COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

Case No: 72/LM/Sep04

In the large merger between:

Multichoice Subscriber Management (Pty) Ltd

and

Tiscali (Pty) Ltd

Non-Confidential Reasons for Decision

APPROVAL

On 12 January 2005 the Competition Tribunal issued a Merger Clearance Certificate conditionally approving the merger between Multichoice Subscriber Management (Pty) Ltd (Pty) Ltd and Tiscali (Pty) Ltd (Tiscali) in terms of section 16(2)(b). The reasons for the approval of the merger appear below.

Transaction description

1. The acquiring firm, Multichoice Subscriber Management Services ('M-Web"), is a subsidiary of M-Web Holdings, whose ultimate owner is Naspers Limited.[1]

2. M-Web is acquiring the entire issued share capital of Tiscali from Tiscali International BV. The internet access business of Tiscali will, post-merger, be incorporated into the internet access business of M-Web. The Tiscali Cellular Mobile Telecommunications business is excluded from this transaction.[2]

Hearing

3. The hearing was held on 12 January 2005. We heard testimony from Anthony Brooks, General Manager of the Internet Service Providers' Association ("ISPA"), who was called as an expert witness by the

[1] Although M-Web is the name of Multichoice's holding company, it is the brand and business unit that is relevant for the purpose of this transaction, so we will for convenience refer to the acquiring firm as M-Web

[2] In a separate transaction we have approved of the sale of Tiscali's cell phone business to Vodacom. See case number 87/LM/Oct04.

Commission, Gerald Chiwashira from G -Soft who had noted objections to the merger, Kim Reid, CEO of M-Web, and Diego Massidda, CEO of Tiscali, who testified on behalf of the merging parties.

Rationale

4. Tiscali's Italian based parent decided in 2004 to sell its South African subsidiary. The reasons for this decision, we were told, had nothing to do with conditions in the South African market - the business was considered to be doing well - but were rather rooted in changes in the regulatory environment in Europe. As a result of these changes the group had decided to invest more heavily in its primary market and needed to generate cash to fund this. It decided to sell its South African investment and called for offers.

5. After a bidding process it decided to sell the internet business to M-Web and the cellular business to Vodacom.

6. M-Web saw an opportunity to increase its subscriber base in a market, where growth appears to be driven more by acquisition than organic growth. Both parties consider that the market is stagnating presently.

Merging parties

M-Web

7. M-Web was launched in October 1996 by the acquisition of an ISP from the CSIR. It focussed initially on selling technology as a consumer product with an emphasis on handholding, support and reliability. In 1998 it bought the I-Africa ISP business from UUNet, comprising approximately 60 000 subscribers. In 1999 it acquired another ISP, Netactive, with a consumer base of approximately 31 000 subscribers. By 2000 its subscriber base had reached approximately 250 000. Since then, M-Web maintains that it has lost subscribers due to keen competition, especially from ABSA and Telkom.

8. Early in 2004 it launched a product called "Polka", a lower priced internet access brand, in order to increase its subscriber base.

Tiscali

9. In 1998 Vodacom and World Online, a Dutch company, started an ISP in which each had a 50% stake. The joint venture grew by acquiring many subscriber bases. Historically Tiscali had always been number two in terms of size after M-Web.

10. In 2000 Tiscali, an Italian company, bought a 60% interest in the company, buying out the Dutch based parent and part of Vodacom's

stake. Nevertheless it retained the rights to the brand and continued to trade as WorldOnline. In 2001 Tiscali bought the remaining 40% from Vodacom and became the sole shareholder. In 2002 the company acquired a relatively small ISP called Netactive, focussed on the corporate market. That allowed the company to increase its presence in the corporate market, especially in leased lines dedicated connections. The re-branding of WorldOnline to Tiscali only started in 2003, being completed in January 2004. [3]

Identifying the markets

11. The parties provide the following services:

M-Web	Tiscali
Internet access including leased line	Internet access including leased line
Local access	Cellular mobile telephony
E-commerce	
Subscriber management	

Market analysis

12. Both merging firms as we have seen from the table provide a service that enables consumers to access the internet. The merging parties would have it that this is where the boundaries of the relevant market are to be found, and that it would be wrong to segment it further on some more narrow definition. Indeed they go as far as suggesting that even defining a market as one for internet service provision is a concession to narrowing rather than broadening the market. Thus in their filing they state:

" A narrower definition of the market (that is narrower than telecommunications services) is the provision of access to the Internet (or Internet connectivity) generally."[4]

13. They go on to assert that further segmentation on the basis of the licence required or the technology used to provide access is unwarranted as these are "*technical details not integral to the service being provided.*"[5]

[3] Record page 1155
-[4] Record page 43.
[5] Record page 43.

