COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

Case No: 81/LM/Aug00

In the large merger between:

Telkom SA Ltd

and

TPI Investments

and

Praysa Trade 1062 (Pty) Ltd

Reasons for Decision

APPROVAL

1. On 2 October 2000 we approved the merger between Telkom SA Ltd ("Telkom"), TPI Investments and Praysa Trade 1062 (Pty) Ltd [the name of which is to be changed to Telecommunications Facilities Management Company (Pty) Ltd] ("TFMC") with conditions. Our reasons for approving this merger appear below.

THE MERGER TRANSACTION

2. This merger is part of the process of the restructuring of state assets. The state holds seventy (70) percent of the issued share capital of Telkom. The remaining thirty (30) percent of Telkom's issued share capital is held by Thintana Communications LCC, a company registered in the United States. Through this merger Telkom is selling off parts of its non-core assets.

3. TPI Investments (formerly known as Lexshell 409 Property Holdings (Pty) Ltd) is a wholly-owned subsidiary of TPI Holdings. The shareholders of TPI Holdings are Real Africa Durolink Investment Bank Limited, Rebserve Ltd and African Life Properties (Pty) Ltd each of whom hold 33,3% of the entire issued capital of TPI Holdings.

4. TFMC is a wholly owned subsidiary of Newshelf 593 (Pty) Ltd whose shareholders are Rebserve Ltd and WS Atkins International Ltd who hold 55%

and 45% of its issued share capital, respectively. Rebserve is a South African company active in, *inter alia*, the provision of facility management services. WS Atkins is a major British based multinational. Atkins is active in the provision of facility management services in many countries across the world. This is, however, Atkins' first foray into the South African market.

5. Four agreements constitute the merger, two between Telkom and TPI Investments and two between Telkom and TFMC. Telkom is selling to TPI Investments approximately 1400 immovable properties ("the property sale agreement") and in terms of a separate agreement will be leasing back some of the properties sold to TPI ("the lease agreement"). TFMC is acquiring as a going concern the business conducted by Telkom's Facilities Infrastructure Operations and Property Asset Management divisions, including transfer of the staff, ("sale of business agreement"). Telkom and TFMC have also entered into an exclusive Facilities Management Agreement ("FMS agreement") in terms of which TFMC will provide Telkom with the services previously undertaken by the Facilities Infrastructure Operations and Property Asset Management divisions. This agreement includes the servicing of the properties to be leased by Telkom from TPI Investments in terms of the lease agreement referred to above.

BACKGROUND

6. This matter was initially set down for hearing on 6 September 2000. The day before the hearing COSATU sent a letter on behalf of the Communications Workers Union ("CWU"), one of its affiliates, requesting that the hearing be postponed to allow them to consult with the merging parties on the merger. At the hearing the parties to the transaction agreed to a limited postponement although they argued that commercial considerations necessitated an expeditious resolution of the matter. We postponed the hearing until 27 September 2000. In addition to the employment concerns of the unions we requested that on resumption of the proceedings on 27 September 2000 the merging parties address us on the exclusive nature of the FMS agreement which provided that, firstly, TFMC would offer its services only to Telkom and, secondly, that TFMC would be the sole provider of these services to Telkom.

7. Soon after the postponement CWU requested the merging parties to supply it with certain information including their business plans, financial statements and financial projections. The merging parties refused to give this information on the basis that it was not necessary for them to supply this information for purposes of the merger proceedings. They claimed that members of CWU had already been supplied with all information necessary for them to make an input into the merger proceedings. Furthermore, they claimed adequate consultation had already occurred between the Union members and the merging parties. As a result of concerns raised during the consultation process they had already included clauses in the FMS agreement to secure employment for Telkom employees transferred to TFMC as part of that

agreement. These clauses prohibit TFMC from retrenching any of the transferred employees for a period of twenty (20) months from the effective date of the merger.

8. On 21 September 2000 we received a letter from legal representatives of Infracom (Pty) Ltd, a company that provides certain consultant, project and facilities management services to Telkom. Infracom had a contract with Telkom regarding the supply of certain of these services, which expired at the end of September 2000. The contract provided that on expiry Telkom was obliged to afford Infracom an opportunity to tender with other firms for the rendering of these services. They were concerned that the FMS agreement covered the services that Infracom provided to Telkom and therefore precluded them from tendering for the supply of these services as envisaged by the contract between themselves and Telkom.

