IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.: 71/SM/Nov10

In the matter between:

ASSOCIATION OF SYSTEM OPERATORS	Applicant
and	
THE COMPETITION COMMISSION OF SOUTH AFRICA	First Respondent
LEXSHELL 129 GENERAL TRADING (PTY) LTD	Second Respondent
NOMAD INFORMATION SYSTEMS (PTY) LTD	Third Respondent

And in the matter between:

Case No.: 72/SM/Nov10

ASSOCIATION OF SYSTEM OPERATORS	Applicant
and	
THE COMPETITION COMMISSION OF SOUTH AFRICA	First Respondent
COMESA FINANCIAL EXCHANGE (PTY) LTD	Second Respondent
EMID HOLDINGS (PTY) LTD	Third Respondent

Panel:	Norman Manoim (Presiding Member) Imraan Valodia (Tribunal Member) Anton Roskam (Tribunal Member)
Heard on:	3 April 2013, with last submission received on 17 April 2013
Decision issued on:	05 June 2013

DECISION

INTRODUCTION

[1] These matters are applications in terms of which the applicants seek to review and set aside the decisions of the first respondent, the Competition Commission ("the Commission"), to approve with conditions the small mergers entered into between Lexshell 129 General Trading (Pty) Ltd ("Lexshell") and Nomad Information Systems (Pty) Ltd ("Nomad"), on the one hand, and Comesa Financial Exchange (Pty) Ltd ("Comesa") and Emid Holdings (Pty) Ltd

("Emid"), on the other. We shall refer to each of the mergers as "the Nomad" and "the Emid" mergers.

[2] The first applicant in each matter, the Association of System Operators ("ASO"), is an industry body that represents most of the South African authorised payment system operators. The first respondent is the Commission, which is established in terms of section 9(1) of the Competition Act, 1998 (Act No. 89 of 1998) ("the Act"). The second respondents in each matter are Lexshell and Comesa respectively. They are companies duly incorporated in South Africa. The third respondents in each matter are Nomad and Emid respectively. They are companies duly incorporated in South Africa.

[3] Lexshell is a wholly owned subsidiary of Automated Clearing Bureau Investments Durban (Pty) Ltd, which is in turn a wholly owned subsidiary of the South African Bankers Services Company Limited ("Bankserv"). Comesa is a wholly owned subsidiary of Bankserv.

[4] Bankserv is the inter-bank clearing and settlement systems operator, known as a Payment Clearing House Systems Operator. It facilitates the clearing and settlement of inter-bank payments. All four major banks, Absa, Nedbank, First National Bank and Standard as well as two smaller banks are shareholders of Bankserv.

[5] Members of the first applicant applied to join in the proceedings after the merging parties had challenged ASO's *locus standi* to bring the review. In respect of the Nomad merger review application, Concorde Solutions (Pty) Ltd, Direct Transact (Pty) Ltd, EFT Pos (Pty) Ltd and Paycorp Holdings (Pty) Ltd applied to join as applicants or intervene in the proceedings. In respect of the Emid merger review application, ACET Processing (Pty) Ltd, Direct Transact (Pty) Ltd, Drawcard (Pty) Ltd, Eastpay (Pty) Ltd and Paycorp Holdings (Pty) Ltd applied to join as applicants or intervene in the proceedings. We shall refer to these applicants as the "interveners". As these applications were not opposed, and these interveners have an interest in the matters, there is no reason to deny the applications.

BACKGROUND

[6] At the outset of the hearing, the Tribunal invited the applicants to make submissions regarding the reasons for the delay in prosecuting the review. Although the review was initiated within the 180 day period set out in section 7 of the Promotion of Administrative

Justice Act, 2000 (Act No. 3 of 2000) ("PAJA"), the matter was only set down to be heard on - 3 April 2013, some 18 months after the date on which it was initiated. Mr Blou, who appeared on behalf of the applicants with Ms Stein, explained the long history to the matters, which involved numerous postponements, arguments about the disclosure of confidential information and settlement discussions about the underlying dispute. In addition, he argued, no adverse party in these proceedings had contended that the review should not be considered on the basis that the applicants had failed to prosecute the review within a reasonable time period. We think the latter point is a good one, and therefore, we do not need to decide whether the reasons for delay are justifiable. Accordingly, the review applications are considered on their merits and in their entirety.