14. The Commission has distinguished between a corporate access and a dial-up access market. This segmentation is not specifically motivated, but appears to arise from the parties own business practice in regarding these as distinct services with distinct customers. What this amounts to, despite the labelling offered by the Commission, is a segmentation premised on customer needs and profiles. Large customers, who the Commission locates in the leased line market, are corporations with high numbers of users willing to incur the costs of this kind of service. Dial-up customers on the other hand are largely consumers who operate from homes and comprise both families and small businesses.

15. We will now consider if the Commission's delineation of the market is appropriate or whether we should segment it in some other fashion, if at all.

16. Internet service provision is about getting the user access to the internet via a range of technology and intermediaries to the networks that carry the data from one consumer of services to another.

17. A consumer wanting to access the internet has a range of technical options to choose from which are disparately priced. What influences the choice finally made is not only the consumer's propensity to pay, but also the quality and quantity of access required.

18. The simplest form of access and the most pervasive at the moment is called 'dial-up' access. The consumer accesses the internet via a telephone through a modem. The consumer gets access by having a contract, pre-paid or subscription with an internet service provider, such as one of the merging firms. Note that dial-up access is defined not by the purpose for which it is used i.e. for private or office use, but the means of access.[6] The disadvantage is that access is not constant and the consumer must dial-up to access the service and then terminate it each time it wants to connect to the Internet.

19. The service is limited to one user at a time and is considered slow. Its advantages are price and technical simplicity.

20. The next stage up is the ISDN line which is also used mainly by households and small businesses. ISDN stands for Integrated Services Digital Network. This is a digital service between a customer's home and the dial-up telephone network.[7] Both Tiscali and M-Web again provide this service. Tiscali's pricing at present is more competitive but the services are not directly comparable and vary in relation to the size

[6] See for instance "Internet Access in South Africa, 2004, An annual study of the Internet access market in South Africa", by World Wide Worx (Pty) Ltd, (Research led by Arthur Goldstuck.), page 37, where the authors say that for the purpose of their research that *"No distinction is made between dial up accounts at homes and offices."*

[7] BMI report record page 801

of the mailboxes for e-mail and the number of e-mail addresses per subscription. [8]

21. ISDN is more expensive but faster than analogue dial-up, according to BMI.[9] Subscriber figures indicate that this service is much less pervasive than analogue. Tiscali's figures indicate that it has about one tenth the number of ISDN subscribers than analogue dial-up.

22. The next mode of access is ADSL (Asymmetric Digital Subscriber Line). This technology allows the user to send faxes, talk on the telephone and surf the internet simultaneously. The advantage of the service is that it is always on with no dial-up necessary. The service is charged at a fixed monthly fee. Fees for ADSL vary according to the size of the gigabytes offered. However pricing even for the lowest is at a premium to that of the most expensive analogue service.

23. At the next level is the leased line. Here the customer is given a dedicated line to an internet service provider. This again is on all the time but allows for use by a large number of users and thus is the preferred method of access for large organisations with a need for many users. Not surprisingly this is the most expensive service and is not used by households or small businesses.

24. Other more ambitious forms of internet access exist as well, albeit that they are very much in their infancy at the time of this decision. We are told that Sentech offers wireless broadband service which users will be able to access by carrying a modem in their pockets and connecting from anywhere that has reception.[10] But at the same time it is suggested that there have been significant delays in the roll out of this technology.[11] Mr Brooks, the Commission' s expert, made much of the fact that from 1 February 2005 there would be significant deregulation in the industry following an earlier announcement to this effect by the Minister. He predicted that this would lead to an expansion of business for existing private sector providers who would no longer be dependant on having to use Telkom' s infrastructure, as they were obliged to do by law up till now. We were also informed that the mobile cell companies had targeted internet access as basis for business expansion, and that access could come from a cell-phone.