9. Infracom claimed that they were concerned that the FMS agreement may constitute a prohibited practice in terms of the Act and a breach of the existing contract between itself and Telkom. Infracom also gave notice of its intention to participate in the hearing as a party having a material interest in the matter. No formal application to intervene was made by Infracom.

10. When our hearing resumed on the 27th September both CWU and Infracom requested that we order the merging parties to give them give them access to substantial information relating to the business of the merging parties.

11. At the hearing CWU moderated the request for information that had been contained in its earlier letter to the parties and confined itself to requesting the following information:
    a. The complete version of the statement of merger information CC 4 (3) submitted by Telkom to the Competition Commission;
    b. The sale of business agreement;
    c. Telkom's business plan;
    d. The business plan of TPI Investments and TFMC in respect of the transferred undertakings;
    e. Telkom's intermediate financial projections;
    f. The identity of the owners of the acquiring companies; and
    g. A cost benefit analysis of the transaction.

12. In addition CWU requested a postponement of ten days to allow it an opportunity to participate adequately in a postponed hearing after having sight of the above documents. In the event that we decided to approve the merger CWU made three other prayers in the alternative. Firstly that we amend a clause in the sale of business agreement that gave Telkom the right to purchase back the business sold to TFMC in the event of a termination of the contract to provide that Telkom was obliged to do so. Secondly that all obligations in respect of employees in the sale of business agreement be enforceable as a term of each employees contract with the relevant employer

in the event of a breach of any of the obligations. Lastly, we were requested to order that the merging parties recognize CWU as a collective bargaining representative of the Telkom employees who are to be transferred to TFMC in terms of the sale of business agreement.

13. Infracom for its part requested us to order that it be entitled to have sight of the FMS agreement, the joint venture agreement setting up TFMC and a copy of the Commission's recommendations to the Tribunal. In addition it requested a postponement of the proceedings to allow it an opportunity to make submissions on those documents.

14. In response to the submissions of Infracom the Commission pointed out that both parties had been aware of the transaction and its implications for them for some time and had decided not to make any representations. The Commission stated that they had contacted CWU to get its views on the merger, especially on its employment implications, but had not received any input. Regarding the application by Infracom the Commission also submitted that there was no reason why Infracom could not have submitted its views on the merger at an earlier date. Notice of the merger was published in the Government Gazette in July 2000 and any party with an interest in the merger had been free to make submissions to the Commission from that time.

15. The merging parties opposed both CWU's and Infracom's application for access to additional information and for a postponement.

16. Regarding CWU's submissions the merging parties argued that the Unions were already in possession of all information necessary for them to determine the employment implications of the merger. They already had been given copies of the sections dealing with the protection of employees in the sale of business agreement and in the FMS agreement. The parties submitted that this was adequate information for CWU to determine the impact of the merger on employment and they were not entitled to further information. Furthermore, the parties had embarked on a consultation process on the merger and CWU members had most of the information relating to the merger. The further information requested was relevant only to the viability of the businesses of the merging parties. The merging parties submitted that the future viability of businesses was not one of the factors that the Tribunal was entitled to consider in merger proceedings.

17. Regarding the request for a postponement by CWU, the merging parties referred to a record of consultations with members of CWU and submitted that there had been ample opportunity for CWU to make representations before the hearing.

18. The merging parties queried, without formally opposing, Infracom's right to participate in the hearing in the absence of a formal application to intervene. The merging parties submitted that in these proceedings the Tribunal was not entitled to consider the question of whether or not there are prior or existing

rights between Telkom and Infracom. This was a question for a civil court to decide. The Tribunal is only entitled to consider factors listed in Section 16(3) of the Act. The parties also revealed that, in any event, there were negotiations in process between themselves and Infracom regarding a possible future role for Infracom in the provision of those services that it currently provided to Telkom.

19. The parties opposed Infracom's application for a postponement on the grounds that they had had adequate opportunity to make representations and chose not to. In addition they claimed that there were commercial considerations to be taken into account. The funds for the sale of business transaction have to be raised by the parties in the capital market. Current favourable interest rates may change and, moreover, it is generally difficult to raise finance in the latter half of November and in December. These factors mean that a further delay could mean that the merger never materializes or that the cost of undertaking the merger would be considerably increased.

20. We found that we were entitled to permit participation in merger proceedings by an interested party at any time. Furthermore, proper consideration of the transaction would not be served by refusing Infracom the right to participate in the proceedings. Our decision to allow Infracom to participate was also influenced by the fact that Infracom's concern was based on the exclusive nature of the FMS agreement, an issue we had raised during the hearing on 6 September 2000. Accordingly it was not a new issue to which merging parties had to respond.

