

SOUTH AFRICA / JUDGMENT

Competition Commission v Telkom SA SOC Ltd (016865) [2013] ZACT 62 (18 July 2013) [2013] ZACT 62

COURT

Competition Tribunal

BEFORE

N Manoim, Y Carrim, T Madima

CASE / FILE NUMBER

016865

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

COMPETITION TRIBUNAL

REPUBLIC OF SOUTH AFRICA

Case No: 016865

In the matter between:

The Competition Commission Applicant

and

Telkom SA SOC Limited Respondent

Panel: N Manoim (Presiding Member), Y Carrim (Tribunal Member) and T Madima (Tribunal Member)

Heard on: 17 July 2013

Decided on: 18 July 2013

Order (Non-confidential version)

The Tribunal hereby confirms as an order in terms of section 58(1)(a) of the Competition Act, 1998 (Act No. 89 of 1998) the settlement

agreement reached between the Competition Commission and the respondent which is attached hereto including the annexures.

Presiding Member

N Manoim

Concurring: Y Carrim and T Madima

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

HELD AT PRETORIA

Tribunal Case No. 55/CR/Jul09

73/CR/Oct09

78/CR/NOV09

THE COMPETITION COMMISSION Applicant

TELKOM SASOC LIMITED Respondent

SETTLEMENT AGREEMENT IN TERMS OF SECTION 27(1)(d) AS READ WITH

SECTION 58(1)(a)(III) OF THE COMPETITION ACT, 1998 (ACT NO. 89 OF 1998) IN RESPECT OF ALLEGED CONTRAVENTIONS OF SECTION 3 OF THE COMPETITION ACT NO, 89 OF 1998, AS AMENDED

The Competition Commission and Telkom hereby agree that application be made to the Competition Tribunal for the confirmation of this Settlement Agreement in terms of section 27(1) (d) read with section 58(1)(a)(iii) of the Competition Act, on the terms set out below:

1. INTERPRETATION

1.1. In this Settlement Agreement: -

1.1.1. clause headings are for convenience and are not to be used in their interpretation;

1.1.2. unless the context indicates a contrary intention an expression which denotes one gender includes the other, an expression which denotes a natural person includes a juristic person and vice versa and an expression which denotes the singular includes the plural and vice versa.

1.2. In this Settlement Agreement and the annexures thereto the following expressions bear the meanings assigned to them below and related expressions bear corresponding meanings: -

1.2.1. 'ADSL' means asymmetric digital subscriber line;

1.2.2. 'Act' means the Competition Act 89 of 1998 as amended;

1.2.3. 'Code of Conduct' means Telkom's Wholesale f Retail Code of Conduct, which is annexed to this Settlement Agreement as Annexure C;

1.2.4. 'Commissioner' means the Commissioner of the Competition Commission appointed in terms of section 22 of the Act;

1.2.5. 'Common Components' means components that Telkom Retail and OLOs must, in common with each other, obtain from Telkom Wholesale In order to render a

comparable service to their retail customers;

1.2.6. 'Competition Commission' means the Competition Commission, a statutory body established in terms of section 19 of the Act;

1.2.7. 'Competition Tribunal' means the Competition Tribunal, a statutory body established In terms of section 26 of the Act;

1.2.8. 'Complaint Period' means the period of 1 January 2005 to 31 December 2007;

1.2.9. 'Complaints' means the complaints submitted by the complainants and investigated by the Commission under case numbers 2005Jun1670, 2005Dec2023,

2007Apr2868, 2007Jun2990 and 2007Dec3434;

1.2.10. 'Complainants' means Internet Solutions (Pty) Ltd, Multichoice Subscriber Management Services (Pty) Ltd, Internet Service Providers Association and Verizon South Africa (Pty) Ltd

1.2.11. 'Confirmation Date' means the date upon which the Competition Tribunal confirms this Settlement Agreement in terms of section 58(1)(a)(iii) of the Act;

1.2.12. 'Settlement Agreement' means this agreement and its annexures;

1.2.13. 'Diginet' means Telkom's Diginet service, a dedicated constant bit rate data connection between two points running at bandwidth speeds in increments of 64 kb/s up to and including bandwidth speeds of 1984 kb/s;

1.2.14. 'ECA' means the Electronic Communications Act 36 of 2005;

1.2.15. 'ECNS' means an electronic communications network service as defined in the ECA;

1.2.16. 'ECS' means an electronic communications service as defined in the ECA;