25. What all these methods have in common is that they provide a means of access to the internet, but this does not mean that they constitute substitutes for one another for the purpose of competition analysis.

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[8] See record page 1168.
[9] BMI report page 801
[10] See World Wide Worx op cit record page 1031
[11] See World Wide Worx op cit record page 1031

26. Now it must be noted that firms that provide access to the internet typically offer more than one of these modes and that the merging firms are no exception in this respect.

27. We have up till now examined the demand side of the market. But delineating the correct antitrust market also requires an examination of the supply side. Here again the task is no easier. In the first place the market consists of various tiers.

28. At the bottom of the structure is Telkom who to date have enjoyed a monopoly over the supply of infrastructure a situation that may change with deregulation. Telkom sells bandwidth to a range of firms who operate largely as wholesalers of this bandwidth. These firms are sometimes referred to as first tier firms. First tier firms then wholesale this bandwidth to other firms who in turn act as retailers in the sense that they sell internet access to the ultimate consumer. The merging parties fall into this latter category of retailer, also known as second tier firms. There is also a category of firm who are considered by the market to be third tier firms or virtual ISP's who, in the sense that we understand this distinction at all, sell bandwidth to customers but are little more than marketers who depend entirely on the first tier supplier for all the back-up including that of a call centre. For our purposes this distinction is academic as firms in the so-called third tier are still competitors of the merging firms and other firms in the second tier. We have reflected this structure of the industry in the drawing below.

