

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.: 51/LM/Jun06

In the application by:

The Competition Commission

In the large merger between:

**Telkom SA Ltd
and
Business Connection Group Ltd**

**Acquiring Firm
Target Firm**

Panel : N Manoim (Presiding Member)
Heard on : 28 September 2006
Decided on : 28 September 2006

REASONS FOR DECISION

The application

- 1] The Commission, on 26 September 2006, applied in terms of section 14A(2) of the Competition Act (the Act), for a fifteen day extension of the period in which it is to forward its recommendation in respect of this merger. The period was to expire on that day.

Background

- 2] In terms of section 14A(1)(b) of the Act the Commission must, within 40 business days, forward its recommendation to the Tribunal. However, this

period may be extended by periods of up to 15 business days at a time on application to the Tribunal.

- 3] In the ordinary course if the Commission needs an extension, it approaches the merging parties for their consent and if they acquiesce, it attaches this to its application, which is considered as unopposed.
- 4] This merger was filed on 15 June 2006. The first application for extension was made on the day that the 40 day period expired, the 14 August 2006. The present period of extension, the second, expires on the 26 September. If I grant the 15 day extension sought in this application, which will be the third, the Commission will have until 17 October to file its recommendation.
- 5] This application is opposed. The Commission filed its application on the 26th September and on the same day Telkom's attorneys advised the Tribunal that they would not consent to the extension and wanted to be heard. A date for hearing was set on 28 September 2006.
- 6] At the hearing, I heard oral submissions from the Commission, Telkom's attorneys, and Mr Watt, the Chief executive officer of Business Connexion (BCX). Mr Watt advised that BCX would be separately represented at the main hearing.
- 7] Neither of the merging parties has filed papers in answer to the application and thus I base my findings on the factual issues raised in the Commission's papers, as they are the only ones before me.

Reasons

- 8] I have identified three separate reasons in the Commission's application for

an extension – i) the Commission had to replace its lead investigator, ii) the Commission is still awaiting outstanding information from third parties and the merging parties, which it requires in order to make its recommendation, and iii) the Commission has recently briefed expert consultants who require time to analyse the information, in order to assist the Commission to make its recommendation. For the purpose of analysis, I will now consider the adequacy of each of these reasons, separately, although to some extent they are interconnected, and I have borne this in mind in coming to a conclusion.

Lead investigator

- 9] The Commission has lost the services of its lead investigator who left the Commission. The case was then allocated to a new lead investigator on the 1st of September and that person had to acquaint herself with the complexities of the case. This seems to be a reasonable explanation for an extension on its own. There is nothing before me to suggest that the Commission delayed in the new appointment or ought to have known earlier about the erstwhile investigator's departure. Indeed the Commission appears to have taken the case sufficiently seriously by employing a person from the outside on a contract basis to handle the investigation. This seems a perfectly reasonable and timely response to its logistical problem.

Inadequate information

- 10] The Commission alleges that it does not yet have sufficient information to conclude its investigation. The outstanding information is sought from the following classes of persons: customers and competitors, large organisations or 'corporates' as the Commission describes them, other public bodies and the merging parties.

- 11] Although the Commission sent out its request to customers and competitors as far back as 13/14 July, most of these replies remain outstanding.¹ Requests were sent to 22 firms of which 7 have replied to date.
- 12] The list of those referred to as ‘corporates’ again reflects that the majority of the replies were still outstanding, although this request appears to have only gone out on 14 September.² Requests were sent to 18 firms of which 6 have replied to date.
- 13] Moreover, according to the Commission, some competitors are strongly opposed to the merger and as a result have made substantive submissions to the Commission. The Commission has sent follow-up questions to these objectors some of whom have not yet responded.³
- 14] The Commission has also approached another regulator ICASA, and the Department of Communications (“the DOC”) for their respective views. At the date of this application a response from ICASA is still awaited. The DOC has responded, but indicated that it may wish to make a follow-up response.
- 15] Telkom did not in argument dispute that this number of third parties needed to be consulted. Rather its complaint was that the third parties had not been subjected to any deadline to file their responses. This may well be a basis for criticism. But it is not a self-evident one. Because Telkom filed no answering papers, the Commission has not been given an opportunity to

1 Annexure KM1.

2 Annexure KM2.

3 Paragraph 4.7.1

respond to this criticism by way of replying papers and it may well have an explanation for how it conducts its investigations. In the first place, I cannot conclude with any certainty that third parties have not been put under some pressure to respond. There are at least some suggestions in the papers that third parties have been followed up.⁴ In the second place, the Commission which has considerable experience in investigating mergers, may well have its reasons for how it manages third parties, and absent this critique in any papers from Telkom, it has not been given an opportunity to explain.

16] The Commission has also requested extensive further information from the merging parties and it appears from the affidavit in paragraph 4.4 that they have taken some time to reply to this request. Indeed some information seems to still be outstanding at the date of the filing of the extension application.⁵ It would seem again from this that it took the merging parties themselves some weeks to respond.⁶ Since I assume that the merging parties have no interest in delaying matters, I draw the inference that the time was needed because of the complexities. It appears that the merging parties have filed a second report from their economists as late as 8 September.⁷ Given that the merging parties are best placed to deal with issues expeditiously the fact that they needed time, makes the Commission's request for more time, and third parties delay in responding, all the more reasonable.

