COMPETITION TRIBUNAL SOUTH AFRICA

Case NO: 135/LM/Dec08

In the matter between:

Vodafone Group Plc	Acquiring Firm
And	
Vodacom Group (Pty) Ltd	Target Firm

Panel	: D Lewis (Presiding Member); Y Carrim (Tribunal Member) and N Manoim (Tribunal Member)
Heard on	: 25 February 2009
Decided on	: 25 February 2009
Reasons Issued on	: 27 March 2009

Reasons for Decision

Approval

[1] On 25 February 2009 the Competition Tribunal issued a Merger Clearance Certificate unconditionally approving the merger between Vodafone Group Plc and Vodacom Group (Pty) Ltd. The reasons appear below.

Parties

[2] The acquiring firm is Vodafone Group Plc ("Vodafone"), a company incorporated in accordance with the laws of England and Wales. Vodafone is a publicly listed company on the London Stock Exchange and Vodacom Depository Shares are listed on the New York Stock Exchange. Vodafone is a listed company and it is therefore not controlled directly or indirectly by any third party.

[3] The primary target firm is the Vodacom Group (Pty) Ltd ("Vodacom")[1].

[1] Vodacom directly or indirectly controls the following firms: Vodacom (Pty)Ltd, its operating subsidiary in South Africa; Vodacom Service Provider (Pty)Ltd;Smartphone (Pty)Ltd;Smartcom (Pty)Ltd;Cointel VAS (Pty)Ltd Vodacom Properties NO.1 (Pty)Ltd; Vodacom Properties NO.2 (Pty)Ltd; Vodacom Ventures (Pty)Ltd; Vodacom International Holdings (Pty)Ltd; Vodacom Tanzania Ltd;Number Portability Company (Pty)Ltd and Gateway Telecommunications SA (Pty)Ltd.

Transaction

[4] Pre merger, Vodafone through certain subsidiary companies, holds 50% of the issued share capital of Vodacom. The remaining shares are held by Telkom SA ("Telkom"). In terms of the proposed transaction, Vodafone intends to acquire a further 15% of the issued share capital in Vodacom from Telkom. Telkom will then unbundle the remaining shares which it retains in Vodacom (35%) to its own shareholders, who are members of the public. Post merger Vodafone will hold 65% of the issued share capital of Vodacom and the remaining shares of Vodacom will be publicly held.

Rationale for the Transaction

[5] The merger resolves an impasse that was created by having two controlling shareholders with different strategic objectives.

Parties Activities

[6] Vodafone is a large international mobile telecommunications group providing a range of services.[2]

[7] Vodacom is also a vertically integrated mobile telecommunications company active in the upstream as one of the three companies in South Africa that are licensed to operate at the wholesale cellular network level.[3] Vodacom is also active downstream as a service provider through its affiliate Vodacom Service Provider (Pty) Ltd. Vodacom recently launched Vodacom Business. Vodacom Business has developed its own MPLS-based IP network based primarily on lines that it has leased from Telkom and fibre that it is in the process of laying in major cities across Gauteng and other metro areas in the country. Vodacom Business has already been launched and has customers signed up for a number of services including access services via fibre and WiMax, managed network services.[4]

[2] For a complete list of Vodafone's activities please see page 56-62 of the record.
[3] At a network level or carrier level, operators build and maintain networks in order to provide airtime
[4] Vodacom recently acquired the sole control over Gateway Telecommunications SA (Pty)Ltd. Gateway is a provider of value added voice and data network services to multi national corporations and enterprises as well as mobile communications companies. Vodacom also acquired Storage Technology services (Pty) Ltd an enterprise storage solutions provider, which provides storage and hosting and consulting, implementation and managed services. It is currently active in the on-site provision of IT services, focusing on data centre storage and security.

The Relevant Market

[8] The Commission made no finding on the relevant market for the purposes of competition evaluation since Vodafone does not compete with Vodacom in any of the product markets in South Africa. With regard to geographic market, Vodafone provides an extensive range of mobile telecommunication services on a world-wide basis and Vodacom provides its services throughout South Africa.