[7] The Notices of Motion relating to the review applications were divided into two parts. Part A dealt with the applicants' application to inspect confidential documents in the record of proceedings before the Commission. Part B dealt with the prayers for review and setting aside of the Commissions' decisions and a prayer that the decisions be "corrected", although precisely how these should be corrected was not spelt out.

[8] Part A was vigorously opposed by Bankserv and the merging parties. The Tribunal was never called upon to make a ruling in regard to the prayers contained in Part A of the Notice of Motion, as an agreement was reached between the parties which provided limited and restricted access to the applicants' legal representatives to inspect the confidential documents. Curiously, despite its vigorous resistance to Part A of the review applications, Bankserv and the merging parties never opposed Part B of the Notice of Motion. On 10 September 2012 the attorneys for Bankserv and the merging parties wrote to the Tribunal to advise that their clients would no longer be opposing the application for review in view of the mounting legal costs and they left the matter for the Tribunal to decide. They indicated in their letter that their clients' decision was made on the basis of the pleadings as they stood, and that if the applicants changed the relief they sought, their clients reserved the right to re-consider their decision not to oppose Part B of the Notice of Motion.

[9] The review applications were brought in terms of section 27(1)(c) of the Act read together with rule 42 of the Competition Tribunal Rules. Section 27(1)(c) of the Act lists as one of the functions of the Competition Tribunal to "review any decision of the Competition Commission that may, in terms of the Act, be referred to it". The Competition Tribunal is

empowered in terms of this section of the Act, as stated in *TWK Agriculture Limited v The Competition Commission*, to hear review applications of this nature.[1]

[10] The Act does not specify the grounds upon which decisions of the Commission may be reviewed and set aside. However, in two decisions *TWK Agriculture Limited* and *A.C Whitcher (Pty) Ltd v The Competition Commission and Others*[2], the Competition Appeal Court (CAC) decided that the PAJA , and in particular section 6 of that Act, applies to reviews of the Commission's decisions, on the grounds that these decisions constitute administrative action as defined in PAJA.

[11] At the conclusion of the hearing, the parties were invited to make further written submissions on the following: If the Tribunal were to find that there had been a reviewable irregularity in the Commission's consideration of the Emid and Nomad small mergers and the Tribunal decided to remit the matters back to the Commission, what should the terms of the remittal be? Both parties submitted written representations. The applicants argued that the merger transactions should be referred back to the Commission for reconsideration as to whether they should be approved or prohibited, and, if approved, whether conditions should be attached to the approval. Mr Ngcukaitobi, who appeared on behalf of the Commission, argued that the Commission should only be directed to revise its conditions having regard to the submissions of any interested party and any relevant facts; it should not be required to reconsider whether it should have prohibited the merger.

THE COMMISSION'S DECISIONS

[12] On 31 August 2010 the Commission conditionally approved the Emid and Nomad merger transactions. The transactions were notified voluntarily as small mergers.[3]

[13] From the Commissions' decisions the following is apparent.

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[1] Case No. 67/CAC/Jan07
[2] Case No. 84/CAC/Jan09
[3] Unlike large and intermediate mergers, small mergers are not notifiable in terms of the Act. The Commission only has jurisdiction if the merging firms notify voluntarily or the Commission requires the merger to be notified by giving notice to the merging firms, not less than six months after the date of implementation.

THE NOMAD MERGER

[14] Nomad has a system that provides technology for the electronic switching of funds from a cardholder's personal bank account to the bank account of Nomad's retail client. The Nomad software ensures that a payment request is sent from the retailer's point of sale to the retailer's acquiring bank. Nomad also provides related value added and reconciliation services.

[15] The Commission found that there was no existing horizontal overlap in the activities of the merging parties and that the merger gave rise to a merger of firms that provided complementary services, as Bankserv and Nomad provided services to distinct clients; viz. banks and retailers respectively. The Commission therefore noted that there was no concern about the possible bundling of Bankserv's and Nomad's services.

[16] However, it noted concerns about the likelihood that "Bankserv could leverage its market power in its payment clearing core services into the transaction switching market through cross-subsidisation and degradation of interoperability." The Commission noted that Bankserv perceived threats to its inter-bank clearing market coming from various companies, including those operating in the adjacent transaction switching market. As a result, the Commission believed that Bankserv may be incentivised to leverage its market power in the interbank clearing market into the related transaction switching market and Bankserv had the ability to reduce the interoperability of rival vendors of transaction switching services because it controlled the interfaces of the payment clearing core.