21. However, we denied both applications for additional information. We were firmly of the view that while the private interests of the parties may well have been served by the information requested much of it had precious little, if any, connection to the matters within the purview of the Competition Act. The information already submitted by the parties adequately covered those matters of concern that were relevant to the administration of the Act. Moreover, there had been ample opportunity for dialogue between the parties on the one hand, and CWU and Infracom on the other, before the hearing.

22. We deal with CWU's application first. Our view was that CWU could make an assessment of the impact of the merger on employment without access to the parties' business plans, their intermediate financial projections, or a cost benefit analysis of the transaction. The identity of the owners of the acquiring companies is a matter of public record and this request is hard to understand. Furthermore, the parties provided CWU with all clauses dealing with employee protection in the sale of business agreement and we were not convinced that CWU needed access to the whole agreement to make a meaningful assessment of the employment implications of the merger. The evidence before us suggested that the merging parties had adequately consulted with CWU members regarding this merger.

23. With regards to Infracom's application we were of the view that it was fully

aware of the implications of the contract for its business, having been engaged in discussions with the parties. In any event we were not convinced that their request for information was necessitated by genuine competition concerns on their part. The legal representatives of the merging parties characterized Infracom's request for further information as a fishing expedition on its part, an attempt to gain access to commercially valuable information and to use any postponement of these proceedings to leverage their as yet unsuccessful negotiations with TFMC for a share of the contract. Harsh as this criticism may be, when seen in the context of the unfathomable objection raised by Infracom to the merger on competition grounds, and the lateness of their intervention, we suspect it is not unfounded. Nevertheless, however skeptical we may be of the motives of Infracom we must consider the substance of their request for information.

24. We are satisfied that Infracom was fully informed as to the exclusivity clauses contained in the agreements, the scope of the services and the duration of the agreements (as these aspects were canvassed in their correspondence and subsequent submissions to us), for them to have adequately made representations to us on their issues of concern, insofar as these were relevant to our proceedings. Infracom had also met with TFMC to discuss the agreement, a further indication that the material terms were well known to them. Granting them access to any further information would not have assisted them any further in articulating their submissions to us, but would have compromised the confidential information of the merging parties.

25. We accordingly denied the application for postponement by both Infracom and CWU. The request for a postponement was made so that the parties could consider further information that they requested we release to them. Having denied the application for access to further information there was no reason for us to give a postponement.

26. Having denied the two applications for further information and a postponement we accordingly invited the various parties to address us on the substantive merits of the proposed transaction, relying on the information already in their possession.

THE COMPETITION ANALYSIS

The Relevant Market

27. There are two distinct markets affected by this composite transaction. The first is **the property or real estate market**. This flows from that component of the transaction in which Telkom proposes to sell its immovable property to TPI Investments. The second is **the facilities management services market**. This flows from the proposed sale to TFMC by Telkom of those of its business units responsible for the management and maintenance of its

immovable property.

The Impact on Competition

28. In ordinary circumstances where a company active in the property market or the facilities management services market acquires control of another property company or over a company providing facilities management services, the competition authority would commence its analysis of the competition implications by calculating the change in market shares and market concentration consequent upon the transaction. Where these indicate grounds for concern the competition investigator would proceed to a deeper examination of the competition implications of the transaction, that is, to an analysis encompassing, *inter alia*, the various factors listed in Section 16(2) of the Act.

29. However, in the circumstances of this case, this approach is not appropriate. Telkom, a telecommunications company, owns the property from which it conducts its various telecommunications activities. These properties are managed and generally serviced by divisions of Telkom. In other words, the properties and the services are fully integrated assets and activities of Telkom and are available for the sole utilization of Telkom – they do not constitute part of the property market or the facilities management services market.

30. As a result of its decision to outsource its non-core assets and activities, Telkom has released these onto the market. From a long term competition perspective the most significant upshot of this transaction is the increase in the size of the market – in no sense does it represent a shift in market share from one controlling entity to another, but rather an expansion in the reach of the market. As such the transaction unequivocally promotes competition. However, in the short to medium term this pro-competition impact is modified somewhat by the form of this transaction because Telkom has simultaneously concluded a series of contracts in terms of which it leases back the property sold to TPI and it contracts all the services rendered by its erstwhile property management and maintenance divisions. In other words, although the acquiring companies have acquired businesses and assets previously part of Telkom, they will continue to be employed exclusively by Telkom. There is, accordingly, no immediate impact, on competition in either market. Although the implementation of Telkom's decision to outsource the management and maintenance of its property has assumed the form of a merger as defined in the Act, competition in the relevant markets implicated in the transaction is not affected – for at least the next 10 years the property is for the exclusive use of Telkom and the services provided by TFMC are dedicated to servicing this property. In form we have a merger, but in substantive content the property and its management and maintenance remain integrated within Telkom.

