducing these discount rates."[9]

[18] It is not surprising that in the covering letter accompanying the document VSP's attorneys should have attempted an explanation of this paragraph. In so doing it provides a brief and simple text book example of the operation of competition:

After Global Telematics was appointed as a service provider for the purpose of negotiating benefits for its telematics subscribers, it expanded its business to act as a service provider in respect of other subscribers as well. In order to attract customers, it passed a larger share of its margin on to its customers.

[19] Followed immediately, and without elaboration, by the standard excuse proferred by those intent upon snuffing out competition:

It is not sustainable for VSP to provide the same level of discounts to its customers and this level of discounting is not in line with its discounting policy.

[20] We directed that the Commission consider this document which, despite its obvious centrality to a competition analysis, VSP had not seen fit to place on the record during the investigation of the merger. The Commission indicated in the hearing that it feared that in the event that the merger was not approved the service provider agreement would nevertheless be terminated which may cause considerable prejudice to the target firm and its subscribers. VSP's legal representatives undertook to take instructions on this.

[21] On the 14th March 2008 we received a letter from Vodacom indicating that it did not intend to renew or extend the service provider agreement. The Commission confirmed then that on the basis that the termination of the agreement would take the acquiring party out of the market anyway, it therefore recommended the unconditional approval of the transaction.

[9] *Proposed acquisition of the subscriber base of Global Telematics South Africa ('GTSA') from the Thales Group* page 2. Our emphasis. This document was the 'final' presentation to the 'Investment Committee'. It is not clear whether this is a Vodacom or VSP committee.

[22] We comment as follows:

[23] Firstly, we do not agree with the Commission's stated basis for approving the merger. VSP and its parent, Vodacom, clearly have no wish to terminate their relationship with GTSA through the simple expiration of the agreement. Quite the contrary, VSP is willing to pay a considerable sum of money in order to purchase GTSA because Vodacom is intent upon purchasing the GTSA subscriber base thus effecting the seamless transfer of GTSA's customer base to Vodacom. Presumably if the termination of the arrangement was not effected in this manner – that is, if it was simply terminated by the expiry of the agreement – it risked losing the subscribers either to one of the few remaining independent service providers or, worse, to one of the competitor networks. Sympathy for the presumed plight of the shareholders of GTSA is not an appropriate basis for approving the merger – presumably GTSA could have sold its subscriber base to one of the other independent service providers who have recently extended their agreements with VSP/Vodacom. A key strategic rationale for the transaction is, as the document submitted to the VSP/Vodacom Investment Committee indicates, to eliminate the competition generated by GTSA's aggressive discounting strategy. This is the proper basis for deciding this transaction.

[24] Second, it does not follow from this that we are of the view that the transaction should be prohibited.

[25] As already indicated, it is difficult to assess the impact on competition of an incremental acquisition of market share. It is highly unlikely that any of the six acquisitions of Vodacom service providers could, by virtue of the small accretion of market share that each accounts for, have permitted a finding of a substantial lessening of (intra-brand) competition even if the cumulative effect of the transactions viewed with the benefit of hindsight may well have substantially lessened competition. In this instance in the market for the resale of Vodacom contracts at the service provider level, the market share accretion is small (between 4-6%). In the market for prepaid subscribers the accretion is less than 1%. This market share accretion virtually assures the transaction a safe passage through the merger review process although the rationale cited in the submission to the investment committee indicates that GTSA was something of a maverick in its discounting practices.

[26] However VSP's steady acquisition of the market share of the erstwhile service providers has meant that its market share is already overwhelming and the accretion is too small to justify a finding of a substantial lessening of competition. We repeat: had we been

able to review the six transactions as a single transaction, it would have been vulnerable to prohibition.

[27] In any event, Vodacom is entitled to present an efficiency defence. Indeed because the transaction embodies an important vertical dimension, with the upstream supplier of a service vertically integrating the distribution function, the efficiency defence usually associated with a vertical transaction has been presented as the rationale for the transaction. In our previous decisions, we indicated that this was a defence that we were inclined to accept. In other words, the acquiring party had little reason to fear prohibition of its transaction and yet it still chose to withhold material information from the Commission that it was obliged to file, to craft its disclosure obligations in such a way as to avoid making this denial on oath, and subsequently, at a later stage, when requested again by the Commission to produce information relevant to the transaction denied, stating that all relevant documents had been provided. Other than being advised that the relevant person is no longer with the company no satisfactory explanation has been given for this conduct. If the relevant person was unaware of the documents she should have not been chosen to make the affidavit, if she was then the consequences are intentional non-disclosure.