1.2.17. 'HBTL' means a high bandwidth (2 mb/s and above) national electronic communications transmission line;

1.2.18. 'IP' means Internet protocol;

1.2.19. 'IP Connect' means the service provided by Telkom Wholesale to facilitate the provision of Internet and !P VPN services to customers that use ADSL to connect to a backbone network;

1.2.20. 'IPLC' means an international private leased circuit;

1.2.21. 'IP VPN' means a Multiprotocol Layer Switching based VPN;

1.2.22. 'ISP' means Internet service provider;

1.2.23. 'Non-common Components' means components which are either a) ordinarily required by OLOs only and not Telkom Retail in order to access Telkom's Wholesale

network services due to not being vertically integrated, or b) ordinarily required by Telkom Retail and not OLOs in order to access

Telkom's Wholesale network services by virtue of its vertical integration;

1.2.24. 'OLO', an acronym for other licensed operator, means an ECNS or ECS licensee other than Telkom;

1.2.25. 'Party' means either the Competition Commission or Telkom, and

'Parties' means both of them;

1.2.26. 'Referral' means the referral by the Competition Commission of certain aspects of the Complaints to the Competition Tribunal on 26 October 2009 under Competition Tribunal case numbers 55/CR/JUL09, 73/CR/OCT09 and 78/CR/NOV09;

1.2.27. 'Signature Date' means the date that the Settlement Agreement is signed by the Party signing last in time;

1.2.28. 'Telkom' means Telkom SA SOC Limited, a public company duly incorporated in the Republic of South Africa, with registration number 1991/05476/30

and with its registered office at Telkom Towers North, 152 Johannes Ramokhoase Street, Pretoria;

1.2.29. 'Telkom Retail' means Telkom's retail division and encompasses the business conducted by the division;

1.2.30. 'Telkom Wholesale' means Telkom's wholesale division and encompasses the business conducted by the division;

1.2.31. 'Transfer Pricing Programme' means Telkom's internal transfer pricing programme, a draft of which is annexed to this Settlement Agreement as Annexure A; and

1.2.31. 'VPN' means virtual private network.

2. THE COMPLAINTS AND THE INVESTIGATION

2.1. Over the period 26 June 2005 to 19 July 2007, Internet Solutions (Pty) Ltd, the internet division of Multichoice Subscriber Management Services (Pty) Ltd, Verizon (Pty) Ltd and the Internet Service Providers Association submitted five complaints against Telkom to the Competition Commission for investigation.

2.2. On the basis of information solicited and obtained in the ensuing investigation the Competition Commission concluded that Telkom had engaged upon a so-called 'margin squeeze' by exacting from OLOs that are first tier ISPs or, in the case of Diginet access lines, their customers, prices for:

2.2.1. HBTLs and IPLCs that were excessive;

2.2.2. Diginet access lines, HBTLs, IPLCs and IP Connect that were being set at levels that precluded cost-effective competition with Telkom Retail's internet access and IP VPN services (via leased line or ADSL access).

2.3. The Commission also concluded that Telkom had engaged in anti-competitive conditional selling of IP VPN and Internet access services through bundling these products with Diginet and ADSL access services that were priced far lower than the equivalent access services which end customers would purchase when considering the purchase of IP VPN and Internet access from OLOs relative to Telkom Retail.

2.4. The Competition Commission, characterizing the conduct as a contravention of sections 8(a), 8(6), 8(c) and 8(d)(iii) of the Act, referred it to the Competition Tribunal on 26 October 2009 for adjudication. Following the exchange of pleadings, the Parties have agreed to settle the Referral on the terms of this Settlement Agreement.

3. STATEMENT OF CONDUCT AND ADMISSION

3.1. The facts which are common cause between the Competition Commission and Telkom are that during the Complaint Period -

3.1.1. first tier ISPs attempted to compete in the provision of wholesale and retail Internet access and IP VPN services through the use and sale of backbone networks built for such services;

3.1.2. first tier ISPs had no commercially viable alternative but to build the backbone networks using transmission lines sold by Telkom, namely HBTLs and IPLCs;

3.1.3. first tier ISP customers had no commercially viable alternative but to utilize Telkom's ADSL and Diginet services to gain access to the backbone networks;

3.1.4. the prices for the Telkom access services supplied to first tier ISPs and their end customers were higher than those that Telkom Retail accounted for in pricing its bundled IP VPN services to its customers;

3.1.5. the structures of pricing amounted to a margin squeeze of the first tier ISP competitors of Telkom and anti-competitive conditional selling of IP VPN and internet Access with Diginet and ADSL access services;

3.2. Telkom admits that its conduct amounted to a contravention of sections 8(c) and 8(d)(iii) of the Act.

4. CESSATION OF CONDUCT

4.1. Telkom warrants that the conduct has already ceased or to the extent not ceased, that it will cease within six calendar months of the Confirmation Date.

