

SOUTH AFRICA / JUDGMENT

IEP Portfolio 1 (Pty) Ltd v Assupol Holdings Limited (LM042May18) [2018] ZACT 76 (22 August 2018) [2018] ZACT 76

COURT

Competition Tribunal

BEFORE

Andreas Wessels, Enver Daniels, Fiona Tregenna

CASE / FILE NUMBER

LM042May18

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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM042May18

In the matter between:

IEP Portfolio 1 (Pty) Ltd

Primary Acquiring Firm

And

Assupol Holdings Limited

Primary Target Firm

Panel

: Mr Andreas Wessels (Presiding Member)

: Mr Enver Daniels (Tribunal Member)

: Prof Fiona Tregenna (Tribunal Member)

Heard on

: 4 July 2018

Last Submission on : 25 July 2018

Order Issued on : 26 July 2018

Reasons

Issued on : 22 August 2018

REASONS

FOR DECISION

Conditional approval

- [1] On 26 July 2018, the Competition Tribunal ("Tribunal") conditionally approved the transaction involving IEP Portfolio 1 (Pty) Ltd ("IEP") and Assupol Holdings Limited ("Assupol").
- [2] The reasons for approving the proposed transaction follow.

Parties to the proposed transaction and their activities

Primary acquiring firm

- [3] The primary acquiring firm is IEP. IEP is a wholly owned subsidiary of IEP Group (Pty) Ltd ("IEP Group"). The shareholding in IEP Group is held by Investec Bank Limited ("IBL"); Steinhoff International Holdings Limited; Saad Trust; ED Trust INL Investments 1 (Pty) Ltd; and a number of management staff. The merger parties submitted that currently IBL has negative control over IEP Group. IBL is ultimately controlled by Investec Limited.
- [4] IEP Group is an investment vehicle that holds investments in industrial and chemical, financial, infrastructure and building materials firms.
- [5] IBL is part of the Investec group, an international specialist banking group that provides a diverse range of financial products and services through its subsidiaries. Its principle business is divided into investment banking, treasury and specialised finance, private banking and asset management.
- [6] Of relevance to the competition assessment of the proposed transaction is that IBL controls Investec Life (Pty) Ltd ("Investec Life"). Investec Life provides insurance products such as (i) mortgage protection cover; (ii) life cover; (iii) income protection cover; (iv) disability cover; and (v) severe illness cover.

Primary target firm

- [7] The primary target firm is Assupol, a firm registered according to the company laws of South Africa. Assupol is a widely held public company and is not controlled by any single firm. Pre-merger IEP is the largest shareholder in Assupol.
- [8] Assupol is an authorised financial services provider offering funeral, life, savings and retirement annuity products. Its insurance product offering includes (i) life cover; (ii) funeral cover; (iii) dread-disease benefits; and (iv) physical disability cover.

Proposed transaction

- [9] In terms of the proposed transaction, IEP intends to increase its existing 42.05% shareholding in Assupol to 42.23%. The merger parties and the Competition Commission ("Commission") submitted that post implementation of this transaction, based on voting trends over the past three years, IEP will have de facto control over Assupol.

Relevant markets and impact on competition

- [10] The Commission found th.at the proposed transaction does not raise any direct product overlap between the activities of IEP and Assupol. However, there is a horizontal overlap between the activities of Investec Life and Assupol in respect of their offering of long-term insurance products, namely (i) life cover; (ii) disability cover; and (iii) dread disease/severe illness cover.

- [11] The Commission assessed the competition effects of the proposed transaction in the following national (potential) product markets:

- a. (a broad market for) the provision of long-term insurance;
- b. the provision of life cover;
- c. the provision of disability cover; and
- d. the provision of dread disease cover.

- [12] The Commission found that the combined market shares of Investec Life and Assupol in South Africa are below 5% in all the above-mentioned

(potential) relevant product markets.

- [13] The Commission furthermore investigated post-transaction potential concerns relating to information exchange and cross directorships

between Investec Life and Assupol as competitors in South Africa in the long-term insurance markets.