[17] In the light of this, the Commission found that the proposed merger was likely to substantially prevent or lessen competition in the market for the provision of transaction switching services to retailers.

[18] The Commission was also of the view that there were no substantial public interest concerns.

[19] The Commission, therefore, decided to approve the merger subject to conditions, which, it believed, would alleviate its concerns.

THE NOMAD MERGER CONDITIONS

[20] In summary, the merger conditions addressed the Commission's concerns related to access by system operators, pricing, confidential information, the monitoring of compliance with these conditions and their duration.

[21] In respect of the issue of access by system operators, Bankserv is required, upon the reasonable and *bona fide* written request of any system operator to provide it with the Bankserv Access Service on terms and conditions that are no less favourable than the terms and conditions (including pricing structures and service levels) which Bankserv provides to existing system operators. This condition was subject to the proviso that the system operator requesting the service met the system operator criteria.

[22] In respect of the issue of pricing, Bankserv (1) is required to ensure fair and transparent pricing in its fees and charges for clearing settlement services and the Bankserv Access Service; (2) is required to ensure that its pricing structure for the Bankserv Access Service is made available in writing upon request to the Commission, the Payments Association of Africa (a payments system management body for the purposes of section 3(1) of the National Payment System Act, 1998 (Act No. 78 of 1998)), and any system operator that required the Bankserv Access Service; (3) may not offer any of its customer lower prices or any discounts or rebates for any of the account hosting services or any other services provided by Nomad by reason of the fact that the customer makes use of the clearing and settlement services offered by Bankserv; (4) may not cross-subsidise operating costs between Bankserv's clearing and settlement services and any other service provided by Nomad; and (5) may not discriminate amongst parties that use the Bankserv Access Service in respect of the fees or other connectivity charges and in respect of the agreement in terms of which it provides the Access Service.

[23] In respect of the confidentiality of information condition, Bankserv is required at all times to comply with its policy for the treatment of confidential information, which policy was annexed to the Commission's conditions.

[24] In respect of monitoring of compliance with these conditions, the Commission required the merged entity to report to it on an annual basis within one month of the Commission's

decision. The report has to address the following issues and provide supporting documentation:

- Which firms have applied for access to Bankserv's Access Service;
- Whether or not access has been granted and the terms and conditions thereof;
- If access was not granted, the reasons for refusing access;
- Specify and provide detail about any interruption to the Bankserv Access Service experienced by any system operator;
- Whether or not Bankserv has provided its interbank clearing and settlement services together with any other services provided by Nomad;
- Whether Bankserv has cross-subsidised the operations of Nomad;
- Whether Bankserv has provided its pricing structure to any third parties on request; and
- Any other information relevant to compliance with the conditions imposed.

[25] In respect of the duration of these conditions, the Commission imposed these conditions for 10 years from the date of its decision. The Commission stated that it will review the relevance of these conditions after the expiry of the 10 year period and may, if required, extend or vary the conditions beyond this period. The Commission also stated that it may lift, revise or amend these conditions on good cause being shown by the merging parties or a third party.

THE EMID MERGER

[26] Emid is a specialist provider of ICT services active in the provision of fully integrated retail banking platforms, which includes transaction and account management solutions and managed ICT services.

[27] The Commission found that there was no existing horizontal overlap in the activities of the merging parties and that the merger gave rise to a merger of firms that provide complementary services – Emid processes transaction information for its non-bank and bank clients and ensures it is ready for submission through the payments system which uses Bankserv as a platform. Therefore, the Commission concluded that both Bankserv and Emid provided their services directly and indirectly to the same client and that their services could in the future interface with each other.

[28] However, after noting that there are few competitors (i.e. VISA and MasterCard) in some segments of Bankserv's interbank payment clearing core and that there was a lack of competitors in many other segments, the Commission concluded that currently Bankserv has market power in the interbank clearing space at least against small start-up banks, non-banks and systems operators that require access to Bankserv.

[29] The Commission noted that the proposed transaction presented Bankserv with an opportunity to bundle its payment core with EMID's transaction account management and hosting services to the detriment of competitors in the transaction account management and hosting market. It therefore held that the proposed transaction raised potential foreclosure concerns if competitors did not have the ability to replicate the Bankserv/Emid bundle.