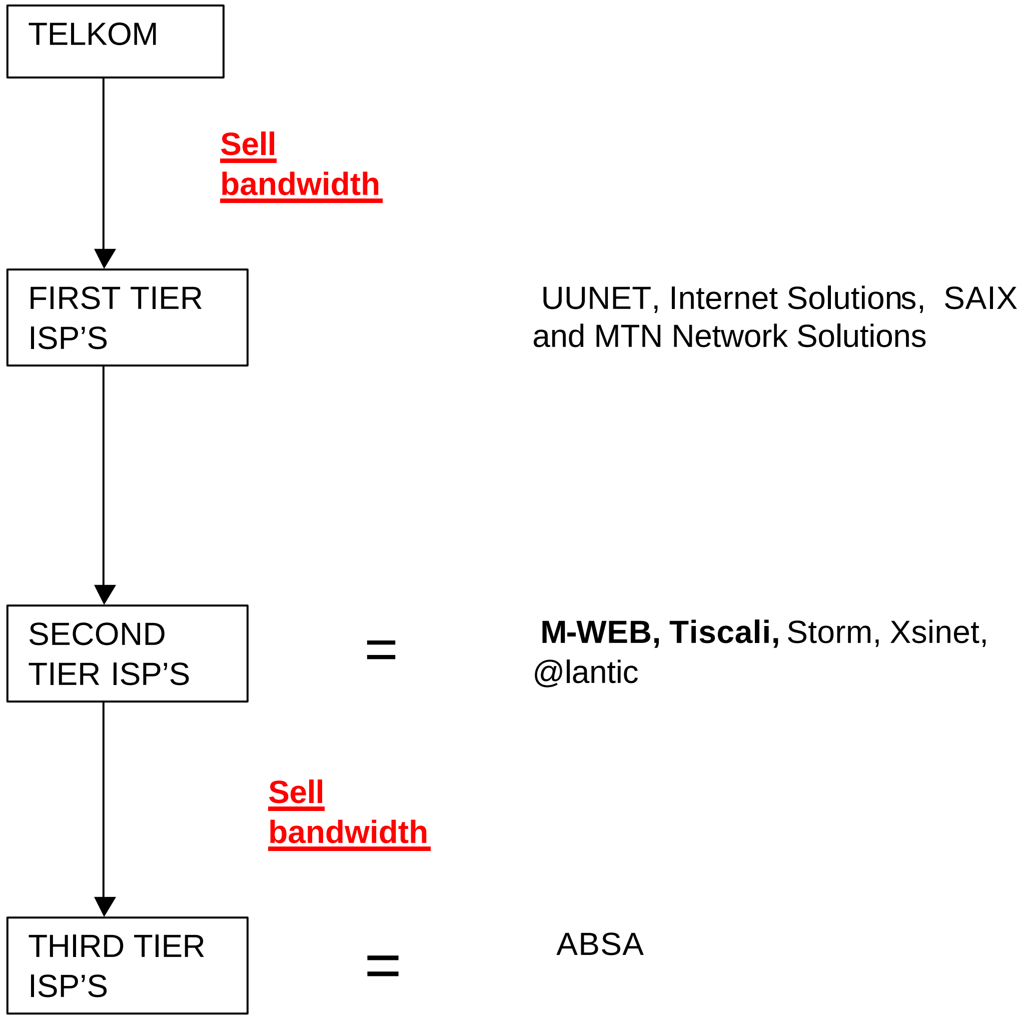

Diagram 1: Structure of industry

29. But this model is far from rigid. Although Telkom is presently a sole supplier to the wholesalers, it is also a competitor itself in the retail market and thus of the merging parties.

30. Although the wholesalers are not in the retail market for dial-up access, they do sell directly to customers who want leased lines.

31. The industry is thus characterised by vertical relationships where suppliers either compete with their customers or at least have the potential to do so.

32. What distinguishes the merging firms as retailers is their access to a mass customer base. This means that they have to concentrate for their competitive advantage on customer service and marketing. This at present distinguishes the merging firms from their suppliers in the first tier, as the latter, whilst geared up to service a niche corporate market, are not at present competitive in the mass market.

Conclusion on defining the relevant market

33. Both M-Web and Tiscali offer analogue and digital dial-up, ISDN, ADSL and leased line. M-Web currently provides a limited internet access service via leased lines. Tiscali too, although the parties state that a fair proportion of its customers use leased lines.[12]

34. The merging parties, as we observed earlier, commenced with an opening observation that the market was one for telecommunication services. That this observation was barely credible seems to have been tacitly acknowledged by them, as they proceeded almost immediately with a concession that the market could be characterised as one for internet access.

35. What we have to evaluate is whether this is an adequate description or whether the market may be further delineated. As the discussion above has indicated, user requirements differ vastly depending on the sophistication of the service required and this is reflected not only in the choice of different technologies, but also in their prices. This is further reflected in the way both merging firms have marketed their products at consumers. We have had access to the business plans and marketing materials of both the merging firms. The home-based consumer, whether a private household or a small business, is identified as a distinct segment of the broader access market. These consumers are overwhelmingly in dial-up access, to a lesser extent in ADSL and even less ISDN. This is not surprising given that the more sophisticated the service, the greater the price to the consumer. But it is not possible to delineate the relevant market on the basis of choice of technology alone. Rather it is the nature of the consumer and the type of service they require. [13]

36. For this reason we suggest, as a point of departure, that there is a distinction between a home-based market and a corporate market.

37. Although the Commission has not followed this approach, instead, as we noted above, using the technology utilised to segment markets into a leased line and dial-up access market, these segments roughly correspond to the division between a corporate and home-based consumer market that we have preferred.

38. Leased lines are far more expensive to operate than other forms of access particularly dial-up access, and are typically only used by corporates or large institutions. On the supply side this market looks different as well.

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[12] Record page 46

[13] Figures show that as at 2004 at least 88% of Tiscali customers utilise dial–up access. See Annexure E Subscribers Warranted. M-Web did not provide figures but stated too that a large proportion of their customers utilised dial-up access.

39. Support for this distinction also comes from industry commentators. According to World Wide Worx;

"The corporate market split off almost entirely form the dial –up services arena with the two major ISP's., Internet Solutions and UUNET, focussing entirely on the former. They remain the market leaders."[14]

40. This highlights an important distinction between the corporate and the home-based market. The leading firms in this former market are not the merging parties, but their suppliers. Indeed, according to the parties they would post merger only have a [less than 10%] per cent share of this market. For this reason if we assume that the corporate market, or in the Commission's estimation the leased line market, is a separate relevant market the merged entity is not post merger likely to be able to behave anti-competitively given its low market share. We need not then consider this market further.

41. It remains for us to consider the home-based segment of the industry. Let us assume that in the home-based segment at present, dial-up access is predominantly the technology of choice. Does this exhaust all the possible ways to delineate this segment for competition purposes? There is some suggestion that there may be a further relevant market distinction in the home-based segment between a premium and non-premium service. This is one of the issues that we explored during the hearing, because if there is a distinct premium market, the merged firms would be its only significant players and hence the merger would lead to a near monopoly.