- [14] The Commission stated that it understands that IEP, by virtue of its current shareholding in Assupol, receives inter alia the following information from Assupol:

- a. Monthly management accounts;
- b. Quarterly unaudited financial statements and CEO reports;
- c. Proposed and final annual budgets; and
- d. Reports on anti-money laundering.

- [15] The Commission further submitted that IEP is able to appoint three members on the board of Assupol and that IBL, given its shareholding

in IEP, is entitled to appoint members onto the board of IEP. This Commission said that this results in IBL having access to the

information of a competitor, i.e. Assupol. The Commission said that this link is further enhanced by the fact that a Mr A Birrell acts as an independent and non-executive board member who sits on both the Assupol and Investec Life boards respectively. The Commission was concerned that access to competitively sensitive information may possibly be used to post-transaction dampen competition between Investec Life and Assupol in the long-term insurance markets.

- [16] The Commission submitted that cross-shareholding and/or cross-directorships may provide a platform for the exchange of competitively sensitive information between competitors. The Commission also said that directors common to competitors can become a conduit for information exchange among competitors.
- [17] However, despite the above concerns, the Commission recommend an unconditional approval of the proposed transaction. The Commission advanced two reasons for this: (i) the structural links between Investec Life and Assupol exist prior to the notification of this proposed transaction; and (ii) Investec Life and Assupol are currently relatively small players in the long-term insurance markets and they currently target different customer segments or LSM groups.
- [18] The main way in which information exchange between competitors can harm consumers is by facilitating collusion. Collusion between horizontal competitors is per se prohibited in terms of section 4 of the Competition Act of 1998 (Act No. 89 of 1998, as amended). Direct exchanges of competitively sensitive information and data can rarely disguise the anticompetitive object of such agreements.
- [19] As indicated above, the activities of Investec Life and Assupol overlap in respect of their offering of various long-term insurance products. We note that the express exchange of competitively sensitive information between (potential close) competitors including, for example, the exchange of future commercial marketing strategies and (new) product or service innovation can be used to maintain, enhance or reinforce or lead to market division strategies between (potential close) competitors. Thus competition concerns from direct information exchange remain even if the competitors in question currently target different customer segments within the long-term insurance markets.
- [20] We further note that this is the notification of a transaction in terms of which IEP will obtain de facto control over Assupol and thus the appropriate time to address any competition concerns. Whether the exchange of competitively sensitive information between Investec Life and Assupol as (potential close) competitors may have taken place prior to this merger notification due to pre-notification structural links, is no reason not to address these competition concerns at this juncture.

[21] We expressed our concerns about the potential exchange of competitively sensitive information between Investec Life and Assupol after the proposed transaction as well as cross directorships between the boards of these (potential close) competitors and requested the merger parties and the Commission to consider remedies that would address these concerns.

[22] The merger parties consequently put forward remedies to address the Tribunal's concerns, which we imposed as conditions to the approval

of the proposed transaction. The imposed conditions address the issues of post- transaction information exchange as well as cross directorships.

[23] The following conditions were imposed relating to information exchange:

- a. To the extent that any Board within IEP Group[1] (including Boards of any IEP Group subsidiary directly or indirectly holding the Assupol investment from time to time) is provided with any Competitively Sensitive Information[2] pertaining to Assupol, IEP Group will ensure that such Competitively Sensitive Information will not be made available to any IBL

Representative that is a director or manager of, or is otherwise involved in determining strategy at, any Competing Investec Entity.[3] Compliance with this condition will include:

- i. ensuring that Competitively Sensitive Information of Assupol is redacted from any Board packs to be made available to such IBL Representatives;
- ii. having such IBL Representatives recused from any discussions surrounding Assupol; and
- iii. requiring other IBL Representatives (who are not managers, directors or involved in determining the strategy of a Competing Investec Entity) not to make Competitively Sensitive Information available to any person who is a manager, director or is involved in determining the strategy of a Competing Investec Entity. All of these IBL Representatives will be required to sign confidentiality undertakings

to this effect.

