

SOUTH AFRICA / JUDGMENT

Alviva Holdings Ltd v Tarsus Technology Group (Pty) Ltd (LM185Jan21) [2021] ZACT 29 (3 June 2021)

[2021] ZACT 29

COURT

Competition Tribunal

BEFORE

Y Carrim, A Wessels, F Tregenna

CASE / FILE NUMBER

LM185Jan21

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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM185Jan21

In the matter between:

Alviva Holdings Ltd

Primary Acquiring Firm

And

Tarsus Technology Group (Pty) Ltd

Primary Target Firm

Panel

Ms Y Carrim (Presiding Member)

Mr A Wessels (Tribunal Member)

Prof. F Tregenna (Tribunal Member)

Heard on: 21 April 2021

Order Issued on: 21 April 2021

Reasons

Issued on: 3 June 2021

REASONS

FOR DECISION

Conditional approval

[1] On 21 April 2021, the Competition Tribunal ("Tribunal") conditionally approved the proposed transaction whereby Alviva Holdings Ltd ("Alviva") intends to acquire 100% of the shares in Tarsus Technology Group (Pty) Ltd ("Tarsus"). Upon the implementation of the proposed merger, Alviva will have sole control of Tarsus.

[2] The reasons for the conditional approval follow.

Parties to the proposed transaction

Primary Acquiring Firm

[3] The primary acquiring firm is Alviva, a public company listed on the JSE Securities Exchange. No shareholder exercises control over Alviva.

[4] Alviva controls several companies with different operations located in South Africa, Mauritius, Zambia, Botswana, Namibia, Kenya, Mozambique, United Arab Emirates, Qatar, United States of America, and United Kingdom.

[5] Alviva is a level-1 8-BBEE Contributor with 51% of it black owned, including being 41.93% black female owned.

[6] Alviva and the firms it controls will be collectively referred to as the Alviva Group.

[7] Alviva is an investment holding company that provides Information and Communication Technology (ICT) products and services through various subsidiaries. The Alviva Group operates through subsidiaries which are distinct and independent entities that compete with one another. The Group is active in three business segments:

[7.1] IT Distribution - imports and sometimes assembles IT hardware and software which is then sold into the sub-Saharan African markets via reseller channels and national retail chains;

[7.2] Services and Solutions - offers systems integration and IT solutions that include cybersecurity, application development, artificial intelligence solutions and renewable energy projects in South Africa and internationally;

[7.3] Financial Services - offers finance solutions to SMMEs and other commercial entities mainly for office automation and technology-based equipment.

[8] In South Africa, Alviva operates through OCT Holdings (RF) (PTY) Ltd ("OCT"), its subsidiary that operates as an IT investment holding company which operates two consolidated clusters:

[8.1] IT Distribution Cluster- offers hardware and software products. The companies that belong to this cluster are Pinnacle, Axiz, VH Fibre, Obscure, Froggy and Apex.

[8.2] IT Services and Solutions Cluster-offers integration and IT solutions. The companies that belong to this cluster are Solareff, Gridcars, IntDev, Centravoice, Sintrex, SynergyERP and Datacentrix.