42. The emergence in the market of a distinction between premium and non-premium offerings was a response to new entry into the market by Absa and Telkom as low cost providers.

43. Absa caught the market by surprise when it entered in 2001 by offering free internet access. The response of consumers was overwhelmingly favourable. However the free offer did not last long and soon Absa began charging its customers for access, discriminating in price between those who were its banking customers and those who were not. Absa's strategy was to use its internet offering not as a means to get into the internet business, but to get customers for its banking business. The Absa offering was a no-frills one that was cheaper even for the non-Absa customer than the services offered by the traditional incumbents, M-Web and Tiscali.

44. Telkom's entry into the internet access home-based market should not have come as a surprise. Indeed the surprise is that it had taken so long for it to do so. Given Telkom's dominance of every tier of the

[14] See World Wide Worx op cit record page 1040.

access edifice it is baffling that it realised so late in the day of the value of being in the second tier. The Telkom offering, marketed through its access to fixed line consumers, was also priced significantly below that of the merging firms.

45. Thus faced with a twin-prong attack on their traditional market by two firms with deep pockets, and access, through their related businesses, to a large customer base, M-Web and Tiscali were forced to respond. Interestingly, both responded in the same way. They first introduced a low priced service to be competitive with Telkom and Absa. M-Web's offering is separately branded with no apparent link in the name and marketing to the M-Web business. Polka, as the product is known, has only recently been introduced and at this stage it is too early to evaluate its success.

46. Tiscali's also developed other, simpler products with less "bells and whistles" at a price of R79.00 - R 90.00 per month, but this was not offered to the public at large, but only to select corporate client's customers who could only have access to the cheaper option, by virtue of being that corporate's client.[15]

47. Of course in developing a lower cost service the firms risked having their clients on the more expensive packages migrate downwards. To avoid this scenario their second strategy was to differentiate their offerings between premium and non-premium. The premium offering contains more features than the non-premium product and these range from access to free content such as educational material news sites and dating services, to additional e-mail addresses, larger data storage capacity and greater safety features. Whether this distinctiveness is sufficient to justify the price premium is not something we are called upon to decide. What is of interest to us is whether the product differentiation has been successful enough to justify segmenting the relevant market between premium and non-premium.

48. According to World Wide Worx;

"The number of dial-up subscribers in South Africa reached 782 000 by the end of December 2000, and the dial up user base consolidated behind M-Web and WorldOnline, [now Tiscali] *which both began to raise their fees, partly in order to position themselves as high-quality ISP's with extensive value-add, and partly because it had become apparent that subscribers were not willing to pay separate additional amounts for additional services."*[16]

49. The table below compares the rates of these particular services.

[15] Transcript page 83
[16] Word Wide Worx op cit , record page 1039.

Current Monthly Charge of the Various ISPs

ISP	Rate Per Month
Telkom Internet	R79
XSINET	R90
M-Web's Polka	R75
Tiscali Lite	R79
ABSA	R39 (ABSA clients), R65 for Non-ABSA clients
@lantic	R65

50. The cost of the premium services offered by Multichoice and Tiscali is R145 per month.

51. Note that the cost to the consumer comprises the monthly charge to its ISP and the per minute call rate charge to Telkom.

52. The parties argue strenuously in their competition filings, and thus contrary to the thrust of their marketing materials, that this market segmentation is not justified. They argue that there is still a single market for internet access and that if the consumer is paying too much for a premium service she will migrate to a cheaper one. With both Absa and Telkom, inter alia, waiting in the wings to take on the dissatisfied consumer the premium customer is not to be taken for granted by them and has choices if the premium does not justify its value.

53. But the evidence would suggest that the act of changing service providers is less ubiquitous than the merging parties would have us accept. One of the major reasons it appears that consumers are reluctant to lightly change their existing service is that like telephone numbers, e-mail addresses are not portable. The price conscious consumer wanting to change to a cheaper supplier must factor in the inconvenience of a changed email address.