4.2. In order to give effect to this warranty:

4.2.1. Telkom Wholesale will adopt and commence implementation of the Transfer Pricing Programme embodied in Annexure A in respect of IPLCs, HBTLs, IP Connect and Diginet services. This entails that, Telkom Wholesale will:

4.2.1.1. price network services it provides to both OLOs and Telkom Retail on a non-discriminatory basis for Common Components. In other words, the transfer price raised by Telkom Wholesale for services provided to Telkom Retail will be at the same price Telkom Wholesale provides the equivalent service to OLOs;

4.2.1.2. price Non-common Components to OLOs at no more than cost plus a reasonable return and Non-common Components to Telkom Retail at no less than cost plus a reasonable return. There will also be no restriction (but specifically excluding network elements, such as the HOF or HOC, which of necessity are part of Telkom's network Infrastructure and which are only constructed by Telkom to enable ODDs to access Telkom's network and or services provided over such network) on self-provisioning the non-common components utilised by OLOs where technically feasible.

4.2.2. Telkom Retail will implement the Retail Pricing Policy embodied in Annexure B, This entails that Telkom Retail will set retail prices for its IP VPN and Internet access products in a manner that ensures it covers its costs, which include both the cost of services from Telkom Wholesale at non-discriminatory transfer prices (including HBTLs, IPLCs, IP Connect and Diginet services) and all Telkom Retail own costs of selling the services. This will ensure that Telkom Retail does not engage in a margin squeeze of rival OLOs.

5. ADMINISTRATIVE PENALTY

5.1. Having regard to the provisions of section 58(1)(aXiii) read with sections 59(1X9). 59(2) and 59(3) of the Act, Telkom is liable to pay an administrative penalty in respect of its contraventions of section 8(dXiii) of the Act.

5.2. Telkom has agreed to pay an administrative penalty in the amount of R200 000 000 (two hundred million Rand). This penalty shall be paid as follows:

5.2.1. R66 666 666 (sixty six million six hundred and sixty six thousand six hundred and sixty six Rand) within 30 days of the Confirmation Date;

5.2.2. R66 666 666 (sixty six million six hundred and sixty six thousand six hundred and sixty six Rand), on or before the first anniversary of the Confirmation Date; and

5.2.3. R66 666 668 (sixty six million six hundred and sixty six thousand six hundred and sixty eight Rand), on or before the second anniversary of the Confirmation Date.

5.3. The penalty shall be paid into the Competition Commission's bank account, details of which are as follows:

Bank name: Absa Bank

Branch name: Pretoria

Account holder Competition Commission Fees Account

Account number: 4050778576

Account type: Current Account

Branch Code: 323 345

5.4. The penalty shall be paid over by the Competition Commission to the National Revenue Fund in accordance with section 59(4) of the Competition Act.

6.1. Telkom shall within 30 days of the Confirmation Date prepare and circulate to its employees and relevant corporate governance

structures a statement summarising the contents of this Settlement Agreement

6.2. Within six months of the Confirmation Date, Telkom will -

6.2.1. implement a functional Wholesale / Retail separation within its business on the basis contemplated in, and subject to the provisions of, the Code of Conduct attached as Annexure C . This entails that Telkom Wholesale will treat OLOs and Telkom Retail in a non-discriminatory manner when providing services and will protect the confidential information of OLO's from Telkom Retail;

6.2.2. adopt and commence implementation of a Transfer Pricing Programme that will regulate transactions in the provision of network services between Telkom's Wholesale and Retail business divisions in accordance with the. Transfer Pricing Programme attached as Annexure A. Key aspects of this programme are that:

6.2.2.1. it will operationalise a system whereby a set of 'fixed network products' are traded internally from the Wholesale division to the Retail division, and a set of transfer prices are applied to these products;

6.2.2.2. transfer prices will be determined based on cost, as calculated by Telkom's regulatory cost reporting systems, or where there are corresponding wholesale products sold to external customers by reference to the pricing structure applicable to external customers;

6.2.2.3. as such, transfer pricing will enable Telkom to provide a transparently non-discriminatory approach to the pricing of services provided to OLOs.