[28] Thirdly, and following directly from the point above, it may well be asked whether any acquiring party should be expected to file internal company information that may be inconsistent with the case it is making to support the merger. The simple answer is that a party filing a merger notification with the Commission is required to tell the truth, and this includes submitting all the stipulated documentation, in order to enable the competition authorities to properly assess the merger. Form CC 4(2) – the 'Statement of Merger Information' – requires merging parties to submit to the Commission, inter alia, the following documents: '*each report or other document assessing the transaction with respect to competitive conditions'* and *'any document, including minutes, reports, presentations and summaries, prepared for the Board of Directors regarding the transaction'.* It also requires the merging parties to submit *'the most recent report you provided the Securities Regulation Panel during the past year'.* Form CC4 (2) also requires the filing parties to submit a 'certification of accuracy' which confirms that where '*completed information has not been provided because it is unavailable'* then it must submit an *'affidavit …explaining why the information is unavailable'.*

[29] The requisite affidavit submitted on behalf of the acquiring firm by Ms. Eleni Christodoulou, the then Group Executive: Corporate Legal Affairs of the Vodacom Group,

expressly acknowledges the requirement to, in her words, '*submit an explanatory affidavit in respect of any information requested on that form which is not available'* and then in the following paragraph concludes her affidavit by affirming that '*Vodacom Service Provider Company (Pty) Ltd has not submitted a report to the Securities Regulation Panel during the past year in respect of the transaction under review and accordingly is unable to provide such a document to the Competition Commission'.* What, of course, her affidavit omits to do is to explain why she has in fact not provided '*each report or other document assessing the transaction with respect to competitive conditions'* and *'any document, including minutes, reports, presentations and summaries, prepared for the Board of Directors regarding the transaction'.* The document entitled '*Proposed Acquisition of the subscriber base of Global Telematics South Africa ("GTSA") from the Thales Group'* clearly falls into one or both of these categories. So while her affidavit may be technically true insofar as no document submitted to the Securities Regulation Panel has been omitted, Vodacom has not complied with the Act in submitting all the other relevant documentation required nor the requisite affidavit explaining this omission. If this was the approach taken in this transaction we are concerned that similar internal documentation may have been omitted from previous filings accompanied by the same thoroughly cynical, essentially deceitful affidavit.

[30] We take an exceedingly dim view of the contempt that Vodacom's conduct reveals for the regulatory process and recommend that the Commission takes the same view. It is, after all, not possible to administer the merger provisions of the Act effectively if parties cannot be relied upon to comply with the Act's requirements to submit relevant information. It has come to our attention that merger filings are increasingly accompanied by similarly carefully constructed, deceitful affidavits. They should be rejected by the Commission. And where the Commission discovers the half-truth – and, consequently the non-compliance – that these affidavits seeks to camouflage it should not hesitate to prosecute the guilty parties to the full extent of the law. Where it discovers that a merger has been approved on the basis of misleading information – and this would include the withholding of pertinent documentation – it is entitled to revoke its approval of the transaction and/or ask the Tribunal to impose an administrative penalty.

[31] It is our earnest recommendation that the Commission treats failures to comply with provisions of this sort as serious contraventions of the Act. We have noted that the affidavits required to be submitted in Terms of Form CC4 (2) are frequently submitted in the format employed in this filing. It should be seen for what it is – a cynical legal stratagem to comply with the technical letter of law while circumventing its true purpose, which, in this instance is

designed to ensure that information is filed that enables the competition authorities to undertake a thorough and expeditious assessment of a transaction's impact on competition and the public interest. The alternative is a merger decision based upon deficient and, as a result of critical omissions in the filings, blatantly misleading information, or, a Tribunal process supplemented by the massive discovery processes leading to lengthy hearings and decision making processes.

[32] In our view the only way of putting an end to this flagrant contempt for the law, a contempt which seriously undermines the ability of the authorities to effectively administer the Act, is to prosecute offenders.

Conclusion

[33] While we are firmly of the view that the acquiring party has wilfully failed to comply with the Act in order to ensure a favourable competition assessment, we believe that even on a full consideration of the evidence, including the documentation belatedly provided to the competition authorities, this transaction will not, on its own, result in a substantial lessening of competition. There are no public interest issues. Accordingly the transaction is unconditionally approved.

_____ **8 April 2008**

D Lewis **Date**
Tribunal Member

Y Carrim and N Manoim concurring

Tribunal Researcher : J Ngobeni
For the merging parties : Hofmeyr and Webber Wentzel Bowens
For the Commission : Grace Mohamed (Mergers and Acquisitions)