

Consistency is a key merit of merger filings

TOWARDS the end of March, the Competition Tribunal approved the buyout by Vodacom Service Provider (a division of Vodacom) of cell phone accessory vendor, Global Telematics South Africa, a company with a Vodacom service provider licence.

It was reported by the media that at the hearing, the tribunal accused Vodacom of presenting the Competition Commission with information that was misleading. The tribunal apparently identified a discrepancy between the rationale stated in Vodacom Service Provider's competitiveness report (that the acquisition was in keeping with the company's strategy of consolidating and owning more of its subscribers, improving its operating margins and bringing it closer to the customer) and internal documents provided to the commission at a very late stage.

Within the midst of the brouhaha the question that has not yet been asked is whether the rationale expressed in the competitiveness report and that contained in the internal documents are mutually exclusive. In finding an answer, the issue of motive is one which cannot be ignored. Ulti-



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mately then, there is a fine interpretive line in assessing whether Vodacom Service Provider's rationale set out in its competitiveness report was a high-level synopsis of that contained within its internal strategic documents, or whether the rationale was that apparently condemned by the tribunal's chairperson, David Lewis, as "blatant lies".

The furore brings to mind provisions of the Competition Act, 1998 which merging parties should carefully heed when submitting a merger filing to the commission.

In terms of section 15 of the Competition Act, provision is made for the commission to revoke merger approval in a small or intermediate merger if its decision was based on incorrect information, which a party to the merger placed before it, or the approval was obtained by deceit. Similarly, upon the application by the commission, the tribunal may revoke approval for a large merger.

The inquiry into Vodacom Service Provider's motives shows that the competition authorities are not prepared to accept the submissions of merging parties as gospel, and will investigate internal strategic documents to satisfy themselves that the documents give credence to the contents of the merger filing. While this robust approach certainly has its merits, authorities need to take cognisance of the environment in which those internal strategy documents and presentations are produced. In many instances they are prepared in order to persuade boards to approve transactions. In this way, the documents may well be penned by marketers who may inadvertently portray inaccurate reflections of the relevant market

and other information pertinent to competition authorities.

However, due to this fine interpretive line, the importance of accuracy in a merger filing cannot be overstressed. Sending mixed signals will result in the merging parties receiving a poor reception from the authorities. Further, in terms of sections 73 and 74 of the Competition Act, a person found guilty of knowingly having provided false information may be liable to either a fine or imprisonment.

Previous submissions made to the commission or tribunal are binding upon merging parties in perpetuity. It follows, therefore, that the rebound effects of any inconsistencies are potentially devastating. Over recent years, the competition authorities have reportedly approved Vodacom's acquisition of as many as six service providers. No doubt these acquisitions will now be scrutinised in the light of the tribunal's questioning of Vodacom's bona fides.

Accordingly, in merger filing submissions to the competition authorities, consistency and accuracy are unparalleled virtues. Not only may merger approval be subsequently revoked but in terms of

rule 32 of the Rules for the Conduct of Proceedings in the Competition Commission, if during the course of its investigation the commission believes that a document filed in respect of a merger contains false or misleading information, it may issue a Form CC 13(4), demanding that the information be corrected. The ramifications can be commercially devastating as it resets the time the commission has to consider the merger to day one.

The message for competition lawyers and their clients alike is unequivocal. Clients should apply their minds to the contents of their internal strategic documents. When compiling a merger filing, they should ensure that the contents mirror what is contained in internal documents, and that they are consistent with previous submissions made. Where the merger filing forms and what is contained in the internal documents diverge, all concerned must be able to explain any discrepancy.

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