Competition Analysis

[9] Since Vodafone does not compete with Vodacom in any of the product markets in South Africa we consider it unnecessary to evaluate the horizontal effects of this merger. The Commission analysed the vertical effects of the merger. According to the Commission in 2004 Vodafone entered into strategic alliance with Vodacom which gives Vodacom access to Vodafone's global research and development, buying power, products, services and content, including retail roaming products and branding arrangements.[5] The Commission's investigation also revealed that Vodafone also has a relationship with Vodacom at the network market level because of international roaming arrangements. According to the Commission, Vodafone customers roam on Vodacom's networks in South Africa, Lesotho, Mozambique, DRC and Tanzania. With regard to these roaming arrangements the parties submit that very little is likely to change as result of the merger as Vodafone will continue to use Vodacom's network post merger. We therefore agree with the Commission's conclusion that the vertical integration between the parties is unlikely to result in any substantial prevention or lessening of competition.

[10] The Commission also analysed both input and or customer foreclosure. According to the Commission in terms of input foreclosure the concern would be the ability of the merged entity's ability to foreclose its upstream rivals (MTN and Cell C) from the market by depriving them access to a sufficient customer base. We are of the view that merged entity can engage in this type of foreclosure with or without the merger and we therefore agree with the Commission that the merged entity's ability to engage in input foreclosure is neither merger specific nor likely. Customer foreclosure occurs when the merged firm prevents its downstream rivals from sufficient or reasonably priced inputs from the merged firm's upstream operations (such as,for example, Vodafone providing roaming services in Europe and elsewhere to MTN and Cell C customers. The Commission's investigation revealed that

[5] The parties allege that the Vodacom alliance with Vodafone enabled Vodafone to be the first mobile network operator to bring innovative products and services to South Africa including the Vodafone 3G mobile connect card; BlackBerry and Vodafone live.

the relationship between Vodafone and Vodacom existed before the merger and will continue after the merger. We agree with the Commission's view that the merged entity can engage in this type of foreclosure with or without the merger.

[11] The merger, as correctly argued by the merging parties, will lead to the end of the integration between the country's largest fixed line operator and largest mobile operator. Given that we were advised that under the new regulatory regime both firms will now be free to compete with one another this outcome is pro-competitive.

Public Interest Issues

[12] During its investigations the Commission contacted the Media Workers Association of South Africa ("MWASA") and the Communications Workers Union ("CWU") in relation to the proposed transaction. Only the CWU made submissions to the Commission. The CWU was invited to make submissions and raise its concerns before this Tribunal. At the hearing CWU was represented by its first Deputy President Mr Kathy Pillay and by its General Secretary Mr Gallant Roberts. Their first concern is that Telkom's sale of its stake in Vodacom may result in a large portion of the workforce in Telkom being retrenched or fired. This appears to be based on the fact that Vodacom contributed significantly to Telkom's profits and that without it, there would be a threat to its viability. Telkom is neither the acquiring firm nor the target firm in this transaction. Whether our public interest jurisdiction in respect of employment can extend to the selling firm is not clear. We will assume in the union's favour that we can. However beyond the surmise that the sale of its Vodacom stake will adversely impact on Telkom we have no evidence from the union or in the record to show that employment loss at Telkom as a result of the sale is likely or even contemplated. There is thus no justification for us to impose any condition on Telkom or to prohibit the transaction based on mere inference.

[13] The next concern appears to be the alleged labour practices of Vodafone. Although not made entirely clear in the submission the argument was that Vodafone had a reputation internationally for an aggressive posture towards labour. What is not clear from the submission is whether labour practices at Vodacom at present are likely to change as a result of the change from joint to sole control. Clearly post merger Vodacom must continue to abide by our labour legislation.

[14] The CWU also raised a concern regarding prior implementation of the proposed merger. We agree with the Commission that this issue requires a separate inquiry and it should not be treated as part of the merger evaluation in this case. We therefore conclude

that the proposed transaction is unlikely to substantially prevent or lessen competition or raise a substantial public interest concern.

Conclusion

[15] Accordingly the transaction is unconditionally approved.

____________________	**27 March 2009**
N Manoim	**Date**

Tribunal Member

D Lewis and Y Carrim concurring

Tribunal Researcher : Jabulani Ngobeni

For the merging parties : Adv David Unterhalter SC with Adv Anthony Gotz instructed by Webber Wentzel and Cliffe Decker Hoffmeyrs

For the Commission : Thabelo Masithulela (Mergers and Acquisitions)