Primary Target Firm

- [9] The primary target firm is Tarsus. Tarsus wholly controls Tarsus Shared Services (Pty) Ltd ("Tarsus Shared Services"). Tarsus Shared Services in turn controls Tarsus Property Holdings RF (Pty) Ltd ("Tarsus Property"), Tarsus Distribution (Pty) Ltd ("Tarsus Distribution") and Tarsus on Demand (Pty) Ltd ("TOD").
- [10] Tarsus Distribution in turn wholly controls Tarsus Distribution (Pty) (Botswana) and Tarsus Distribution(Pty) (Namibia).
- [11] The proposed transaction excludes certain Tarsus companies that were either in the process of being liquidated, deregistered or dormant when the merger was recommended and considered by the Tribunal.
- [12] Tarsus is wholly owned and controlled by Mamzen (Pty) Ltd ("Mamzen"). Mamzen is in turn controlled by Bowwood and Main No. 188 (Pty) Ltd ("Bowwood and Main"). Bowwood and Main is not controlled by any firm, and the shares are held by Investec Bank Ltd ("Investec") , the Entrepreneurship Development Trust and IEP Portfolio 1 (Pty) Ltd.
- [13] Tarsus has five areas in which it is active : (i) Tarsus Shared Services that performs internal group services such as management and consulting, IT, building facilities, marketing, accounting, treasury, risk management, HR and payroll services, (ii) Tarsus Property which is a holding company for properties within Tarsus operations, (iii) Tarsus Distribution which is a traditional IT hardware and software distributor of leading hardware technology brands to resellers, (iii) TOD- Tarsus' cloud computing division that provides services expertise around cloud ecosystem, (iv) Tarsus Technology Solutions ("TTS") that deals with the sales and distribution of data centre technologies including enterprise compute, storage, enterprise connectivity and cybersecurity.

Proposed transaction

- [14] The proposed transaction entails Alviva acquiring 100% of the shares in Tarsus. Post-merger, Alviva will have sole control of Tarsus.

Rationale

- [15] The acquiring firm submits that the proposed transaction will be a facilitator of growth.

- [16] According to the target firm, Tarsus's shareholders seek to realise their investment as the IT Distribution in South Africa has been currently slow growing paired with high costs. Upon the implementation of the merger, Tarsus believes it will be better positioned, by being part of a larger organisation, to grow its business and create opportunities for management and staff.

Industry

Background

IT products distribution market

- [17] The IT distribution market comprises of the designing, manufacturing, supplying, implementing, and supporting of technologies that allow for the storage, retrieval, and transmission of information. The IT distribution value chain consist of five key levels: international vendors or OEMs, distributors, resellers, system integrators and end-users. OEMs or international vendors design and manufacture IT hardware and software products such as HP, Dell, IBM, Microsoft, Acer and sell these products to distributors (i.e., use reseller channels as their main route to market and do not supply directly to the end- user) or supply directly to end-users. OEMs typically appoint distributors on a non-exclusive basis.
- [18] Resellers/systems integrators buy products from distributors or OEMs and supply them to end-users. In terms of system integrators, they supply or sell IT products to end users and also offer services including installation and integration of the products on the end user's behalf. End users include the government sector, retailers, small businesses, and large corporates. These different end users can procure by advertising a tender or buy directly from resellers or system integrators. When buying smaller orders, end users normally approach three different market participants for quotes for the product they wish to buy.

Cloud computing services

- [19] Cloud computing involves the delivering of applications, services, or content to the end user through storage capacity of large-scale data centres. Cloud computing provides the end user with simple ways of accessing servers, storage, databases, and a broad set of application services over the internet. There are three main types of cloud computing services:
- [19.1] IaaS: comprises of the basic capabilities provided by a physical server such as (i) data processing (or computing); (ii) data storage; and (iii) networking. IaaS involves cloud companies (such as Google) providing IT infrastructure that allows customers to store their data in the data centres of the cloud service provider as well as access, interpret and manipulate it.
- [19.2] PaaS: gives access to a cloud environment in which to develop, host and manage applications . PaaS provides the same basics as IaaS, but it is used by developers.

[19.3] Saas : provides customers with access to their service providers' cloud-based software. Saas differs from traditional software because it avoids the need for a customer to buy and install a particular program on a machine.

[20] The merging parties cannot offer cloud computing services and operate as intermediaries that facilitate access to cloud computing services to resellers and retailers on behalf of OEMs. Both merging parties offer Saas.

Competition

analysis

[21] The Commission found that the proposed transaction results in horizontal overlaps in respect of the supply and distribution of software and peripherals and the provision of cloud computing services.

