

SUMMARY: ADVISORY OPINIONS

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THE COMPETITION COMMISSION

The Competition Commission is part of three independent statutory authorities established in terms of the Competition Act of 1998, which are charged with administering the Act. Each of the authorities, the Competition Commission, the Competition Tribunal and the Appeal Court have separate roles to execute and help foster a business environment that is efficient and provides access to all.

The Commission is responsible for investigation and evaluation of prohibited practices, exemption applications, control of mergers and acquisitions, and also has an advocacy and education function.

OUR ADVISORY ROLE

The Commission offers an advisory service to ensure that firms, which are regulated, understand the Competition Act, its interpretation and application to their day-to-day operations. The demand for this service is increasing and issues raised are getting more complex. The service includes advisory opinions, clarifications, meetings, training sessions and dissemination of information.

Advisory Opinions

An advisory opinion is a written opinion of the Commission's position in respect of a set of facts submitted by external parties. It offers guidance on the application and interpretation of the Competition Act, as well as the approach the Commission is likely to take in respect of certain transactions, agreements or practices. It is based entirely on the facts provided to us, taking into account relevant case law, policies of the Commission and previous opinions issued. These opinions are not binding on the Commission or the parties requesting them. However, if based on accurate facts, they offer the necessary guidance and clarity to stakeholders. A fee of R2 850 (VAT incl.) is payable for each opinion.

Issues raised in advisory opinions: Acquisition of minority stakes

1. Firm A holds 25% in Firm B and wishes to acquire additional shares of 24%, which will subsequently put it in possession of 49% in B. The question was whether or not the proposed transaction would constitute a merger as defined in the Competition Act. We advised that the acquisition of additional 24% by A does not appear to result in acquisition of the kind of control that A did not have prior to the transaction. Furthermore, A already acquired control over B through the 25% acquisition together with the veto rights entrenched in the shareholders' agreement. Thus, the proposed transaction would not change the nature or quality of such control.
2. A, B and C are shareholders in D, with A holding 14.63%, B with 11.0% and C holding 22.92% of the issued share capital. The transaction comprised a "rescue operation", in which D was in a position where it was required to raise additional capital for its ongoing viability. To ensure this, A, B and C would capitalize D by acquiring additional shares in the share capital of D. After the offer, D would embark upon a subscription offer to all of its shareholders in order to raise maximum funds. The question was whether or not the intended capitalization will constitute a merger. We noted from the agreements submitted that the three shareholders in question would act together at all times to decide on the manner in which they will vote. On the basis that the parties appear to have a common controlling mind in that they will act in concert to pursue the same interest, jointly they will control D through the consortium agreement that requires these shareholders to act in that manner. A merger would thus be triggered.
3. A intended to acquire 25% in B, with the remaining shares held by C. A will by virtue of the minority share holding be entitled to certain rights for minority protection, which include inter alia, approval for any change in the nature of any business conducted by B. We advised that though the rights concerned appear to be mere minority rights, the right relating to approval of change in the nature of "any business" appears to be broad, and that if such right included approval in respect of the budget, business plan, investments and/or appointment of senior management, it would for purposes of the Competition Act confer de facto control on A.

4. A intended to acquire from B 43.98%, with the remaining shares being dispersed to various other shareholders. The question was whether a merger would occur or not. We advised that the minority stake in question appears to be significant enough to confer control, particularly as the rest of the share holding is dispersed. In addition, the fact that the other shareholders cannot vote in favour of certain resolutions unless A approves them, and that A appoints more directors on the board of B than any of the shareholders, indicates that A would have the ability to materially influence the business of B and could thus acquire control over B.

5. A intended to acquire 33.33% shares held by B in C and thereafter A would acquire 66.67% of the share holding held by A1 (“a wholly owned subsidiary of A”) in C. Therefore the question was whether the proposed transaction would trigger a merger. We advised regarding the first leg of the transaction that even though A was a majority shareholder in C, it exercised joint control with B by virtue of the 33.33% share holding and the powers granted to B in terms of the agreement. Among those rights, B was entitled to appoint or remove directors and the CEO, and B also enjoyed equal representation on the Board of C despite the fact that its minority stake does not entitle it to such equal representation. Thus acquisition of that 33.33% stake by A from B would trigger a merger. The second transaction would be the acquisition between the same group of companies and therefore no merger would occur.

