

SOUTH AFRICA / JUDGMENT

Fidelity Security Services (Pty) Ltd v ADT Security Ltd (LM100Sep16) [2017] ZACT 38; [2017] 1 CPLR 248 (CT) (6 April 2017) [2017] ZACT 38

COURT

Competition Tribunal

BEFORE

Norman Manoim, AW Wessels, Andiswa Ndoni

CASE / FILE NUMBER

LM100Sep16

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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM100Sep16

In the matter between:

FIDELITY SECURITY SERVICES (PTY) LTD

Primary Acquiring Firm

and

ADT SECURITY (PTY) LTD

Primary Target Firm

Panel

: Norman Manoim (Presiding Member)

: AW Wessels (Tribunal Member)

: Andiswa Ndoni (Tribunal Member)

Heard on

: 08 March 2017

Order Issued on

: 08 March 2017

Reasons

Issued on : 06 April 2017

Reasons

for Decision (Public Version)

Conditional Approval

- [1] On 08 March 2017, the Competition Tribunal (“Tribunal”) conditionally approved the proposed transaction between Fidelity Security Services (Pty) Ltd (“Fidelity”) and ADT Security (Pty) Ltd (“ADT”).
- [2] The reasons for approving the proposed transaction follow.

Background

- [3] The Competition Commission (“Commission”) referred the proposed merger to the Tribunal on 14 February 2017. The Tribunal thereafter, in seeking clarification of certain issues, scheduled a pre-hearing for 22 February 2017. The Tribunal at this pre-hearing posed a number of questions to and requested certain additional information from both the Commission and the merging parties.
- [4] The additional information requested from the Commission related to the market for the provision of monitoring and response security services in which both Fidelity and ADT are active and included information to be obtained from commercial customers in relation to various details of past tenders; customer perspectives, specifically with regards to the potential (post-merger) bundling of products/services and whether or not it is important that a service provider has an established reputation; market shares in a hypothetical national geographic market; as well as the status of an apparently sought condition by the Commission requiring the merging parties to notify future “small” mergers in terms of the Competition Act, Act 89 of 1998 as amended (“the Act”).
- [5] The Tribunal further requested the following additional documents from the Commission and the merging parties: any industry/market

research in the past three years that deals with the security industry sector; any other board minutes/packs other than those already contained in the merger filing where either of the merging parties discusses the proposed transaction; as well as Fidelity’s strategic plans.

Parties to the proposed transaction

Primary acquiring firm

- [6] The primary acquiring firm is Fidelity, a firm incorporated in accordance with the laws of the Republic of South Africa. Fidelity is a wholly owned subsidiary of Fidelity Security Group (Pty) Ltd (“Fidelity Group”). Fidelity Group is not controlled by any single firm.[1]
- [7] The Fidelity group is an integrated security solutions provider. Its key areas of business include the provision of the following services and products:
- alarm monitoring and armed response services;
 - cash solutions which entail cash-in-transit services, cash handling devices and cash processing services (collectively referred to as cash management solutions);
 - guarding which includes the deployment of security officers that are trained in all aspects of security discipline, integrated technology solutions including alarm systems and panic buttons, as well as closed circuit television (“CCTV”) systems, armed response services and investigations; and
 - electronic solutions which entail the provision of products and services which provide innovative technological solutions to give clients the ability to protect their customers and assets.

Primary target firm

- [8] The primary target firm is ADT, a firm incorporated in accordance with the laws of the Republic of South Africa. ADT is controlled by ADT South Africa Holdings Limited (“ADT Holdings”). ADT Holdings is ultimately controlled by Tyco International Limited (“Tyco”).
- [9] ADT is a security solutions firm that operates across South Africa. It is organised into three operating divisions, including a subscriber and a commercial business unit.
- [10] ADT’s subscriber business unit offers armed response services; monitoring services delivered via ADT’s monitoring centres; home protection, comprising the installation of intruder alarms, access control, perimeter security, panic buttons, medical equipment, smoke detection and community relations; home automation; and FindU, a mobile device or application that enables ADT subscribers to be found in times of need, with response backup.
- [11] ADT’s commercial business unit provides monitoring and armed response services to commercial customers.
- [12] Tyco Retail Solutions primarily supplies electronic article surveillance and other security equipment and services to retail stores.
- [13] ADT Kusela, a separate legal entity, provides manned guarding for the unarmed protection of property, tenants, employees and inventory and which can be supplemented with ADT’s other offerings.