54. Whilst Mr Reid of M-Web did not consider this an insurmountable obstacle to changing one's provider, his company's own practices suggest otherwise. When M-Web has acquired other businesses it has allowed consumers to retain existing e-mail addresses. In the sale agreement with Tiscali it has provided for the right to use the Tiscali name for [confidential] years before it will have to migrate customers on to another name. Prior to the conclusion of the sale M-Web's anxiety to secure this right is manifest in its written offer to Tiscali where Mr Reid states:

"For this reason it is imperative that M-Web retains the Tiscali.co.za and wol.co.za domain names on the terms set out in the Sale Agreement in order to minimise the risk of losing subscribers. It is our experience that e-mail domain related cut over comes with significant

churn risk and that in the event that we are not able to manage such a risk in the manner proposed, this will have a material effect on the retention of subscribers and therefore the consideration offered."[17]

55. The M-Web strategy document indicates that Polka consumers will be allowed to migrate upward and get the premium service, whilst still retaining their Polka e-mail address, but that the opposite will not be allowed – if M-Web customers want to migrate to Polka they forfeit their e-mail address. This strategy appears to be an acknowledgment of the 'sticky' quality of the e-mail address. M-Web lets you keep your address if you migrate upwards towards the more expensive service, but it is less accommodating if you want to migrate downwards.

56. The Commission's expert, Mr Brooks, also suggested that there is inertia amongst consumers to change service providers, although he attributed this more to a reluctance to change stop-orders, than a reluctance to lose an address.

57. Yet this churn inertia, whatever its provenance, is not one which is exacerbated by the merger. Even if the merging parties were to raise the price of the premium service, it is likely that consumers, once they have come to the realisation that they may have to forfeit their address, would as easily opt for a non-premium service as a premium one. Thus the existence of an independent Tiscali is not decisive in constraining an exercise of market power by the merged entity, as once a consumer has decided to churn it is as likely, given the questionable value of the premium product, that they would churn 'downwards' rather than 'sideways'. For this reason, we believe that the merger itself would not contribute to the lack of portability already in the market, because each provider has some relational dominance in relation to its customer and that dominance is a function of the value of the inconvenience in changing e-mail addresses, <u>not market power</u>.

58. This feature would suggest that at the time of this merger, a premium segment has not yet been carved out as a stand-alone relevant market for competition law purposes and that the market is one for **internet access by a home-based consumer.**

59. That being said there is no doubt from all the materials that:

i. M-Web and Tiscali are the two largest firms in the market.

ii. Both have grown more by acquisition than organically and that this suggests that the scope for smaller rivals to grow organically is slight.

iii. Pricing behaviour suggests that they behave as a duopoly and a pricing move by one is followed by a response by the other. At present their prices are identical for both premium and non-premium dial-up

[17] Letter from Mr Reid to Evert den Hollander of Tiscali dated 21 June 2004.

access. According to Mr Massidda from Tiscali when on one occasion they priced above M-Web they suffered the consequences and decided to keep pricing in line in future. It would appear that M-Web was the price leader in this relationship.

iv. Each regarded the other as its primary rival and that the merger leads to the elimination of M-Web's most effective competitor.

v. If the market is a home-based market the merged parties combined share would be 34.4 % made up as follows:–

Firm	**Market Share**
M-Web	24.3 %
Tiscali	10.1 %
Telkom Internet	15.8 %
ABSA	14%
Atlantic Internet	3 %
XSInet	1.2 %
Internet Solutions	16 %
Other	15.4 %

Source: Parties' figures given at hearing

60. Precise data for this share is nevertheless not available and the merging parties do not claim that their knowledge on this point is definitive. Nevertheless, even accepting a broader home-based market, one not segmented into a premium and non-premium market, the merging parties have a large enough share in a concentrated market for it to raise some concerns.

<u>Barriers to entry</u>

61. It is trite that even if concentration levels are high in a market as long as entry barriers are low, a merger is unlikely to be anti-competitive as any attempt by the merged firm to exercise market power will be countered by new entry, provided that entry is timely, likely and sufficient. [18]

62. The merging parties argue that entry barriers in the internet access market are low for three reasons:

62.1 Firstly, new entrants may come from firms with access to a large client base of their own who see the provision of internet services as an add-on to attract clients to an unrelated core service. In this regard we have seen already the successful entry of a firm like Absa. At the time of this decision we are informed that Discovery, a medical aid scheme and

[18] See United States Department of Justice and Federal Trade Commission's "Horizontal merger Guidelines, 1997."

administrator, is offering internet services at a very low cost to its members.