17] It appears from the Commission's papers that this is a complex merger and

⁴ In paragraph 4.9.1 the Commission alleges that it is making constant follow up calls to Icasa. See also KM2 which refers to promises being made.

⁵ See par 4.4.3 of the Affidavit.

⁶ By way of example the Commission says it requested updated data from the merging parties on 6 July at a meeting followed this up with a written reminder on 14 August, but only received the information on 31 August. (see 4.4.1)

⁷ Paragraph 4.4.2

Telkom, in argument, did not dispute this. If the issues are indeed complex, not only does the Commission need to know enough about them to ask the correct questions, but those asked need time as well to consider them and reply. The Commission in turn then also needs time to analyse those replies to see whether they are adequate and if follow up information is required. Given the large number of parties to be consulted, the complexity of the issues and the need for possible follow-up requests, I do not consider the request for further time on this ground unreasonable.

Consultants

18] Finally the Commission argues it needs more time because it has recently appointed new consultants to advise it - a firm of attorneys that specialises in telecommunications law (on 22 September) and an economist (on 26 September). The Commission says the complexities at issue here are not only the usual competition concerns, but require specialist knowledge of a sector that is now subject to new and untested legislation in the form of the Electronic Communications Act no 36 of 2005.⁸

19] Telkom did not dispute the need for the Commission to engage consultants (it appears to have at least on the papers engaged experts of its own) but again was concerned about the lateness of their appointment.

20] On the face of it the experts were only appointed in late September so Telkom may well have a valid complaint. But because it has not put up papers to raise these concerns the Commission has not had an opportunity to reply. Again the mere lateness of the appointments does not make it self-evident that the Commission is dragging its feet. The Commission, unlike the merging parties, does not have a full conspectus of the issues

⁸ This Act came into force on 19 July 2006.

upfront. It needs to get information from the merging parties, as well as third parties, before it can present a case to experts to assess, otherwise they may opine prematurely. Thus, the fact that experts may only be briefed long into the process of investigation is not in of itself an indication that the Commission has been dilatory. Given the amount of information that the Commission is still awaiting, it does not seem that the lateness of this appointment has in itself occasioned delay. This ground as well as a basis for extension is reasonable.

Other issues raised

21] Although I have considered the Commission's reasons *prima facie* justify the granting of an extension, in coming to a final conclusion I must consider the impact on the merging parties. Telkom, in its oral submissions, raised the concern that its deadline for the fulfilment of conditions, including approval in terms of the Competition Act, was the 15th of December 2006. I was given to understand that Telkom and BCX are able to extend this date by agreement. Telkom, it seems, would prefer not to run the risk of having to rely on the consent of BCX for the extension. However, when I asked Mr Driver, who appeared for Telkom, if he expected the Tribunal to have concluded its hearing into the merger and made a decision by that date, he conceded that this was unrealistic. He did indicate, however, that if there was greater certainty as to the way the merger was proceeding, and I understood this to mean by the submission of the Commission's recommendation, that it would make it easier for his client to conclude the negotiations for an extension of the agreement.

22] Thus, if the 15th of December is a date that won't be met, regardless of the granting of the extension, then Telkom is not prejudiced by the present

extension. But even if it is, the Commission must perform its public duty, which is to investigate the possible effects of the merger. In discharging that function it cannot be held to a deadline that merging parties have negotiated for themselves and in so doing compromise its duty. If that were the case parties to mergers with anticompetitive effects, or mergers which are against the public interest, would set deadlines that are impossible for the Commission to meet so as to compromise its investigative function. Whilst I am sure that the Commission is not unsympathetic to commercial pressures faced by merging parties, its primary duty is to perform its investigation with the necessary thoroughness that the facts of the case dictate.

23] I am also not persuaded by Mr Driver's argument that we could proceed to the Tribunal stage of the process without the Commission's recommendation or be prepared to accept it once our process has started. The recommendation is a vital part of the merger process and for this reason the legislature has provided for it expressly in the Act. Conducting hearings without a recommendation would compromise their quality, and be unfair on third parties, who rely on reading the Commissions' recommendation to decide whether to apply to intervene in a merger and what the extent of that intervention should be. Nor can hearings be properly arranged without knowing what the Commission's stance is.

24] I am thus satisfied that the Commission has made out a case justifying the extension of the merger referral period by 15 days. I come to this conclusion by viewing the three reasons advanced as an interconnected whole that explains why the Commission is not in a position to file its recommendation now. Nevertheless even if they are to be viewed in isolation of one another, each constitutes a self-standing, and separate,

basis for justifying an extension.

N Manoim

Presiding Member

4 October 2006

Date

Tribunal Researcher:

For Telkom:

For Business Connexion:

For the Competition Commission:

R Badenhorst

G Driver and D Rudman of Werksmans

P Watt

Koos Theron and Lizel Blignaut