Proposed transaction and rationale

- [14] In terms of the Stock Purchase Agreement entered into by the merging parties Fidelity intends to acquire all of the issued share capital of ADT from ADT Holdings. Post- merger, ADT will be wholly owned by Fidelity.
- [15] Fidelity submitted that it has been actively seeking a monitoring and response partner and that ADT represents an attractive target. Fidelity hopes to grow the ADT business inter alia by expanding a more pro-active offering into the underserved areas of the market.
- [16] Tyco submitted that the transaction is as a result of an ongoing review of its businesses with a view to redeploy capital to other parts of its portfolio. Fidelity furthermore brings diversified experience and knowledge.
- [17] The Commission noted that the proposed merger is likely to also be as a result of certain amendments to the Private Security Industry

Regulation, Act 2001. Section 20 of the amendment states that at least 51% of ownership and control must be exercised by South African citizens. The Bill is yet to be signed into law by the President of the Republic of South Africa. The Commission noted that the proposed merger appears to be in reaction to this pending legislation.[2]

Impact on competition

- [18] The Commission found that the merging parties are both active, in very broad terms, in the South African private security sector.

Fidelity is primarily active in the provision of cash solutions, guarding services, as well as monitoring and response services. ADT is primarily active in the provision of monitoring and response services, security equipment and guarding services.

- [19] The Commission concluded that there is a horizontal overlap between the activities of the merging parties in the following three areas:

- (i) the provision of monitoring and response services;
- (ii) the provision of guarding services; and
- (iii) the sale and installation of security equipment.

The provision of monitoring and response services

- [20] The Commission found that the provision of monitoring and response services comprises certain key components. The first component being monitoring of alarm and intruder detection systems at a monitoring centre. In the event that an alarm is triggered, a signal is sent to the monitoring centre, where staff verify whether the alarm is false or not. If the alarm is not found to be false, the matter is either reported to the relevant resident owner or to the armed response personnel if both services are acquired. Upon arriving at the scene of the alarm, the armed response officer will take appropriate action as required.

[21] Monitoring and response services are typically provided to two groups of customers:

(i) households; and (ii) commercial customers.

[22] The Commission found that the required response time that a service provider will have to react to an incident differs between private residences and commercial clients. The Commission further found that in some instances the response company will have dedicated vehicles to respond to a particular commercial business as compared to a residential area wherein a single patrol vehicle may patrol around a neighbourhood consisting of a number of individual customers.

[23] The merging parties acknowledged that large commercial customers may require monitoring and response service providers to dedicate more resources to serving them, for instance in terms of requiring more vehicles and/or armed response officers to respond to an incident and/or that officers remain at the premises for a relatively longer time period afterwards.[3]

[24] The above in our view suggests that the abovementioned customer groups' requirements and barriers to market entry may

significantly differ between the commercial and residential market segments.

[25] The Commission also noted that it received varied responses from customers with regards to their requirements of monitoring and response service providers.

[26] Although the Commission said that there could potentially be (narrower) separate relevant product markets for the provision of monitoring and response services to (i) residential customers; and (ii) commercial customers, it ultimately did not take a view on this given that [...] % of ADT's revenue from monitoring and response services is derived from residential customers, whereas the number is much lower at [...] % for Fidelity. The Commission therefore concluded that there is limited overlap between the activities of the merging parties when potential narrow relevant product markets are considered for the provision of monitoring and response services to (i) residential customers; and (ii) commercial customers.

