

SOUTH AFRICA / JUDGMENT

EOH Mthombo Proprietary Limited v Price Waterhouse Coopers Combined Systems (Pty) Ltd (LM159Nov16) [2017] ZACT 28 (23 June 2017)

[2017] ZACT 28

COURT
Competition Tribunal

BEFORE
AW Wessels, M Mokuena, A Ndoni

CASE / FILE NUMBER
LM159Nov16

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COMPETITION
TRIBUNAL OF SOUTH AFRICA
Case
No: LM159Nov16
In

the matter between:

EOH
MTHOMBO PROPRIETARY
LIMITED
Acquiring Firm
and
PRICEWATERHOUSECOOPERS
COMBINED SYSTEMS Target
Firm
(PTY)
LTD
Panel
: AW Wessels (Presiding Member)
: Medi Mokuena (Tribunal
Member)
: Andiswa Ndoni (Tribunal
Member)
Heard
on
: 12 April 2017
Final
Submissions received
: 24 May 2017
Order

Issued on
: 25 May 2017
Reasons
Issued on
: 23 June 2017
NON-CONFIDENTIAL

REASONS FOR DECISION

APPROVAL

[1] On 25 May 2017, the Competition Tribunal ("Tribunal") approved the acquisition by EOH Mthombo (Pty) Ltd ("EOH")

of PricewaterhouseCoopers Combined Systems (Pty) Ltd ("Combined Systems").

[2] The matter was heard on 12 April 2017, at which time the Tribunal stood the matter down so that the Competition Commission ("Commission") could make further representations. Given the high market shares of the merged entity in the relevant market(s) (discussed below), as well as the large discrepancy between the Commission's market share figures and estimates provided by the merging parties, the Tribunal requested the Commission to conduct further market investigation including an analysis of the most recent past tenders issued by customers. The Tribunal furthermore specifically requested that certain customers in the public sector be consulted, i.e. Government Departments such as Public Works and Water and Sanitation.

[3] The Commission's supplementary merger report was received on 24 May 2017 and after considering such representations, the Tribunal issued its order on 25 May 2017 approving the proposed transaction unconditionally.

[4] The reasons for the approval follow.

Parties to the proposed transaction

Primary Acquiring Firm

[5] The primary acquiring firm is EOH, a company incorporated in accordance with the laws of the Republic of South Africa. EOH is

wholly controlled by EOH Holdings Limited ("EOH Holdings") which is listed on the Johannesburg Securities Exchange. The shares in EOH Holdings are widely dispersed and as such no single shareholder controls EOH Holdings.

[6] EOH Holdings controls in excess of 50 subsidiaries in South Africa. Of relevance to the competition assessment of the proposed transaction

are the fixed asset management services of the acquiring group which are provided by EOH[1] , IMQS Software (Pty) Ltd and Enterprise Softworks (Pty) Ltd.

Primary Target Firm

- [7] The primary target firm is Combined Systems, a firm incorporated in accordance with the laws of the Republic of South Africa. Pre-merger Combined Systems is wholly controlled by PricewaterhouseCoopers Incorporated. Combined Systems does not control any firm.
- [8] Combined Systems is a fixed asset management and asset tracking business which offers asset accounting and compliance services as well as asset lifecycle management services to public and private sector customers.

PROPOSED TRANSACTION AND RATIONALE

- [9] The proposed transaction involves the acquisition of the entire issued share capital of Combined Systems by EOH. Post-transaction EOH will thus have sole control over Combined Systems.
- [10] In terms of rationale, the acquiring firm submitted that the proposed transaction presents a solid business investment for EOH whilst providing EOH with additional product and service offerings to add to its existing product and service portfolio.
- [11] The target firm submitted that the proposed transaction provides an opportunity for its shareholders to recoup their investment as well as providing the firm and its employees growth opportunities through access to the resources, customer base and shared services of a listed group.