[30] In addition, the Commission held that Bankserv was in a position not only to offer a bundle that cannot be replicated by competitors, but can also offer the bundled services at discounted prices which competitors were unlikely to match. It also held that, related to this, was the likelihood that profits earned in the less competitive interbank clearing market could sustain predatory pricing in the more competitive transaction account management and hosting market.

[31] Lastly, the Commission noted that reliance on Bankserv as the only alternative service provider for accessing some segments of interbank clearing (also known as payment streams) was also likely to give rise to issues relating to degradation of third party system operators' interoperability with Bankserv, if Bankserv sought to leverage its market power into markets in which these system operators were active.

[32] The Commission, therefore, found that the proposed transaction was likely to substantially prevent or lessen competition in the provision of retail bank platform which included card issuing and transaction account hosting and management services. In order to alleviate the identified concerns, the Commission decided to approve the transaction subject to conditions. It was also of the view that there were no substantial public interest concerns.

[33] The Emid merger conditions were the same as those that applied for the Nomad merger.

THE SARB CONDITIONS

[34] Before imposing its conditions the Commission sought the advice of the South African Reserve Bank ("SARB"). Mr DC Mitchell, SARB's Head: National Payment System Department informed the Commission on 16 August 2010 as follows:

> *In order to address possible risk to the payment system that could result from Bankserv's diversification strategy SARB's National payment System division is proposing to its Board of governors conditions for holding separate the new businesses of Bankserv from the payment core. These conditions include:*
>
> - *Ensuring that the core and non-core entities are contained in separate legal entities;*
> - *No sharing of resource, e.g. Human Resources and IT;*
> - *No cross-subsidisation of profits;*
> - *Ensure that the core operates safely and efficiently.*

[35] The Commission's report stated that "SARB's National Payment System division noted that the way that they will ensure that Bankserv complies will be by data request and site visits." It went on to state that the "Commission [was] of the view that if there is effective policing of the [SARB] conditions they could assist in significantly alleviating the competition concerns raised ...". However, when the Commission states this, it is referring to the letter dated 8 September 2010 from SARB's Head: National Payment System Department referred to in paragraph [66] below. Therefore, at the time the Commission made its decision, the SARB Board of Governors had not yet imposed any conditions on the merger. At most for the Commission, a senior official involved in regulation had indicated a confident intention to recommend that the Board do so. We discuss the implications of this choice later.

REVIEWS

[36] Before considering the grounds upon which the applicants submitted that the Commission's decisions should be set aside, two important issues must be noted. The first is that the Commission prevailed upon us, quite correctly we believe, to bear in mind the distinction between a review and an appeal. Accordingly, a mere disagreement with the substance of the Commission's decisions, including the conditions, is not sufficient to upset the decisions rationally taken by the Commission. Instead the question is whether the decisions, including the conditions, bear a rational connection to the identified potential harm ("the issue of rationality") and whether the decisions are ones that a reasonable decision-maker could reach ("the issue of reasonableness"). See *Democratic Alliance v President of South Africa and others* 2013 (1) SA 248 (CC) paras 29-32.

[37] The second is that the Commission noted, again correctly in our view, that to a large extent, the applicant lumped the PAJA grounds of review together[4] and then listed its complaints regarding the decisions of the Commission. During the course of the oral argument, it appeared that the applicant's main contentions centred on the allegations relating to an error of law – the taking into account of conditions allegedly imposed upon the merging parties by the South African Reserve Bank (SARB) – and reasonableness and rationality. However, this was not altogether clear.

[38] The applicant's approach should, we believe, be discouraged, as a reviewing party should specifically identify the legal provisions upon which the Commission's decisions are challenged so that the party whose decision is being reviewed – the Commission in this case – is able to answer the factual allegations by reference to the provisions of PAJA that are alleged to ground the review.

[39] Be that as it may, we shall consider each of the applicant's complaints in the light of the above.

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[4] The applicant relied upon the following grounds of review: (1) the Commission was influenced by an error of law (s 6(2)(d) of PAJA); (2) the Commission took into account irrelevant considerations and ignored relevant considerations (s 6(2)(e)(iii)); (3) the Commission's decision was arbitrarily and capriciously taken (s 6(2)(e)(vi)); (4) the Commission's decision was not rationally connected to the material facts before it; (5) the Commission's decision was so unreasonable such that no person could have taken the decision.