[27] We also take no view in this case regarding the exact parameters of the relevant product market for the provision of monitoring and response services, i.e. whether there exists a broad product market for the provision of monitoring and response services in general or whether there are separate, narrower relevant product markets for the provision of monitoring and response services to different customer groups i.e. to (i) residential customers; and (ii) commercial customers.

[28] From a geographic market perspective, the Commission found that the response time of the service provider is an important factor affecting the scope of the relevant geographic market. This is echoed by the merging parties in their Joint Competitiveness Report.[4] The Commission submitted that to meet required response times, service providers need to be on standby closer to the relevant territory or service site. The Commission however also noted that certain (larger) commercial customers require or prefer service

providers with a national presence.

[29] With regards to the commercial market segment, the Commission also considered potential sub-contracting by service providers that have no presence in a particular geographic area. The merging parties submitted that sub-contracting in the commercial market segment

suggests that there may be some aspects of competition that take place “at a less granular geographic level”. [5]

[30] The Commission ultimately concluded that it cannot reach a definitive conclusion on the exact scope of the relevant geographic market but said that this does not alter its conclusion in this case.

[31] The Tribunal also takes no view in this case regarding the exact scope of the relevant geographic market for the provision of monitoring and response services, i.e. whether the relevant geographic market is (i) national; (ii) regional (and the exact scope thereof); or (iii) local (and the exact scope thereof).

[32] From an effects perspective, the Commission ultimately concluded that, regardless of the precise market delineation, there is limited overlap between the activities of merging parties in the provision of monitoring and response services and that Fidelity is a very small player in this area. The Commission therefore concluded that the proposed transaction is unlikely to raise competition concerns in this market, however defined.

[33] The Commission went on to state that entry barriers in this market are low given the number of (small) firms currently operating within the monitoring and response space and further concluded that customers have countervailing power.

[34] We, however, given the limited available information and evidence in this case on certain issues are unable to come to any conclusions regarding the precise product and geographic market delineation, as well as the level of barriers to entry in the various potential product markets and any potential countervailing power of customers. The market characteristics and dynamics of the market seem to be more complex and nuanced than that alluded to by the Commission. This however does not prevent us from taking a decision on the likely competitive effects of the proposed transaction.

[35] In relation to entry barriers, we note that the Commission seems to have conflated barriers to entry in the abovementioned two different

market segments, i.e. the potential product markets for the provision of monitoring and response services to (i) residential; and (ii) commercial customers. Based on the limited available information in this case, entry barriers appear to be significantly higher in the commercial market segment than in the residential segment. Customers contacted by the Commission as part of our additional information request (see paragraph 4 above) indicated that from their perspective track record and reputation indeed are important criteria in the consideration of a potential (new) service provider.^[6] Certain of these commercial customers furthermore indicated that they enter into specific service level agreements with suppliers. The Commission could not provide details of the customers' requirements as contained in the service level agreements.

[36] We also note that the Commission's analysis of (potential new and past) entry and exit was lacking, specifically in relation to the effectiveness of new entry by small (it appears often micro-sized) players that service a very limited number of only residential

customers in a specific street, neighbourhood or other very limited geographic area. We seriously doubt if these very small entrants

could service the commercial market segment. Further information would also be required in future cases in relation to how the

different market participants in this market set prices, i.e. at a local, regional or national level and if and how they react to new entry (by small players).

[37] Furthermore, as indicated at the hearing, concrete examples of how customers have exercised countervailing power in the past, if at all, would be required in future cases before one could reach any conclusion on the presence and extent of any potential customer countervailing power.

[38] Be that as it may, we have no reason to disagree with the Commission's ultimate conclusion that the proposed merger is

unlikely to substantially prevent or lessen competition in the provision of monitoring and response services. We base this on the

fact that Fidelity is a small player in the provision of monitoring and response services and that there is no evidence that suggests

that the merging parties are close competitors in this market. We also note that none of the customers of the merging parties raised

any concerns with the proposed merger.