IMPACT ON COMPETITION

- [12] The Commission identified a product overlap between the activities of the merging parties in the market for the provision of fixed asset management services for both movable and immovable assets in South Africa.
- [13] The Commission stated that the fixed asset management services market can be defined as the management of the asset value chain from procurement to the decommissioning and disposal of the assets. These asset management services commence with the decision to build, buy or construct an asset; continue as the asset moves through its lifecycle (this includes financing and procuring the asset; bringing the asset into service; operating the asset efficiently and effectively, adhering to accounting and compliance standards; managing, maintaining and enhancing the asset); and end with the decision / process to replace, decommission and the disposal of the asset.
- [14] Fixed asset management services are offered in two main components, that is
 - (i) a technical asset management service component; and (ii) an asset software system component.

- [15] The technical asset management service component requires, on a yearly basis, the collection of the fixed asset data through the physical inspection and verification of every asset owned by the firm or public entity. Depending on the type of asset, the verification process may require the skills of engineers, especially in instances of immovable fixed assets such as infrastructure (for example dams, roads and bridges). The capturing of the data can be performed by handheld devices or historically on paper.
- [16] Once the fixed asset data are collected, the data are captured into an asset software system. The asset software system component can be a desktop based software which includes names such as BAUD, IMQS, SAP, Pastel and Abacus. The asset software system component records the fixed asset data that have been collected from the physical asset verification process. Once the fixed asset data are captured in the asset software, it allows users to populate the asset register. The asset register shows the valuation of the assets which incorporates for example the assets value and depreciation.
- [17] The need for proper fixed asset management is borne from the requirements of accounting standards and legislation to establish and maintain asset registers for compliance and auditing purposes. Functionally, physical asset management involves the value of a firm's assets being recorded, reported, and presented in a firm or public entity's financial statements.
- [18] The Commission further indicted that fixed asset management services include the management of (i) immovable; and (ii) movable assets. Immovable assets refer to assets such as buildings and utility infrastructure such as electrical cables, water pipes; roads and traffic lights; movable assets refer to assets such as vehicles, furniture and equipment.
- [19] The Commission also found that the bulk of customers of fixed asset management services are public entities which solicit the services of firms that provide these services through tender processes.
- [20] The Commission ultimately defined the relevant market as the national market for the provision of fixed asset management services for both movable and immovable assets. It provided an estimate of the merged entity's market share in this market (see paragraph 22 below). However following questions from the Tribunal at the hearing, the Commission in its supplementary merger report provided separate market share estimates for the management of (i) movable; and (ii) immovable assets.
- [21] The Tribunal takes no definitive view in this matter on the exact scope of the relevant product market, i.e. whether there is a broad market for the provision of fixed asset management services or separate relevant markets for the fixed asset management of (i) movable and (ii) immovable assets.

- [22] In its initial merger report, the Commission indicated that the merged entity will have a national market share of 40-45% in the provision of fixed asset management services for movable and immovable assets. The Commission indicated that this market share was based on the actual revenue figures of market participants which market share was significantly higher than the merging parties' own estimate of their combined market share in their merger filing.
- [23] The Commission however concluded that despite the high market share and relative high barriers to entry, the proposed merger raised no significant concerns given that this is a tender market and that there are certain alternative service providers active in the market such as I@Consulting and Ducharme Consulting.
- [24] Although the Commission consulted a number of customers and competitors, it did not do an analysis of past tenders.
- [25] As indicated above, given the merged entity's high market share as estimated by the Commission, the Tribunal requested the Commission to do a proper analysis of the most recent past tenders issued by both public and private sector customers. The Tribunal furthermore specifically requested that the Department of Public Works and the Department of Water and Sanitation be consulted as part of the Commission's analysis.
- [26] The Tribunal received the Commission's supplementary report on 24 May 2017.
- [27] In this supplementary evaluation, the Commission engaged the following customers: [...]; [2] the Department of Water and Sanitation; the Department of Public Works; the Gauteng Department of Education; the Mpumalanga Department of Education; the Department of Rural Development and Land Reform; the City of Tshwane; the Umdoni Municipality; and the King Cetshwayo Municipality.
- [28] Furthermore, to the extent that there could be narrower markets comprising separate relevant product markets for (i) movable; and (ii) immovable fixed asset management services, the Commission carried out a further assessment on the basis of such potential narrower markets.
- [29] The Commission also carried out an assessment of the tenders that have been awarded by different customers in the recent past.