[24] The following conditions were imposed in relation to cross directorships:

- a. IEP Group shall, for as long as it directly or indirectly holds shares in Assupol and for as long as Investec directly or indirectly has a minority shareholding in IEP Group:
 - i. ensure that no director that it (IEP Group) is entitled to appoint to Assupol's Board, by virtue of its shareholding, is simultaneously a director or manager of, or is otherwise involved in determining strategy at any Competing Investec Entity;
 - ii. not vote in favour of the appointment of any director of Assupol who is a director or manager of, or is otherwise involved in determining

strategy at any Competing Investec Entity; and

iii. ensure that no individual who is also a director or manager of, or is otherwise involved in determining strategy at any Competing Investec Entity will be appointed to any Board within IEP Group that has access to information obtained from Assupol by virtue of its investment in Assupol.

[25] Appropriate compliance and monitoring conditions were also imposed.

[26] We are satisfied that the imposed conditions adequately address any concerns relating to post-transaction information exchange between (potential close) competitors and cross directorships.

Public interest

[27] The merger parties confirmed that the proposed transaction will not have any negative impact on employment.[4]

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

Conclusion

[29] We conclude that the imposed conditions adequately address any concerns relating to post-transaction information exchange between (potential close) competitors and cross-directorship. No public interest issues arise from the proposed transaction. Accordingly, we approve the proposed transaction subject to the conditions annexed hereto marked as "Annexure A".

Mr Andreas Wessels

Mr Enver Daniels and Prof Fiona Tregenna

22 August 2018

Date

Tribunal Case Manager: Jonathan Thomson

For the merging parties

Chris Charter of Cliffe Dekker Hofmeyr Inc.

For the Commission:

Mogau Aphane

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

(HELD IN PRETORIA)

ANNEXURE A

IEP Portfolio 1 (Pty) Ltd

Assupol Holdings Limited

CASE NUMBER: LM042May18

CONDITIONS

1. DEFINITIONS

The following terms shall have the meaning assigned to them below and cognate expressions have corresponding meanings -

1.1 "Approval Date" means the date referred to in the Tribunal's merger Clearance Certificate (Form CT10);

1.2 "Acquiring Firm" means IEP Portfolio 1 Proprietary Limited, a wholly owned subsidiary in the IEP Group, having its principal place of business at 100 Grayston Drive, Sandown, Sandton, 2196, Gauteng;

1.3 "Board" means a Board of Directors;

1.4 "Commission" means the Competition Commission of South Africa;

1.5 "Competing Investec Entity" means Investec Life and any firm directly or indirectly controlled by Investec from time to time that competes, or is capable of competing, with the Target Firm;

1.6 "Competition Act" means the Competition Act No. 89 of 1998, as amended;

1.7 "Competitively Sensitive Information" includes but is not limited to:

1.7.1 pricing

- including, but not limited to, pricing of specific products within those overlapping relevant markets, prices/ discounts / rebates offered to specific clients and planned reductions or increases;

1.7.2 margin information by product or client;

1.7.3 cost information;

1.7.4 information on specific clients and client strategy, including information with respect to the sales volume of clients;

1.7.5 marketing strategies;

1.7.6 budgets and business plans; and

1.7.7 agreements and other (non-standard) terms and conditions relating to the supply and distribution of the relevant product;

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

1.9 "Conditions" mean these conditions;

1.10 "Cross Directorship" means the situation where the same individual is appointed as a director of both the Target Firm and a Competing Investec Entity;

1.11 "Days" mean business days, being any day other than a Saturday, Sunday or official public holiday;

1.12 "IBL" means Investec Bank Limited;

1.13 "IBL Representative" means any IBL representative on a Board within the IEP Group (which includes the Board of any IEP Group subsidiary directly or indirectly holding an investment in the Target Firm);

1.14 "IEP Group" means IEP Group Proprietary Limited and its subsidiaries;

1.15 "Implementation Date" means the date on which the Proposed Transaction is implemented by the Merging Parties;

1.16 "Information Exchange" means the possible situation where Competitively Sensitive Information flows from the Target Firm to a Competing Investec Entity through existing structural links between the Target Firm and Investec;

1.17 "Investec" means Investec Limited;

1.18 "Investec Life" means Investec Life Proprietary Limited, a subsidiary of Investec;

1.19 "Merging Parties" mean the Acquiring Firm and the Target Firm;

1.20 "Proposed Transaction" means the acquisition of control of the Target Firm by the Acquiring Firm;

1.21 "Target Firm" means Assupol Holdings Limited, having its principal place of business at Summit Office Park, Building 6, 221 Garstfontein Road, Menlyn, Pretoria, 0181, Gauteng; and

1.22 "Tribunal" means the Competition Tribunal of South Africa.