The provision of guarding services

[39] The Commission found that the provision of guarding services primarily relates to the guarding and securing of assets and property. This is done by trained guards who typically patrol a certain defined area or stand guard at an entrance or other defined area. These

services are provided to a number of different industries including residential and golf estates, shopping and retail centres, banks and financial institutions, casinos and gaming, commercial and industrial properties, government, health and education, hospitality, oil and gas, ports and airports and any other area where security is required such as sporting and social events.

- [40] With regards to the types of guards, the Commission found that according to the sectorial determinations[7], guards are graded from A to E indicating their level of training and specialisation. Grade A represents the highest level; these are guards who are typically highly trained. For the remaining categories from B to E, the level of responsibility and training reduces and grade E is the entry level consisting of guards without extensive training or experience. The grade of the guards determines their cost to be deployed. The merging parties provide guards at each grading level save for ADT that does not have any grade E guards.
- [41] The merging parties submitted that manned guarding services are provided across a spectrum of sophistication, ranging from (i) standard guarding services (which generally involve just the presence of a security guard) to (ii) complex or advanced services such as escorting mobile assets, event security and VIP protection.[8]
- [42] The Commission noted that commercial and retail customers require higher graded guards compared to residential customers. This is mainly due to the type of work done in commercial settings such as shopping malls and office parks where security guards are required inter alia to interact with customers. The Commission however did not in this case conclude on the exact parameters of the relevant product market for the provision of guarding services.
- [43] We also take no view on the exact parameters of the relevant product market for the provision of guarding services, i.e. whether a broad market exists for the provision of all guarding services or whether there are narrower relevant product markets according to specific types of (advanced) services provided or services provided to specific customer groups.
- [44] From a geographic market perspective, the Commission said that the information gathered during its investigation suggests that the business model for the provision of guarding services entails transporting guards from a selected pick-up point to the site/premises and security companies strive to strategically appoint guards closer to relevant site. The Commission however again noted that certain commercial customers prefer to utilise players with a national footprint. This would require large service providers that have employees all over the country. However, the Commission noted that, at the same time, other firms are willing

to utilise local firms.

[45] The Commission was of the view that the geographic scope of the market for the provision of guarding services is local with an average radius 0 - 35 km. However, in its competitive assessment of the proposed transaction the Commission considered three regional markets given that while Fidelity is active nationally, ADT is currently only active in three provinces namely, Gauteng, the Western Cape and KwaZulu-Natal. The Commission further stated that the proposed merger is unlikely to pose any adverse effects on competition in a broader geographic market than these regional markets.

[46] The Tribunal takes no view in this case regarding the exact scope of the relevant geographic market for the provision of guarding

services, i.e. whether the relevant geographic market is (i) national; (ii) regional (and the exact scope thereof); or (iii) local

(and the exact scope thereof).

[47] In terms of effects, based on its abovementioned regional approach, the Commission found that the merging parties' combined market shares in the provision of guarding services in each of the aforementioned three provinces are below 10%. On this basis the Commission concluded that the proposed transaction raises no significant competition concerns in relation to the provision of guarding services.

[48] We again note that there is insufficient information in this case to come to any conclusions regarding the precise product and geographic market delineation, the level of barriers to entry in the potential markets and any potential countervailing power of customers. We however have no reason to doubt the Commission's conclusion that the proposed merger is unlikely to substantially prevent or lessen competition in the provision of guarding services.

The sale and installation of security equipment

[49] The Commission found that the sale and installation of security equipment entail various devices and products that enhance the ability to secure assets or property. This includes CCTV cameras, electric fencing, security gates, beams, intercoms and keypads. The sophistication of the equipment varies according to the type of customer with commercial customers requiring highly advanced

products. The security equipment is manufactured by third parties and sold by ADT and Fidelity to their clients.

[50] The Commission further found that in most situations the equipment will be sold as part of the monitoring and response service as the monitoring aspect is done inter alia using beams that when triggered sound an alarm.

[51] The Commission was of the view that the relevant geographic market for the sale and installation of security devices and equipment is national since such devices and equipment can be transported across the country and the installation of most devices and equipment

requires lower levels of technical skills.