THE APPLICANTS' COMPLAINTS

BUNDLING OF PRODUCTS

[40] It is common cause that the bundling concern relates only to the Emid merger. As stated above the Commission identified the possibility that the Emid merger could present Bankserv with an opportunity to bundle its payment core with Emid's account hosting and card issuing services to the detriment of account hosting and card issuing markets. The applicant's main contention is that the Commission failed to provide a remedy relating to this matter.

[41] The Commission stated that its condition relating to access by system operators, which is explained in paragraph [21] above, addresses the potential inability of competitors to replicate the bundle, and, in so doing, imposes an effective competitive restraint on Bankserv. It alleges that it does this in two ways: First, by guaranteeing access to all operators to the Bankserv system; and, second by providing that such access must be on terms and conditions (including pricing structures and service levels) that are no less favourable than those that Bankserv provides to existing system operators.

[42] The applicant was of the view that the flaw in this argument is that "access" to Bankserv's systems and a "presence" in Bankserv's core are not the same thing. It alleged that Bankserv was the only firm that had a presence in the payment core, and therefore only it had the ability to use the information and systems provided by that core in conjunction with the information and systems provided by Emid in order to offer a competitive bundled product.

[43] The Commission's view was that the distinction between access and presence was artificial and a guarantee of access and a guarantee about equality in relation to that access ensured that competitors would have the capacity to replicate the bundle in a manner that could place effective competitive constraints on the merged entity.

[44] In our view, there is a rational connection between the identified potential harm and the conditions imposed by the Commission and the decisions are ones that a reasonable decision-maker could reach. Bundling is not, in and of itself, considered an anticompetitive

practice – it depends on various circumstances.[5] The Commission has attempted to remedy the potential exclusionary effects of bundling in this merger. The only difference between it and the applicant is whether prohibition was more appropriate than a condition to remedy the bundling concern. In our view beyond mere allegation, the applicant has not demonstrated that this would be the case. It has failed to show why a regulatory choice that favoured a condition to deal with bundling, as to prohibition, was a reviewable error.

[45] However, we are of the view that the condition that relates to bundling is imprecisely formulated and should be redrafted on the terms we suggest later in this decision.

CROSS-SUBSIDISATION

[46] The Commission identified that Bankserv was in a position to cross-subsidise the services offered by the businesses within the Bankserv group. In order to deal with this problem it imposed the conditions relating to pricing.

[47] The applicant's chief contention was that the Commission only chose to address cross-subsidisation of the services provided by Emid and Nomad with Bankserv's clearing and settlement services and did not recognise Bankserv's ability to use its other services to cross subsidise to the detriment of competitors.

[48] The Commission's response was that its conditions must also be read with those put in place by the SARB. This is a matter to which we will return later.

ASYMMETRIC INFORMATION EXCHANGE

[49] The Commission was of the view that Bankserv could have access to information about systems operators which are competitors of Emid and Nomad. The Commission alleged that this concern was dealt with by way of the condition relating to confidential information, which would ensure that management must safeguard that the board of Bankserv is only

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[5] As some commentators have noted:
"In particular, in the merger context, a portfolio effects theory of harm does not work unless consumers have preferences for buying the bundle and there are significant economies of scope in supplying that bundle (which gives the ability to foreclose), and unless rivals in the second market can be kept at a disadvantage (which gives the incentive to foreclose)." See Niles, G, Jenkins, H & Kavanagh, J (2011) Economics for Competition Lawyers Oxford University Press, p 371

provided with aggregated information and not customer specific information, and if the information could not be aggregated, it had to be provided on an anonymous basis.

[50] The Commission also contended that this concern is addressed by maintaining separate management structures, which the Commission contends is required by virtue of the SARB conditions. Accordingly, this whole matter is again wrapped up in the issue relating to the "SARB conditions", which we deal; with below.

GROWTH, INNOVATION AND PRODUCT DIFFERENTIATION

[51] As with this previous concern, the applicant's central complaint pertains to the risk of information exchange that could potentially be deployed to the advantage of the merged entities to the disadvantage of its competitors. Again the Commission relies on the conditions allegedly imposed by SARB to justify its conclusion that this concern does not arise.