Immovable fixed asset management services

- [30] For the provision of immovable fixed asset management services, the Commission found that the merged entity will have a market share of below 20%. The Commission further found that the merging parties will continue to be constrained by firms such as Ernst and Young, Ducharme Consulting,

I@Consulting and Aurecon. The Commission was of the view that the proposed transaction is unlikely to substantially prevent or lessen

competition in the provision of immovable asset management services since there are credible rivals who will constrain the merged entity. We concur with this finding.

Movable fixed asset management services

- [31] For the provision of movable fixed asset management services, the Commission found, based on revenues for 2015, that the merged entity will have a market share of approximately 60%.[3] However, that market share reduces significantly in the more recent period, i.e. since late 2016, as explained below.
- [32] The Commission in its additional analysis found that the significant increase in the merging parties' combined market shares from approximately 31% in 2013 to approximately 60% in 2015 is due to a significant increase in the market share of Combined Systems as the result of a specific large contract that was concluded with the [...] in 2013. However, this contract concluded in September
2016. [...] confirmed that Combined Systems is no longer its supplier for fixed asset management services and as of early 2017, [...] has been procuring these services from two alternative service providers. If the revenues from [...] contract are not attributed to the merging parties, their combined market share decreases significantly.
- [33] From its tender analysis in its supplementary report the Commission concluded that most government departments procure fixed asset management services through various ways, most of which involve a form of a tender process. From the information submitted by customers, it appears that in instances where tenders are issued, there are a sufficient number of companies that can bid that will be able to constrain the merged entity. The Commission noted that certain rivals won tenders in direct competition with Combined Systems.
- [34] Furthermore, the Department of Public Works indicated to the Commission that it currently performs asset verification for both
- movable and immovable in-house after it gained training and software solutions through its past tenders. Certain other government
- departments indicated to the Commission they currently make use of the LOGIS system provided by the National Treasury for their fixed asset management needs. There appears to be a trend for departments to start providing such services in-house.
- [35] Given all this the Commission concluded that the proposed transaction is unlikely to substantially prevent or lessen competition in the provision of movable fixed asset management services.
- [36] Based on the further analysis contained in the Commission's supplementary report we concur with its finding that the proposed

transaction is unlikely to substantially prevent or lessen competition in the relevant market(s).

PUBLIC INTEREST

[37] The merging parties confirmed that the proposed transaction will have no negative effects on employment and particularly that no

rationalization was planned nor entrenchments envisioned as a result of the proposed transaction.
[4]

[38] No other public interest concerns arise from the proposed transaction.

Conclusion

[39] In light of the above, we conclude that the proposed transaction is unlikely to substantially prevent or lessen competition in any relevant market. In addition no public interest issues arise from the proposed transaction. Accordingly we approve the proposed transaction unconditionally.

23 June 2017

Date

Mr AW Wessels

Ms A Ndoni and Mrs M Mokuena concurring

Tribunal Researcher: Alistair Dey-Van Heerden

For the Commission: Nolubabalo Myoli

For the Merging Parties: Mike Baxter of EOH

[1] EOH's key business areas are IT services, software, IT infrastructure, industrial technologies and business process outsourcing

[2] The identity of the customer has been claimed as confidential by the merging parties.

[3] The Commission noted that the above market share is overstated since not all the market participants are accounted for in this

calculation. Numerous small companies active in this market did not submit their revenues to the Commission to be included in the market share calculation.

[4] Merger Record, pages 6 and 61.

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