6.2.3. keep separate internal accounts for its retail IP VPN and Internet access products in a way that permits the profitability of these retail products to be monitored by the Competition Commission, in keeping with the principles set out in Annexure B.

6.3. The Code of Conduct and the Transfer Pricing Programme contemplated in 6.2.1 and 6.2.2 and the obligation described in 6.2.3 will remain in force for a period of five years after the Confirmation Date.

6.4. Telkom shall, subject to 10-

6.4.1. in its 2014, 2015 and 2016 financial years, reduce the prices of wholesale products implicated in the complaint (namely, IPLCs, HBTLs, Diginet and IP Connect) and related retail products (VPN Supreme and internet Access, along with the retail IPLCs, HBTLs and Diginet

provided to corporate customers) by at least the percentages contemplated in Annexure D. Such price reductions shall amount to an indicative value of at least R875 000 000 (eight hundred and seventy five million Rand) and shall be at least 70% wholesale and no more than 30% retail weighted in order to eliminate any margin squeeze whilst ensuring that wholesale product savings are passed on to the benefit of end consumers;

6.4.2. in the 2017 and 2018 financial years, charge no higher prices for the products referred to in 6.4.1 than the prices charged in the 2016 financial year.

6.5. Telkom shall within the 2014 financial year embark on a rollout of strategic points of presence in the public sector at Telkom's cost.

7. COMPLIANCE PROGRAM

7.1. Telkom shall develop or, if already developed, review and update, implement and monitor a competition law compliance programme

incorporating corporate governance ("the compliance programme") in Telkom Wholesale and Telkom Retail, designed to ensure that its employees, management and directors do not engage in future contraventions of Chapter 2 of the Act.

7.2. In particular, after confirmation of this Settlement Agreement by the Competition Tribunal, Telkom shall:

7.2.1. formulate and implement the compliance programme

7.2.2. as part of the compliance programme, provide training on relevant competition law compliance to all relevant persons and/or officials employed by Telkom; and

7.2.3. review (and update where necessary) the compliance programme annually to ensure Telkom's continued compliance with the Act

7.3. Telkom will submit a copy of the compliance programme to the Competition Commission within 120 business days of the Confirmation

Date.

8. CO-OPERATION AND DISPUTE RESOLUTION PROCEDURE

8.1. Telkom and the Competition Commission will, within 60 business days of the Confirmation Date, enter into a memorandum of agreement

containing a Co-operation and Dispute Resolution Procedure -

8.1.1. for complaints initiated by third parties or the Commissioner,

8.1.2. arising out of alleged contraventions of the Act by Telkom which are the subject of an investigation by the Competition Commission.

8.2. The Co-operation and Dispute Resolution Procedure shall -

8.2.1. not detract in any manner from the Competition Commission's execution of its statutory duties nor derogate from its powers in terms of the Act;

8.2.2. not detract in any manner from a complainant's rights in terms of the Act; and

8.2.3. be in force for a period of 5 (five) years from the Confirmation Date or such longer period as Telkom and the Competition Commission agree in writing.

8.3. The Cooperation and Dispute Resolution Procedure shall include -

8.3.1. reasonable time frames within which -

8.3.1.1. the Competition Commission will provide Telkom with a statement of the facts and contentions that inform the complaint;

8.3.1.2. there can be an exchange of views on the merits of the complaint;

8.3.1.3. Telkom will provide its statement of defence and any proposal to remedy the conduct complained of;

8.3.2. a process by which high level representatives (at executive/department head level) of both Parties will endeavour to negotiate a settlement of the dispute.

8.4. The Parties will review (and update where necessary) the Co-operation and Dispute Resolution Procedure from time to time as the need arises.

9. MONITORING

9.1. Telkom shall procure that, within six months of the Confirmation Date (or such longer period as may be agreed with the Competition

Commission in writing), an audit is conducted by an independent expert accountant or economist ('the first reviewer') to determine whether Telkom's conduct is in substantial compliance with the obligations contemplated in 4 and the annexures referred to in that paragraph.

9.2. If the determination is positive, the first reviewer will issue a certificate of compliance to this effect and provide reasons for the conclusion,

9.3. if the determination is negative, Telkom may elect, within seven business days to

9.3.1. abide by the determination; or

9.3.2. refer it for reconsideration by a second independent expert accountant or economist chosen by the agreement of the Parties ('the second reviewer') or, failing their agreement, by the Chair of the General Bar Council for the time being. The second reviewer shall -

9.3.2.1. hear the Parties if one or other so desire; and

9.3.2.2. make a decision that shall, in the absence of manifest error of calculation, be final and binding upon the Parties.