[52] Again there is no need for the Tribunal in this case to define the precise parameters of either the relevant product or geographic

markets.

[53] The merging parties provided national market share estimates for Fidelity and ADT in the following equipment categories in which their activities overlap: (i) intruder detection; (ii) access control; (iii) CCTV; and (iv) electric fencing. The merging parties submitted that that neither party has a significant presence in any category of equipment (i.e. combined national market shares of less than 10% in each category), except for ADT's national market share in the provision of intruder detection equipment which is estimated at approximately [20-30]%; with Fidelity's share estimated at less than [0-10]%.

[54] The Commission found no competition concerns arising from the proposed transaction in the market for the sale and installation of security equipment since the merged entity will continue to be constrained by a number of other firms including ASP Security CC, Compass Visual Security (Pty) Ltd, Elvey Security Technology (Pty) Ltd, STG Inc, Security & Fire Projects (Pty) Ltd, Plessey (Pty) Ltd, C3 SS Shared Services (Pty) Ltd and Engineered System Solutions (Pty) Ltd.

[55] We concur with the Commission that, given the presence of a number of competitors in this market, the proposed merger appears unlikely to substantially prevent or lessen competition in the sale and installation of security equipment, regardless of the exact market delineation.

Bundling

[56] The Commission also considered the likelihood of bundling/conglomerate effects arising as a result of the proposed merger. It engaged with customers who indicated that the merger is unlikely to result in a change in the manner in which they source the

relevant services. The Commission concluded that the proposed transaction is unlikely to create a platform for the merged entity to engage in tying and/or bundling conduct post-merger. We have no reason to disagree with this conclusion.

Proposed condition in relation to the notification of future "small" mergers

[57] The Commission in its analysis of the proposed transaction also considered the history of acquisitions in the security industry. It noted that Fidelity has undertaken a number of acquisitions that can be classified as "small" mergers in terms of the Act, allegedly including two acquisitions of players active in the provision of monitoring and response services.

[58] The Commission further noted that in addition to the non-notifiable "small" mergers above, Fidelity also notified an

intermediate merger to the Commission wherein it acquired the CIT and the cash processing business of Protea Coin (Pty) Ltd.[9]

- [59] The Commission further found that ADT on the other hand has had three mergers wherein there was a partial acquisition of assets from Lobra CC t/a Specialised Electronic lines in November 2013, SSG in August 2014 and Securitas in January 2016.
- [60] Although the Commission found that this proposed transaction was unlikely to result in a substantial lessening or prevention of competition in any relevant market (primarily because of the small market position of Fidelity in the provision of monitoring and response services and the lack of closeness of competition between the merging parties in that area), it raised a concern in the context of the “small” mergers implemented by Fidelity in the past five years. As a result of this concern the Commission stated that it would closely monitor Fidelity’s future acquisition strategy and might require Fidelity to also notify future “small” mergers.
- [61] After the Tribunal requested clarity from the Commission regarding its position on this, it indicated that it was engaging with the merging parties with a view to approving the proposed transaction subject to the notification of future “small” mergers in certain markets where the activities of the merging parties overlap.
- [62] The Commission ultimately recommended the abovementioned conditional approval. Fidelity however argued that such a condition would be unfairly burdensome on the merging parties and would unfairly disadvantage them in “small” merger transactions.
- [63] At the hearing before the Tribunal, we asked questions relating to the rationale for the Commission’s proposed condition, past “small” merger transactions that the merging parties were involved in, as well as the merging parties’ strategy regarding future growth.
- [64] The Tribunal specifically noted that section 13(2) of the Act provides that a party to a “small” merger may voluntarily notify such merger at any time (as opposed to the compulsory notification of a “small” merger in situations where the merging parties are required by the Commission to notify in terms of section 13(3) of the Act), which does not prohibit the implementation of the voluntarily notified merger - an exception to the way that “intermediate” and “large” mergers are treated in the Act. This could potentially mitigate certain of the merging parties’ concerns.[10]
- [65] The Commission and the merging parties considered the above. Although the merging parties disputed the need for any conditional approval, the Commission and the merging parties, after certain interventions from the Tribunal, agreed on the wording of a condition should the Tribunal decide that a conditional approval of the proposed transaction is justified.