CO-ORDINATED EFFECTS

[52] The applicant contended that the Commission failed to take into account the possibility of co-ordinated effects in regard to the Nomad transaction. This issue was fully canvassed in the Emid transaction where the Commission concluded that banks will not have access to unique information that was not available to Bankserv before the acquisition. The Commission argued that, although this was not specifically stated in the Nomad report, the same applied to the Nomad merger.

[53] The Commission also argued that the risks of co-ordinated effects was mitigated by the SARB condition requiring separate legal entities and the conditions relating to confidential information.

[54] In our view, the applicants have failed to articulate a case for the merger raising co-ordinated effects problems. It is not clear from their objection in which market the co-ordination would take place; the banking market, the markets for bank clearing services or the markets where Emid and Nomad operate. Given that these are not horizontal or vertical mergers and that the relationship between banks exists in Bankserv pre-merger, it is hard to understand this concern and hence to fault the Commission for insufficiently addressing it.

PUBLIC INTEREST ISSUES

[55] The applicants contended that SARB had significant structural concerns about the mergers, including Bankserv's ability to continue to operate as a core payments utility simultaneously with its endeavours to diversify its business activities to include other commercial offerings. This, the applicants contended, showed that the matter had significant public interest.

[56] The applicants also submitted that the approach of the Commission discounting the effect of the transaction on small businesses on the grounds that large businesses would also be affected was irrational.

[57] However, in our view the Commission's findings cannot be criticised on the grounds of irrationality, albeit that another person may disagree with these contentions.

MONITORING OF COMPLIANCE

[58] The applicants' central complaint is that the issue of effective monitoring of the conditions has not been considered by the Commission. The Commission noted that a behavioural remedy that ensures that behaviours do not take place can be difficult, but it argued that there was no basis to assume that the reporting measures would be violated and that monitoring of compliance was multifaceted involving both reporting and investigation as well as industry participation.

[59] There is, therefore, in our view no irrationality or unreasonableness on regard to this matter.

THE SARB CONDITIONS

[60] As regards these conditions, the applicants complaints were that these conditions were imprecisely formulated – by the use of the word "include"[6], it was not clear whether the SARB conditions were in fact the full set, they were not public, they were not part of the Commission's decisions so the Commission could not enforce them and when enforcing these "conditions" the SARB is not concerned with competition issues, but rather risks to the payment system.

[6] See the quote in paragraph [34]

[61] The Commission's decisions recognised that "hold separate" conditions were a necessary element of the conditional approval. The Commission did not know the precise form that the "hold separate" condition would take.

[62] The Commission abdicated the regulation of this aspect to another regulator, SARB. This was a reviewable irregularity, especially because that regulator – SARB – is not primarily concerned with competition issues, but rather matters associated with risk to the payment system.

[63] In terms of section 15(1)(c) of the Competition Act, the Commission can take steps to revoke its approval of a merger, if a firm breaches an obligation attached to the decision. In terms of section 59(d)(iiii) of the Act, the Commission can seek an administrative penalty against a firm that has implemented a merger contrary to conditions imposed on it. These are important powers that the Commission exercises to ensure that firms comply with merger conditions.

[64] By not formally imposing the SARB conditions on Bankserv and leaving this job up to the SARB, the Commission gave up its ability to exercise these powers of oversight and abdicated its responsibility to SARB.

[65] In addition, at the time that it gave its conditional approval, the Commission could not have known whether the Reserve Bank would impose such conditions, or that, if it did, whether it would take the form indicated by the SARB senior official.

[66] Even if it could make it a condition to a merger that the merging parties comply with the conditions of another regulator, it did not do so here. It could not, of course, have done so as the other regulator had not acted. Whilst we know now that the decision was taken later, this does not help the Commission. (According to a letter dated 8 September 2010 from SARB to the Commission (which is after the date of the Commission's decisions), the Governors Executive Council of SARB endorsed these recommendations, including the necessity for BankservAfrica to ring-fence the core activities from the non-core activities in separate legal entities and that no cross-subsidisations be allowed between the two.) It should also be noted that SARB refused to provide the ASO with the "actions, principles and restrictions" used to monitor Bankserv, as it claimed that the information that ASO

requested was confidential and could not be provided in terms of section 33 of the South African Reserve Bank Act, 1989 (Act 90 of 1989).