2. CONDITIONS ON INFORMATION EXCHANGE

2.1 To the extent that any Board within the IEP Group (including Boards of any IEP Group subsidiary directly or indirectly holding the Target Firm investment from time to time) is provided with any Competitively Sensitive Information pertaining to the Target Firm, the IEP Group will ensure that such Competitively Sensitive Information will not be made available to any IBL Representative that is a director or manager of, or is otherwise involved in determining strategy at, any Competing Investec Entity. Compliance with this condition will include:

2.2 ensuring that Competitively Sensitive Information of the Target Firm is redacted from any Board packs to be made available to such IBL Representatives;

2.3 having such IBL Representatives recused from any discussions surrounding the Target Firm; and

2.4 requiring other IBL Representatives (who are not managers, directors or involved in determining the strategy of a Competing Investec Entity) not to make Competitively Sensitive Information available to any person who is a manager, director or is involved in determining the strategy of a Competing Investec Entity. All of these IBL Representatives will be required to sign confidentiality undertakings to this effect.

3. CONDITIONS ON CROSS DIRECTORSHIP

3.1.1 The IEP Group shall, for as long as it directly or indirectly holds shares in the Target Firm and for as long as Investec directly or indirectly has a minority shareholding in the IEP Group:

3.1.1.1 ensure that no director that it (the IEP Group) is entitled to appoint to the Target Firm's Board, by virtue of its shareholding, is simultaneously a director or manager of, or is otherwise involved in determining strategy at any Competing Investec Entity;

3.1.1.2 not vote in favour of the appointment of any director of the Target Firm who is a director or manager of, or is otherwise involved in determining strategy at any Competing Investec Entity;

3.1.1.3 ensure that no individual who is also a director or manager of, or is otherwise involved in determining strategy at any Competing Investec Entity will be appointed to any Board within the IEP Group that has access to information obtained from the Target Firm by virtue of its investment in the Target Firm.

4. MONITORING OF COMPLIANCE WITH THE CONDITIONS

4.1 The Acquiring Finn shall inform the Commission in writing of the Implementation Date within 5 Days thereof.

4.2 A senior representative of the IEP Group shall depose to and submit an affidavit on each anniversary of the Implementation Date for as long as it directly or indirectly holds a controlling interest in the Target Firm, confirming compliance with clauses 2 and 3 of these Conditions.

4.3 Within 30 days of the Implementation Date, IEP Group shall provide the Commission with copies of the IBL Representatives' confidentiality undertakings contemplated in clause 2.4.

4.4 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 of the conditions, the matter shall be dealt with in terms of Rule 39 of the Commission's Rules.

4.5 Any Merging Party may at any time, on good cause shown, apply to the Tribunal for the Conditions or any part thereof to be lifted, revised or amended.

4.6 All correspondence in relation this Condition should be forwarded to:
mergerconditions@compcom.co.za.

- [1] "IEP Group" means IEP Group (Pty) Ltd and its subsidiaries.
- [2] "Competitively Sensitive Information" includes but is not limited to: pricing - including, but not limited to, pricing of specific products within those overlapping relevant markets, prices/ discounts/ rebates offered to specific clients and planned reductions or increases; margin information by product or client; cost information; information on specific clients and client strategy, including information with respect to the sales volume of clients; marketing strategies; budgets and business plans; and agreements and other (non-standard) terms and conditions relating to the supply and distribution of the relevant product(s).
- [3] "Competing Investec Entity" means Investec Life and any firm directly or indirectly controlled by Investec from time to time that competes, or is capable of competing, with Assupol.
- [4] Merger Record, inter alia page 8.

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