62.2 Secondly, is the fact that this is an innovation market. The Act requires us in section 12A(2)(e) to recognise:

" the dynamic characteristics of a market including growth, innovation, and product differentiation."

These are all features inherent in this market. We are advised that wireless internet access for the home consumer is around the corner, that the new incumbent in the fixed line market is likely to target this market as an area for growth and that the three mobile phone operators have plans up their sleeves to provide an internet access service as well. Whilst we must be cautious about the optimistic hype that surrounds the plethora of would-be but not yet proven entrants, the history of the market to date has shown that entry has come from unexpected quarters (e.g. Absa) and that new technology is developing continually and with it, the potential for new entry and newly priced offerings. This has been the decisive factor in our allowing the merger. Were this not a dynamic innovation market we might have found against the merging parties.

62.3 The third reason given to justify likely entry is its low cost. Both the merging parties and Mr Brooks indicate that a firm can enter the market at the access provider level without great capital outlay. Even if we accept that is the case, it does not mean that entry will be effective. G-Soft, the intervenor, indicated that this was precisely the problem and hence their interest in acquiring Tiscali. The history of both parties indicates that they have grown more by acquisition than organically, and that post-merger, most of the jewels in the market will have been acquired. Of course some new entrants such as financial institutions have a built-in marketing advantage by their ability to mine their existing or potential customer basis.

63. The brand new entrant without a client base may have to rely on new sign-ups and this requires access to the retail market where people purchase their new computers and software.

64. For this reason, both Tiscali and M-Web have successfully tied up the major computer retail outlets with exclusive agreements. Tiscali has exclusive relationships with Game and Dions. M-Web has an exclusive relationship with Internet Connection, which clearly has a large presence in the retail market, operating chains in the major centres around the country and described by the merging parties as one of the largest computer retailers in the country.[19] Kim Reid, the MD of M-

[19] Transcript page 36-37

Web, admitted that Incredible Connection was their most important and had been their most effective channel to market.[20] The Commission has recently received a complaint from a small computer retailer complaining about the fact that the exclusivity impacts on his ability to compete in the sale of computers. As he cannot sell computers that come with free internet software of one of the merging parties as part of the deal, his offering, he alleges, is less attractive.

65. The analogue of this complaint would be the difficulty of small internet companies to enter the market for sale of their product if they are precluded from the major retail outlets. For this reason we have proposed a condition that seeks to address this problem by requiring the merged firm to terminate its exclusive distribution arrangements with its retail customers. The merging parties were consulted on this condition and had no objection.

66. The other potential problem the merger raises concerns the buying power of the merged firm. UUNet, which along with Internet Solutions is one of the first tier firms in the internet market, has raised this concern with us in a submission dated 4 January 2005. Its concern was that the merged entity could enjoy *" extremely high buying power"*. The submission was far from clear, but we understand UUNET to be concerned that the balance of power in the industry could shift from the first to the second tier. However UUNET ended its objection by stating that it has not raised an *"official objection to the merger going ahead* but, that *"it is of the opinion that if it does go ahead the current balance of power in the market will be significantly disturbed."*[21]

67. It is difficult to pursue this concern further when the protagonist has raised it in such a faint-hearted manner. Granted that M-Web in its internal documents does put forward the ability to negotiate better terms with suppliers as one of the advantages of the merger. Since the input costs of its provider constitutes most of its input costs there is no doubt where the squeeze on suppliers will be exercised. However, it seems unlikely that, given the structure of the foundations of this industry that first tier firms such a UUNET will be effectively squeezed in a manner that may raise competition concerns. If the merged firm overreaches UUNET, so that it is no longer profitable for it to supply it at post merger prices, then it can enter the market itself at the second tier and compete with the merged firm. This threat is likely to restrain the merged firm's exercise of market power as a purchaser of inputs. Recall that UUNET was once in this market with Iafrica.com before it sold that business to M-Web in return for the latter staying out of the first tier market.

[20] Transcript page 39
[21] See Record page 70 –71.