[67] Finally, the efficacy of behavioural conditions depends on whether compliance with them can be adequately monitored. The best form of monitoring comes from other players in the market place who have the incentive to do so. If the conditions are not in the public domain, the Commission has no ability to monitor compliance – it has to rely on the merging parties say so. The present conditions by the SARB are not in the public domain. The Commission cannot monitor conditions whose content are unclear nor expect private parties to do the job for it.

[68] Finally, even if the SARB had imposed these conditions prior to the Commission's approval of the mergers and made such conditions public; because they were not the Commission's conditions, but those of another regulator, the Commission could not have enforced compliance with the conditions in terms of section 15 of the Act.[7]

[69] That these conditions were material to its decision was fairly conceded by Mr Ngukaitobi.

[70] Thus by not imposing what it considered material conditions and leaving this aspect to the later, and as yet uncertain decision of another regulator, compliance with which it could not itself enforce under the Act, the Commission abdicated its responsibility for its merger enforcement function.

[71] On this basis the decisions of the Commission were unreasonable, irrational and constitute an error of law.

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[7] Section 15 states:

"15. Revocation of merger approval

(1) The Competition Commission may revoke its own decision to approve or conditionally approve a small or intermediate merger if –
  (a) the decision was based on incorrect information for which a party to the merger is responsible;
  (b) the approval was obtained by deceit; or
  (c) a *firm* concerned has breached an obligation attached to the decision.

(2) If the Competition Commission revokes a decision to approve a merger under subsection (1), it may prohibit that merger even though any time limit set out in this Chapter may have elapsed.

REMEDY

PROHIBITION OF THE MERGERS

[72] The applicant's originally requested that that we should prohibit the merger . In argument ASO conceded that the result of such a ruling would entail and require an order of divestiture. In our view this would be inappropriate for two reasons. There was no request for a divestiture order in the Notice of Motion and the merging parties were not before us.

[73] This means that having found a reviewable error, the choice is between determining the matter ourselves, remitting the matter back to the Commission to either reconsider the approval, as sought by the applicants, or to reconsider the remedy.

[74] It would be inappropriate for us to determine the matter ourselves. Firstly, the merging parties are entitled to be consulted about the conditions, they were not before the Tribunal and such relief was not set out in the applicants' notice of motion. Secondly, the Commission may also want to have regard to what the SARB has done and whether its conditions are working. Thirdly, given the Commission's knowledge of the specifics of the merger, it is better placed to consider the detailed issues more carefully than we can on the present record. Lastly, the bundling remedy may depend on a number of considerations as our order suggests and the Commission again is best placed with the information at its disposal to make this determination.

RECONSIDERATION OF APPROVALS OR THE CONDITIONS

[75] The prevention of the mergers would have dealt with the identified competition concerns. However, behavioural remedies may have the same effect or achieve the same objective as structural ones and may, in appropriate circumstances, be preferable. Each case has to be assessed on its own merits. In our view, the remedies should be the least restrictive means available to effectively eliminate the identified competition concerns.

[76] In this case the Commission determined that behavioural remedies were appropriate, as they would deal with the identified competition concerns. There has been no criticism of the manner and competence in which the Commission has analysed the merger.

[77] In the light of the fact that this is a review and not an appeal, there is, in our view, insufficient reason to interfere with the decisions to approve the mergers. Given the narrow focus of the review, it is easily capable of rectification by imposing the same conditions the Commission expected the SARB to impose.

[78] In addition, we are not persuaded by the argument to the effect that the conditions are not effective because they are of a long term nature. Markets, especially ones involving information technology, are dynamic and 10 years, if anything, seems longer than necessary.

[79] The Commission was in a good position to make this assessment and decided that approval subject to conditions was sufficient. These were small mergers and they were not classical vertical mergers, but mergers in related markets. The Commission could also take into account that competitors would also have an incentive to favour prohibition not because they might be excluded from the market but because they feared the entry of a more effective competitor than the two firms had been under their previous shareholders.

[80] Moreover, the competition harms identified were not of such a nature that they could not be remedied by the imposition of conditions. Remedies can be clearly formulated. They are also capable of being monitored because rival firms can monitor compliance as well as the roles of both SARB and the Commission. In our view, remittal back on a narrow basis sufficiently cures the reviewable error.

[81] For these reasons, it was not unreasonable or irrational to conclude that the competition concerns that arose could be adequately addressed by the conditions.