[22] A vertical overlap was also identified by the Commission, in that the Alviva Group is both an upstream distributor of IT hardware and software products and a downstream system integrator and reseller of IT hardware and software products. As a system integrator, the Alviva Group sells IT products to end users and will also offer services including the installation and integration of the products on the end user's behalf.

[23] The Commission considered the following relevant markets in assessing the proposed transaction and made the subsequent findings:

[23.1] In the national upstream market for the distribution of IT products, the Commission found that the merged entity will have a market share of less than 40% with an accretion of less than 10%.

[23.2] In the national downstream market for the provision of system integration and services, the Commission found that

Alviva Group has a market share of approximately less than 15%.

[23.3] In respect of the national broad market for the provision of cloud computing services, the merged entity will have a market

share of less than 10%, with an accretion of approximately 6%.

[23.4] With relation of the national narrow market for the provision of Saas where both the merging parties are active, the Commission found that merging parties will have approximately 32,9% of the market, however, it is important to note that this estimate is overstated as the Commission's calculation does not include several players active in the cloud computing market.

[24] In all the markets assessed above , the Commission found that the merging parties will continue to face competition from several market players.

Countervailing power

[25] In its investigation, the Commission conducted a countervailing power assessment to evaluate the extent to which customers are able to switch within a reasonable timeframe and whether alternative suppliers are available in the IT products distribution and cloud computing services market. With respect to the distribution of IT products, customers have the ability to switch distributors with sufficient alternative distributors to switch to (including OEMs). The Commission also considered whether the ability of the customers to switch is limited by the number of distributors appointed for the product brands. The Commission found that the OEMs generally seek to appoint more than 1 distributor for their brands and the number of distributors appointed depend on the product requirements in a particular country.

[26] Similarly, in respect to the provision of cloud computing services, the Commission found that the customers have the ability to switch providers of cloud computing services and have alternative providers

to switch to. Taken as a whole, customers in the relevant markets have countervailing power as they are able to switch to alternative suppliers and have sufficient alternative suppliers to switch to.

Barriers to entry

[27] Based on third parties' submissions, the barriers to entry in these markets were found to be significant in the form of capital requirements, securing distribution agreements with OEMs and obtaining access to the customers as a new entrant in competition with larger established distributors. The Commission considered whether new entry in the relevant markets would be timely, likely, and sufficient to constrain the merged entity post-merger. The Commission found that the barriers to entry are not insurmountable as there are currently several smaller distributors distributing the various OEM products in South Africa, although the market has not seen any recent entry.

Unilateral effects

[28] As earlier mentioned, the Commission found that it is unlikely for players in the IT distribution market to exercise any market power as distributors are faced with substantial countervailing power from both upstream by OEMs and downstream by retailers. OEMs directly engage with retail partners and make propositions with regard to the product range offer by them and discuss the order

quantities, recommended retail price points, distributor's margin for warehousing and logistics and any applicable rebates. Moreover, most OEMs publish a recommended retail price list of their products and monitor sales reports generated by distributors, which restricts the merging parties from manipulating or controlling prices to customers. Thus, distributors are price and cost takers who perform the primary function of linking the OEM with the retailer. Hence the merged entity will continue to be constrained by other distributors and direct supply by the OEMs.

- [29] In terms of Cloud computing, customers submit that prices are largely driven by the OEMs. End users (customers) have no leverage over the pricing, while adjusted per country/region, are determined by the cloud computing solution providers in their sole and absolute discretion.

Creeping mergers

- [30] The Commission considered historic transactions over the past 10 years by the merging parties and found that Alviva has been involved in several acquisitions which have contributed to its growth overtime. The merging parties submitted that currently, Alviva is not considering acquiring any other firms in South Africa or in any other territory and confirms that no negotiations and/or agreements have been entered into with intentions to acquire any other firm and no due diligence investigations are on-going or planned.