[66] After certain editorial changes to the ultimate condition recommended by the Commission, we approved the proposed transaction subject to the following condition in relation to the market for the provision of monitoring and response services:

- (i) Fidelity undertakes, for a period of 36 months from the date of implementation of the proposed transaction, voluntarily, to notify Small Mergers[11] in terms of section 13(2) of the Act; and
- (ii) the above obligation will not in any way affect the notification requirements provided for in the Act for transactions that meet the requirements of the Act for merger notification.

[67] We note that the merging parties' own strategic documents clearly point to planned future growth through acquisition strategies.[12]

[68] We further note that not all "small" mergers would have to be notified in terms of the above condition but only those that meet the threshold of a "small" merger in this context, i.e. target firms with a the gross revenue or total assets of R[...] or more. The condition is also limited to the monitoring and response services market and is thus not applicable to all "small" mergers undertaken by the merging parties.

[69] We also note that the imposed condition has a limited duration of three years. Should the Commission be concerned about the levels of concentration in the private security sector in general, or certain markets in particular, it should monitor the acquisition activities of the major players in this sector or in certain markets over a longer term.

[70] Given the merging parties' past acquisitions and potential future transactions, the merging parties' growth strategy

through acquisitions as revealed in their strategic documents, as well as the fact that the merged entity will be the largest player in South Africa in the provision of monitoring and response services, we conclude that the imposed condition (which we have pointed out above is limited in duration and sets a specific threshold for voluntary notification) is justified and proportional to the concern of future creeping acquisition, i.e. the acquisition by the merged entity of small market participants that do not meet the notification thresholds for "intermediate" or "large" mergers.

Public interest

[71] The merging parties confirmed that the proposed transaction will not have any adverse impact on employment.[13]

[72] The proposed transaction further raises no other public interest concerns.

Conclusion

[73] In light of the above, we approve the proposed transaction conditionally. For ease of reference the set of conditions that we have imposed is annexed hereto marked as “Annexure A”.

[74] No public interest issues arise from the proposed transaction.

20 April 2017

DATE

Mr AW Wessels

Mr Norman Manoim and Ms Andiswa Ndoni concurring

Case Managers:

Kameel Pancham and Karissa Moothoo Padayachie

For the merging parties: Adv. A. Subel instructed by Cliffe Dekker Hofmeyr on behalf of the Acquiring Firm

Derek Lotter and Mpumelelo Tshabalala from Bowmans on behalf of the Target Firm

For the Commission: Seabelo Molefe, Thabelo Masithulela and Hariprasad Govinda

[1] For details of the shareholders of Fidelity, see Merger Record inter alia page 18.

[2] The Commission’s Report reflects that this view is shared by the Private Security Industry Regulator of South Africa (“PSIRA”)

and some of the trade unions that the Commission consulted with during the investigation of this merger.

[3] Merging parties’ Joint Competitiveness Report, Merger Record page 69.

[4] See Merger Record, page 70.

[5] See Merger Record, page 71.

[6] See letter from Commission to the Tribunal dated 03 March 2017.

[7] The Commission in its Report refers to Amendment of Sectorial Determination 6: Private Security Sector.

[8] Merger Record, page 71.

[9] The Commission conditionally approved this merger on 23 December

2014. Following a consideration application, the Tribunal

conditionally approved the same transaction on 6 May 2015 (Tribunal Case Number: IM183Jan15).

[10] Transcript, pages 26 to 28.

[11] “Small Merger” means, for the purposes of the imposed conditions, a merger or proposed merger, in the Security Services

Market, involving a transferred firm, with a gross revenue or total assets of R[...] or more, calculated in accordance with the applicable provisions of the Act and Regulations. “Security Services Market” means the market for the provision of monitoring and response services.

[12] Transcript, pages 24 and 25.

[13] Merger Record inter alia pages 13 and 127.

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