[82] There are several practical problems associated with a reconsideration of the approvals of the mergers. The applicants conceded, correctly in our view, that a broad remittal of the mergers back to the Commission would entail a re-consideration of the approvals based on current market conditions. If the Commission were to now not approve the mergers, how would this be put into effect and regulated? What, for example, would be the regime to regulate divestiture? This is made all the more difficult given that the merging parties are not presently part of the proceedings.

[83] Moreover, re-opening the enquiry into the approval of the mergers would involve the expenditure of further substantial public resources, as it would involve considering the matter de *novo* in the light of the new market evidence.

[84] The Commission indicated bundling as a concern in respect of Emid, but not Nomad. However, the orders provide the same somewhat obtuse access remedy for both. A hold separate remedy may include a bundling prohibition or the Commission could decide that fair access to the Bankserv core is adequate for competitors to compose their own bundles assuming bundling is efficient. The Commission should determine this issue, but if it opts for an equal access condition, the conditions must be formulated more clearly than the present one.

COSTS

[85] We do not ordinarily order costs against the Commission, as this would have a chilling effect on the work of the Commission and its resolve to act vigorously to protect markets. We can see no reason to depart from this approach, especially since the Commission was entitled to oppose the application and has, at least, been partially successful in not getting the matter remitted back entirely.

ORDER

[86] In the premises the following order is made:

1. The interveners are given leave to join these proceedings.
2. Subject to paragraphs 3-8 below, the Commission's decisions to approve the mergers conditionally are upheld.
3. The conditions imposed on the approvals are remitted back to the Commission, for reconsideration, in terms of the directions set out below.
4. The Commission must impose additional conditions on the merging parties in respect of the mergers in accordance with the following:
   4.1. In respect of both merger approvals, the Commission must include conditions that relate to the 'hold separate' issue referred to in paragraph 9 of the Nomad merger report and paragraph 7.2.3.8 of the Emid merger report respectively.

4.2. In formulating the hold-separate conditions, the Commission must ensure that at minimum, they provide for the following, namely that:

4.2.1. the activities of Bankserv, Emid and Nomad respectively, remain in separate legal entities;

4.2.2. there is no sharing of human resources and information technology between Bankserv, on the one hand, and Emid and Nomad, on the other;

4.2.3. Bankserv does not cross-subsidise the profits of Nomad and Emid from its profits;

4.2.4. no directors of Bankserv may at the same time serve on the boards of Emid and Nomad; and

4.2.5. Nomad and Emid do not benefit from information flows obtained by Bankserv in its core business, unless such information is made available to rival firms on reasonable terms.

4.3. In respect of the Emid decision, where the Commission identified the need to provide for conditions to prevent anti-competitive use of bundling, the Commission must consider, on the record before it, whether this bundling concern can be remedied sufficiently:

4.3.1. by the hold separate conditions referred to in sub-paragraph 4.2; or

4.3.2. by an improved condition to that presently contained in paragraph 2 of the Emid order that either prevents Bankserv from bundling its services with those of Emid or permits rivals of Emid equal access to the core so as to enable them to offer a reasonably competitive replica bundle to customers.

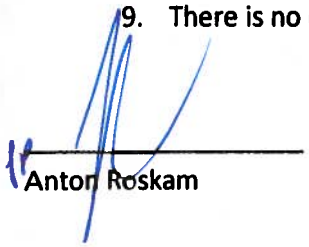
5. The Commission must prepare a draft of the new conditions that are contemplated above and provide them for comment to the applicant, the interveners and the merging parties within 20 business days of date of this order.

6. If the applicant, the interveners or the merging parties wish to make submissions on the proposed conditions contemplated above, they must do so within 10 business days of receipt of the draft from the Commission.

7. The Commission must have regard to these submissions and issue a final order within 14 days of receipt of the last of the submissions referred to above. However, if one or more of the parties contemplated has not provided submissions to it within the requisite time period, the Commission may issue its new order.

8. Until such time as the Commission has issued its new order the merging parties must comply with the conditions contained in the Commission's previous conditions.

9. There is no order as to costs.



Anton Roskam

05 June 2013
DATE

Norman Manoim and Imraan Valodia concurring.

Tribunal Researcher:	Thabo Ngilande
For the Applicant:	Jonathan Blou SC and Shanee Stein instructed by Edward Nathan Sonnenbergs
For the Commission	Thembeka Ngcukaitobi instructed by the State Attorney