31. In terms of their agreement TFMC will provide services exclusively to Telkom and Telkom will, for a defined period, purchase these services exclusively from TFMC. The Tribunal was initially driven to query the

exclusivity aspect of the contract between TFMC and Telkom precisely because it feared that Rebserve and Atkins, TFMC's shareholders and important providers of facilities management services, were, in exchange for a large and presumably lucrative contract with Telkom, agreeing to withhold their services from the rest of the South African market. However, we are assured that this restraint applies only to TFMC and does not extend to its shareholders, Rebserve and WS Atkins, who are free to compete in the South African market and have indicated their intention to do so.

32. Infracom, however, remains concerned with that aspect of the agreement which stipulates that Telkom will purchase these services from TFMC exclusively.

33. Infracom alleges that this is anti-competitive. Infracom's arguments are extremely difficult to understand. They appear to conflate allegations of contract violation (they allege that Telkom was contractually bound to give them the opportunity to tender afresh on the expiry of their contract) with allegations of anti-competitive restrictive practices. Infracom's novel argument suggests that the transaction constitutes an abuse of a dominant position on the part of Telkom and, it appears, on the part of TFMC and its shareholders, Rebserve and WS Atkins. They argue that Rebserve and WS Atkins are dominant in the facilities management services market – this despite the fact that WS Atkins is a new entrant in the South African market – and that Telkom is the only client for the services that it has contracted from TFMC. The abuses that they have alleged appear to be based on the argument that the transaction constitutes a 'refusal to deal' on the part of Telkom and/or TFMC. Other arguments that rest on claims that Telkom is the only customer for the services offered by Infracom suggest that the Telkom contract constitutes an 'essential facility'.

34. The Tribunal is, of course, not legally competent to deal with contractual disputes and these allegations need not detain us any further. We simply note that Infracom has, until recently, been involved in discussions with TFMC regarding the sub-contracting of certain of the services that the latter is obliged to supply to Telkom. These appear to encompass many, and possibly all, of the services currently provided by Infracom to Telkom. It appears that a contract (or contracts) for provision of these services will be offered by public tender. Their appearance before the Tribunal was manifestly prompted by a perceived lack of progress in these negotiations.

35. The allegation that the transaction constitutes an anti-competitive restrictive practice is rejected. Procedurally, it is not at all apparent that these allegations should be examined in the context of a merger evaluation. Substantively, we should simply point out that, in respect of those services previously provided by Infracom to Telkom, one exclusive contract (between Telkom and Infracom) has been replaced by another exclusive contract (between Telkom and TFMC) – there is accordingly no impact on competition whatsoever. Electing one supplier over another may impact grievously on the commercial

fortunes of the excluded supplier, but this unfortunate fact does not render the contract actionable in terms of competition law, indeed it may, and likely does, simply signify the workings of competition. Telkom is not attempting, through the exclusion of Infracom, to strengthen its own position or that of an associated company in the facilities management services market. On the contrary Telkom has elected to exit from those activities and is, in the process, simply exercising its right to appoint a supplier of services, some of which were previously carried out by Infracom. The parties have, moreover, made out a persuasive case for concluding a single agreement with a service provider rather than a myriad of small agreements. TFMC having acquired the contract to provide the services is, naturally under no obligation, to invite any other firm to participate in the contract, although, as its discussion with Infracom indicates, this is precisely what it is doing. There is no basis for the argument that this be viewed as a 'refusal to deal'.

36. The claim that the Telkom contract constitutes an essential facility is equally without merit. It is asserted that the services provided by Infracom are highly specialized and focused in telecommunications facilities and that the firm's existence depends upon it renewing its contract with Telkom. We are not convinced that this claim is well founded – Telkom is not the only provider of telecommunications services, nor are we convinced that the services provided by Infracom are so narrowly dedicated that they could not be re-directed at servicing other facilities. However, even if these claims were valid, it would simply establish the commercial importance of the Telkom contract; it would not render it an essential facility and it would certainly not constitute the basis for a claim that every service provider that set itself up as a provider of facility management services to the telecommunications industry would be entitled to demand a share of the servicing of Telkom's facilities.