9.4. When a determination becomes binding, Telkom will take immediate action to comply with the obligations set out in 4 above and, within a period set by agreement between the Parties or the reviewer in question, shall solicit and obtain a fresh determination from the first reviewer that will trigger a repetition of the process described above.

9.5. A statement of the findings of the audit shall be included in Telkom's annual report for the 2014 financial year.

9.6. Within 3 months after the end of each of the five financial years after the Confirmation Date, Telkom will -

9.6.1. undertake an audit, which may be internal, to confirm that the transfer pricing system between Telkom Wholesale and Telkom Retail complies at least substantially with the Transfer Pricing Programme and the Retail Pricing Policy;

9.6.2. provide the Competition Commission with a written report of the findings of the audit within thirty days of its finalisation,

9.7. For the period of five years after the Confirmation Date, Telkom shall include in its annual report a statement by the Chief Executive Officer, for each year in question, that Telkom has complied with the terms of this Settlement Agreement

9.8. For a period of five years after the Confirmation Date Telkom shall, upon request and reasonable notice, grant the Competition Commission access during business hours to its transfer pricing and retail product accounts and such underlying documents as may be required by the Competition Commission to enable it to analyse and interpret such accounts.

10. VARIATION

10.1. This Settlement Agreement may not be varied, provided that Telkom shall be entitled, upon good cause, to make a reasoned proposal to the Competition Commission to consent to the waiver, modification and/or substitution of one or more of the terms of this Settlement

Agreement, which consent shall not be unreasonably withheld.

10.2. In the event of the Competition Commission and Telkom agreeing upon the waiver, modification or substitution of any aspect of this Settlement Agreement, the Competition Commission and Telkom shall make application to the Competition Tribunal for confirmation by it of such waiver, modification or substitution of any one or more of the terms of this Settlement Agreement.

10.3. In the event of the Competition Commission withholding its consent to a waiver, modification and/or substitution of one or more of the terms of this Settlement Agreement, Telkom shall be entitled to apply to the Competition Tribunal for an order waiving, modifying or substituting any one or more terms of this Settlement Agreement, The Competition Commission shall be entitled to oppose such application.

10.4. The Tribunal's decision in respect of the applications contemplated in paragraphs 10.2 and 10,3 shall be binding on the parties and may not be appealed further.

10.5. For the purpose of this Settlement Agreement, 'good cause' means circumstances that could not have reasonably been foreseen by Telkom and/or the Competition Commission at the time the Settlement Agreement was entered into.

11. FULL AND FINAL RESOLUTION

The Settlement Agreement, upon its confirmation by the Competition Tribunal, shall be in full and final settlement of and conclude all proceedings between the Competition Commission and Telkom relating to the Complaints.

12. GENERAL

12.1. This Settlement Agreement will in all respects be governed by and construed under the laws of the Republic of South Africa.

12.2. This Settlement Agreement constitutes the whole of the agreement between the Parties relating to the matters dealt with herein and save to the extent otherwise provided herein no undertaking, representation, term or condition relating to the subject matter of this Settlement Agreement not incorporated in this Settlement Agreement shall be binding on the Parties.

12.3. No variation, addition, deletion, or agreed cancellation (including this clause 12.3) shall be of any force or effect unless in writing and signed by or on behalf of the Parties hereto.

12.4. No waiver of any of the terms and conditions of this Settlement Agreement will be binding or effectual for any purpose unless in writing and signed by or on behalf of the Party giving the same. Any such waiver will be effective only in the specific instance and for the purpose given. No failure or delay on the part of either Party in exercising any right, power or privilege hereunder will constitute or be deemed to be a waiver thereof, nor will any single or partial exercise of any right, power or privilege preclude any other or further exercise thereof or the exercise of any other right, power or privilege.

Signed at PRETORIA on the 13th day of JUNE 2013

Mr Shan Ramburuth, The Commissioner

Competition Commission

Signed at MIDRAND on the 14th day of JUNE 2013

Sipho Maseko CEO

For: Telkom SA SOC Limited

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZACT/2013/62.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/competition-commission-v-telkom-unknown-topic-act-2013>

Prepared on 9 October 2026 · Esheria