Vertical assessment

- [31] The Commission found that the existing vertical relationship within the Alviva Group is not as a result of the proposed merger.
- [32] As mentioned above, in the upstream IT product distribution market, the merged entity was found to not have market power to engage in an input foreclosure strategy as there is a significant number of distributors in the market that will continue to constrain the merged entity. Furthermore, OEMs have the ability to bypass distribution level of the value chain and sell directly to the end users.
- [33] Because distributors are required to sell their products to as many customers as possible given that the OEMs that appoint them typically set sale targets, it is unlikely that they will be incentivised to foreclose downstream customers from access to the IT products distributed by Tarsus.
- [34] Third parties expressed concerns that a vertically integrated distributor may distribute IT products to their downstream system integrators and resellers at a lower or preferential price and thus place the downstream player within a vertically integrated distributor at an advantageous position to better compete against rivals in the downstream market. However, as indicated, the Alviva Group is already vertically integrated and therefore the concerns raised are not merger specific and there is no evidence that the Alviva Group is providing its internal downstream operations with preferential pricing.
- [35] In terms of customer foreclosure, Datacentrix, a subsidiary of Alviva, faces competition from several system integrators in the downstream market. If the merging parties engage in a customer foreclosure strategy and Tarsus supplies more of its products to Datacentrix, there remain other customers in the market that the current suppliers of Datacentrix can turn to. All the competitors of Axiz, Tarsus and Pinnacle would continue to have access to a sufficient number of customers in the market.

Information sharing

[36] The Commission received concerns from system integrators and resellers that distributors get access to competitively sensitive information. Specifically, that Tarsus has access to customer information in the downstream. This transactional information includes static and statutory information that is captured when resellers apply to open an account and subsequently enters into agreement with the distributor.

[37] The Commission in its assessment found that even if this information is disclosed, Datacentrix would not be able to use this information to influence a transaction which has already been concluded. The sharing of this information would be detrimental to Tarsus as Datacentrix could engage with the reseller and compete directly

with Tarsus since Datacentrix can also purchase products from OEMs directly at the same price as distributors and sell to another reseller in competition with Tarsus.

[38] It is submitted by the merging parties that distributors are prevented from disclosing information because distributors and OEMs vendor contracts contain strict confidentiality clauses and breaching these clauses would mean the termination of the distributor's OEMs contracts. Disclosure is further limited by legislation and the Protection of Personal Information Act 4 of 2013 and the General Data Protection Regulation ("GDPR") issued by the EU and applicable to Axiz, Pinnacle and Tarsus. Neither of Axiz, Pinnacle or Tarsus share a common system with Datacentrix, and we understand that it would therefore require an intentional and unlawful act to acquire or share the customer information with Datacentrix.

[39] Given that the vertical integration within the Alviva Group is pre-existing, and the only change is that the Alviva Group is adding Tarsus. Also noting that the Alviva Group is not the only vertically integrated company in the relevant markets. As such, the Commission concluded that the merger does not present any information sharing concerns that require further intervention. We did not find any reason to disagree with this.

Public Interest

[40] In terms of the proposed transaction's effect on employment, the merging parties provided an unequivocal undertaking that the merger will not result in any retrenchments or otherwise negatively impact employment. It was further indicated by the merging parties that the merger will not result in any duplications as Tarsus will continue to operate as a separate entity, post- merger.

[41] During its investigation, the Commission found that in March 2020, Tarsus had undertaken a retrenchment process in terms of which 68 employees ("Affected Employees") were retrenched across the group. The merging parties submitted that these retrenchments are not merger specific but due to operational requirements given the dire financial state of Tarsus for several years and not in any reference to the proposed transaction or known by Alviva.