68. We do not see that the merger will lead to the merged firm having monopsony power in respect of first tier firms .At present there are at least four firms in the first tier market.[22]

Vertical issues

69. As outlined above, Naspers is the ultimate shareholder of M-Web. There is therefore a vertical relationship between a primary internet service provider and a firm which is a significant content contributor to its portal. According to G-Soft, content provision is crucial to the success of any ISP. G-Soft raised the concern that the merger would give M-Web a big advantage over other incumbents in the industry, insofar as Naspers is a multinational media group with operations in, inter alia, pay-TV, print media and publishing. Naspers for instance, controls M-Net, MultiChoice, News 24, and prints and publishes Beeld, Volksblad, City Press and Daily Sun. It thus is an owner of a considerable amount of content, which, if considered a 'must have' by consumers, would give the merged entity a considerable competitive advantage.

70. M-Web has explained that Naspers offers it two types of content product. The first, of which news on Nasper's Media 24 site is one example, is what it terms 'open content'. Although available on dial-up to its subscribers, the content can be accessed freely by anyone with internet access.

71. The second type it terms 'closed content'. This content is only available to subscribers and is not open to view on the internet. An example of this closed content is Naspers' *A-to-Z of Diseases*. Although this product is available to M-Web, Naspers does not sell it exclusively to M-Web and it gives examples of other firms, unrelated to Naspers, who have purchased this content for their subscribers. According to figures given by Naspers, M-Web has had to pay for this content. The figures also show that it is paying more than at least two other customers for the content.

72. Although Tiscali also offers content none of this is acquired exclusively by it and rivals are free to purchase similar content.[23]

73. The commission argued that any vertical concerns that arose out of the relationship between Naspers and M-Web, existed prior to the merger and are not merger-specific. However, there is a possibility that if there were foreclosure problems before, this merger could exacerbate these, since the merged entity would command a greater share of the market, therefore the foreclosure effects would be more pronounced.

[22] See World Wide Worx op cit record page 1041.
[23] Record page 909

74. Nevertheless even if foreclosure may be attractive to Naspers post merger, we must consider if it is likely. The Commission's investigations revealed that of the 22 content products M-Web provides to its customers, only 6 are sourced from Naspers. Of those 6, not all are offered exclusively to M-Web.

75. Our conclusion is that the content:

   i. is not of the 'must have' variety. Indeed with all due respect to the merging parties, it seems particularly lacking in that respect;
   ii. is not exclusive to the merged firms presently ;
   iii. is not unique. There is a vast amount of similar content available to new entrants;
   iv. does not play a decisive role in consumers preference for providers.

76. For all these reasons we concluded that the merger raises no serious vertical concerns.

<u>Better buyer issue</u>

77. An objector to the merger, G-Soft, raised certain concerns about the merger. G-Soft is a new BEE entrant, which was one of the bidders for the Tiscali business, and indeed at one stage was considered the preferred bidder. It was ultimately rejected as the buyer in favour of M-Web, it appears for funding reasons, although this remains a subject of dispute between G-Soft and Tiscali.

78. G-Soft's objections were to the effect that the merger with M-Web raised both vertical and horizontal concerns and that if it were the purchaser of Tiscali, as a new entrant, none of these concerns would arise.

79. We have already dealt with the horizontal and vertical issues and found that the merger would, if accompanied by the condition we require, not have an anticompetitive effect.

80. Although G-Soft, had it been successful as a purchaser, may have presaged a more competitive market than M-Web, this is not the test we have to apply. Our task is not to indicate which firm might be a preferred buyer, but only if the merger as proposed would be in violation of the Act. If the answer to the latter question is in the negative then the merger as proposed must be approved regardless of whether a better bride waits in the wings.

81. Although sympathetic to G-Soft's obvious disappointment at not being able to conclude the deal, we cannot interfere with the merger on this basis.

<u>Public interest –employment condition</u>

82. We have imposed a condition in relation to the retrenchment of employees. This condition arose not out of the hearings but an agreement reached between the merged entity and their employees as part of their collective bargaining. For this reason we do not have to explain it any further.

83. In imposing this condition, we have followed the approach adopted in a previous merger, in terms of respecting the agreement reached between employees and employer.[24]

Conclusion

We approve the merger subject to the conditions, which are set out in the annexure to this decision.

______________ 20 April 2005

N. Manoim

Concurring: D. H. Lewis, M. Madlanga

For the merging parties:	J. Meijer, Cliffe Dekker Attorneys
For the Commission:	C. Mabusa, K. Moodliar, M. Langa, Competition Commission

[24] Cherry Creek Trading 14 (Pty) Ltd and NorthWest Star (Pty) Ltd - 52/LM/Jul04