37. Telkom's exclusive arrangement with TFMC certainly impacts negatively on the commercial fortunes of Infracom. However it is trite to record that the objective of competition enforcement is to defend competition, not competitors. Infracom's arguments appear to conflate its own commercial success with the existence of competition – certainly the process of competition may promote the commercial fortunes of a single competitor but by the same token it may undermine them.

38. We should note that the introduction of WS Atkins into the South African market represents a considerable and obvious boost to the level of competition in the facilities management services market. Infracom's attempt to cast Atkins entry and the prospect of further joint ventures between Atkins and Rebserve as a threat to competition is unfounded. Indeed it is a transparent attempt to erect barriers to new entry.

PUBLIC INTEREST CONSIDERATIONS

39. When considering a merger the Act enjoins us to take into account public

interest issues, including in terms of section 16(3)(ii) the effect of the merger on employment. This obligation must also be read in the context of section 2(b) of the Act, which states that amongst the purposes of the Act is to "promote and maintain competition in order to promote employment…" This means that we must look at whether the merger will result in the creation or loss of employment and weigh this against other factors that we have to consider in terms of the Act.

40. The FMS and sale of business agreements impose an obligation on TFMC to refrain from retrenching staff transferred from Telkom in terms of those agreements for a period of twenty (20) months. The merging parties informed us that this obligation was included in the agreements to accommodate concerns raised by employees of Telkom during the consultation process. In our view this obligation comprehensively addresses any employment concerns the merger may otherwise have raised. We should point out that the telecommunications market is highly dynamic – technologies are changing rapidly as are approaches to competition and state ownership. Accordingly the telecommunications market, here and elsewhere, is characterized by new entry. Telkom, which will be TFMC's only client for at least the next ten years in terms of the FMS agreement, might be a very different institution in twenty months time. Seen in this light, the commitment by TFMC to guarantee 20 months employment to the transferred staff takes on added significance. We have made this obligation one of the conditions for the approval of this merger.

41. Concerns were raised by CWU that even though the object of the above obligation is to protect affected employees it is a term of contract between Telkom and TFMC and, as such, is not enforceable by the individual employees. This is a valid concern - the obligation was agreed upon by the parties for the benefit of the employees and we think that they should be able to enforce it. We have therefore included a further condition for the approval of the merger, making the employment obligation enforceable by individual employees affected by the merger.

42. Despite assurances from Telkom, CWU was concerned that retrenchments within Telkom itself might result from the merger. CWU was concerned at the prospect that, in the event that insufficient employees had been transferred from Telkom to TFMC, retrenchments arising from the transaction may take place within Telkom and that these would not be protected by the guarantees contained in the agreement. They told us that their experience has been that whenever Telkom out-sources some of its activities retrenchments occur from amongst the employees left behind. Telkom pointed out that all the businesses were sold to TFMC as going concerns and that all employees engaged in activities associated with these functions would be transferred, and, accordingly, there would be no further retrenchments in Telkom directly consequent upon this transaction. We have incorporated this undertaking as a third condition for approval of the merger, namely, that Telkom shall not retrench any of its employees as a direct result of this merger for a period of

twenty (20) months. This condition simply serves to render legally enforceable an undertaking volunteered by the representative of the parties.

43. The last condition attached to our approval of the merger makes the employment obligation on TFMC binding on its shareholders. TFMC is a shelf company formed by Rebserve Ltd and WS Atkins International Ltd solely for purposes of this merger. The employment obligations are binding only on TFMC, a company that currently has no assets or income. We were concerned that if the company dissolved for some reason the employees would have no recourse. We have therefore made the employment obligation binding on the shareholders of TFMC.

44. We therefore approve the merger with the following conditions:

    a. TFMC must not retrench any employee transferred to its employ from Telkom SA Ltd as part of this transaction ("transferred employees") for a period of twenty (20) months to commence from the effective date of the merger.

    b. During the period referred to in clause 1, the obligation contemplated in relation to the transferred employees must be enforceable by each such employee -

        - against TFMC or any other person contemplated in clause 20.1.2 of the FMS Agreement; and

        - against the shareholders of TFMC, namely, Rebserve Ltd and WS Atkins International Ltd, in the event that it cannot be enforced against TFMC, subject to clause 20.1.2 of the FMS Agreement.

    c. Telkom SA Ltd must not retrench any employee as a consequence of this merger for a period of twenty (20) months from the effective date of the merger.

_____ **06 October 2000**

D. H. Lewis **Date**

Concurring: N.M. Manoim, P. Maponya