Competition

- [42] In light of the retrenchments, the Minister of Trade, Industry and ("the Minister") filed an intention to participate. The Minister submitted that the retrenchment of the Affected Employees was likely to have been influenced by the merger given the notable proximity of the retrenchment processes to the merger. The Minister proposed that the Affected Employees be reinstated or alternatively, the Commission impose a condition requiring the merging parties to reinstate the Affected Employees or provide offers of employment when suitable positions become available for a period of 36 months post-merger approval.
- [43] The Commission engaged with all the relevant employee and trade union representatives who confirmed receipt of the merger notice and that the merger did not raise any concerns.
- [44] The Commission assessed whether the retrenchment of the Affect Employees is merger specific by assessing all relevant internal documents to ascertain whether the retrenchment process was conducted in anticipation of the merger. The Commission's findings are aligned with the merging parties' submissions, in that, the Affected Employees were retrenched pursuant to a decision taken to restructure Tarsus for operational reasons [.....]. Further, the Commission found that the restructuring of Tarsus was contemplated in December 2019, while the merging parties commenced negotiations on or about July 2020, after the decision to retrench had been taken internally by Investec Bank, the controller of Tarsus.
- [45] Nevertheless, in order to address any employment concerns, the merging parties agreed to a condition placing a 2-year moratorium on post-merger retrenchments as a result of the merger and to enable the Affected Employees to apply for any vacancies that may arise at the merged entity for a period of 3 years from the implementation date.
- [46] In relation to the proposed transaction`s effect on B-BBEE, the Commission received concerns from a complainant who preferred to remain anonymous ("the complainant") [.....]
- [47] [.....] The Commission engaged the Complainant who was subsequently directed to the relevant authorities to assist with the concerns raised.
- [48] The proposed transaction does not give rise to any other public interest concerns.

Conclusion

- [49] Based on the above, we are of the view that the proposed transaction is unlikely to substantially prevent or lessen competition in any of the relevant markets. Furthermore, the proposed transaction does not raise any public interest concerns. We therefore approved the merger subject to the employment condition set out in the attached Annexure A.

Signed by:Yasmin Tayob Carrim Signed at:2021-06-03 15:00:32 +02:00

Reason :I approve this document

Ms Yasmin Carrim

Mr Andreas Wessels and Prof. Fiona Tregenna concurring

3 June 2021 Date

Tribunal Case Manager: For the merging parties:

For the Commission:

Lumkisa Jordan

Zoe Banchetti of Tugendhaft Wapnick Banchetti and Partners

Portia Bele and Wiri Gumbie

Annexure A

THE COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.: LM185Jan21

Alviva Holdings Ltd Primary

Acquiring Firm

and

Tarsus Technology Group (Pty) Ltd Primary Target Firm

CONDITIONS

1. DEFINITIONS

The following expressions shall bear the meanings assigned to them below and cognate expressions bear corresponding meanings: -

1.1 "Acquiring Firm" means Alviva;

1.2 "Alviva" means Alviva Holdings Limited;

1.3 "Affected Employees" means the 68 employees of Tarsus who have been retrenched prior to the Merger;

1.4 "Alviva Group" means Alviva and its subsidiaries;

1.5 "Approval Date" means the date referred to in the Competition Tribunal's merger clearance certificate (Form CT10);

1.6 "Business Days" mean any day other than a Saturday, Sunday or official public holiday in the Republic of South Africa;

1.7 "Day" means any calendar day which is not a Saturday, Sunday or public holiday in South Africa;

1.8 "Commission" means the Competition Commission of South Africa, duly established under the Competition Act;

1.9 "Commission Rules" means the Rules for the Conduct of Proceedings in the Commission;

1.10 "Competition Act" means the Competition Act, No. 89 of 1998, (as amended);

1.11 "Conditions" mean, collectively, the conditions referred to in this document;

1.12 "HDIs" means a historically disadvantaged person/s as defined in section 3(2) of the Competition Act;

1.13 "Implementation Date" means the date, occurring after the Approval Date, on which the Merger is implemented by the Merging Parties;

1.14 "LRA" means the Labour Relations Act, No. 66 of 1995, (as amended);

1.15 "Merger" means the acquisition of control by the Acquiring Firm over the Target Firm;

1.16 "Merged Entity" means the Acquiring Firm and the Target Firm following the Merger;

1.17 "Merging Parties" means the Acquiring Firms and the Target Firm;

1.18 "Minister" means the honourable Minister for the Department of Trade, Industry and Competition;

1.19 "Moratorium" means a period of 2 (two) years from the Implementation Date;

1.20 "Rules" mean the Rules for the Conduct of Proceedings in the Competition Commission and the Rules for the Conduct of Proceedings in the Competition Tribunal;

1.21 "South Africa" means the Republic of South Africa;

1.22 "Target Firm" means Tarsus;

1.23 "Tarsus" means Tarsus Technology Group Proprietary Limited;

1.24 "Tribunal" means the Competition Tribunal of South Africa; and

1.25 "Tribunal Rules" means the Rules for the Conduct of Proceedings in the Tribunal.

2. CONDITIONS TO THE APPROVAL OF THE MERGER

2.1 The Merging Parties shall not retrench any employees because of the Merger for the duration of the Moratorium.

2.2 For the sake of clarity, retrenchments do not include (i) voluntary separation arrangements; (ii) voluntary early retirement packages; (iii) retrenchments as a result of unreasonable refusals to be redeployed in accordance with the provisions of the LRA; (iv) resignations or retirements in the ordinary course of business; (v) retrenchments lawfully effected for operational requirements unrelated to the Merger;

(vi) terminations in the ordinary course of business, including but not limited to, dismissals as a result of misconduct or poor performance; and (vii) any decision not to renew or extend a contract of a contract worker.

2.3 For a period of 36 (thirty-six) months post the Implementation Date, if vacancies at the Merged Entity become available, first preference to apply for vacancies at the Merged Entity will be offered to the Affected Employees.

2.4 For the sake of brevity for purposes of clause 2.3 of the Conditions, the Affected Employee will be considered for any vacancy on the basis that the Affected Employee

- (i) has the relevant expertise and experience in respect of the position for which he/she is applying; (ii) is a person of good repute with no criminal record; and (iii) it is understood that preference will be given to applicants who are HDIs,

irrespective of whether the applicant in question, is an Affected Employee.

3. MONITORING OF COMPLIANCE WITH THE CONDITIONS

3.1 The Merging Parties shall circulate a copy of the Conditions to all their employees within 5 (five) Days of the Approval Date.

3.2 As proof of compliance with 3.1 above, a director of each Merging Party shall within 10 (ten) Business Days of circulating the Conditions, submit to the Commission an affidavit attesting to the circulation of the Conditions and provide a copy of the notice that was sent to the employees in that regard.

3.3 The Acquiring Firms shall inform the Commission in writing of the Implementation Date within 5 (five) Days of its occurrence.

3.4 The Merged Entity shall provide the Commission with a report detailing the extent of its compliance with clause 2.1, 2.3 and 2.4 of the Conditions on each anniversary of the Implementation Date for the duration of the conditions. This report shall be accompanied by an affidavit, duly signed by the Director of the Merged Entity, attesting to the accuracy of the contents of the report.

4. APPARENT BREACH

4.1 In the event that the Commission receives any complaint in relation to non-compliance with the above Conditions, or otherwise determines that there has been an apparent breach by the Merging Parties of these Conditions, the breach shall be dealt with in terms of Rule 39 of the Commission Rules read together with Rule 37 of the Tribunal Rules.

5. VARIATION

5.1 The Merger Parties or the Commission may at any time, and on good cause shown, apply to the Tribunal for the Conditions to be lifted, revised or amended.

6. GENERAL

6.1 All correspondence in relation these Conditions must be submitted to the following email address: mergerconditions@compcom.co.za and ministry@thedtic.gov.za.

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