6. Y will sell 9.1% of its shares in Z to X with the result that X has 82% in Z. Y will sell its remaining 18% stake in Z to G. G is a newly formed company initially controlled 50:50 by X and Y. That would be an intermediate step to the passing of control to a yet to be identified historically disadvantaged South African investor (“H”) so as to meet the requirements of the mining charter. G will have no other assets other than that 18% stake, and will not participate in any business pending such identification. G will literally be “warehousing” that 18% stake. Subsequent to this transaction, X and Y will cease to be agreed joint controllers of Z. Ultimately, Y will withdraw completely from Z and G. The contention of the parties was that the eventual acquisition of G by H would not result in a merger, as G is not engaging in a business in a manner envisaged by the Competition Act. We advised, in keeping with the Tribunal decision in the Edcon case, that G was engaging in a business. Therefore when H eventually acquires G with a view of taking the minority stake

(i.e. 18%) a merger would be triggered, as H would gain control over G for the first time. We also advised that when X and Y cease to be joint controllers over Z, a merger will be triggered again as that would leave X in sole control.

7. A is a company whose share holding is as follows: X has 60%, Y has 24% and Z has 16%. In turn the share holding in X is as follows: R holds 40% and S holds 60%. In Y, five individuals, namely Y1 to Y5 hold all the shares in varying proportions from 49% down to 5%. Lastly, in S nine individuals, namely S1 to S9 hold the shares in varying proportions from 47% to 0.35%. The proposed transaction entailed the direct acquisition of shares in A by Y1 to Y5 and S1 to S9 following a voluntary winding up of X, S and Y. The question was whether or not such a direct acquisition will result in a merger. We advised that it appears so, as firms with minority stakes that previously did not have control over A would acquire it by virtue of the provisions of the shareholders' agreement which requires unanimity in taking certain decisions that were found to be strategic commercial ones. Also a voting pool agreement was going to be in place, thus conferring control on certain firms. Lastly, the direct acquisition would result in changes in the forms of control in respect of other firms, thus triggering a merger. Following this voluntary winding up phase, two further transactions would take place. The first one would entail R and S2 collectively selling all their shares in A to G. The other transaction would entail an aggregate sale of 5.3% of issued shares in A by S3, S4 and Y3 to any of the members S1 to S9, Y1 to Y5 and to two other individuals who did not have shares in A before. The question was whether or not these two transactions would constitute a merger. We advised that G and two individuals would be acquiring controlling share holding, and therefore a merger would result.

Financial transactions and acquisition of rights

1. A intended to dispose of its book debt, which amounted to approximately R463m. The question raised was whether such disposal would constitute a merger. We referred to a precedent created on the Edcon/RAG case, concluding that the disposal of assets of this nature seems to qualify as a merger and advised the parties to notify.
2. A intended entering into a concession agreement with B in terms of which A grants B exclusive rights to design, construct, commission, operate,

maintain and repair a highway. B will also be entitled to exclusive rights and the obligation to charge, collect and keep for its own account tolls from vehicles using the highway at the relevant toll plazas and to raise revenues from any development undertaken by B along the highway. The question was whether or not the proposed transaction constitutes a notifiable merger. We advised that the transaction appears to constitute a notifiable merger in that the granting of the exclusive rights to B will enable it to undertake developments that it would never have been able to engage in before without those rights. Thus, it is the acquisition of rights that confers control to B over a business wherein such control did not exist.

3. B, a bank, lends money to A and subscribes for certain preference shares in A in terms of a subscription agreement entered into between A and B. As security for or protection of B's investment, A grants B a certain negative/conditional pledge. The question was whether the transaction falls within the ambit of the Practitioner's Update (Issue 4) and whether it would be notifiable. We indicated that the transaction would fall within the ambit of the Practitioner's Update (Issue 4) and that the transaction would only be notifiable within a period of 12 months after A's default in relation to the subscription agreement.

A, a non-bank, intended to sell its rights in terms of a pool of installment sale and financial lease agreement originated by it, assets that form the subject matter of this agreement, all data and documentation relating thereto and securities granted in respect thereof ("collectively securitized assets") to B. B is described as an independent service provider ("SPV") created for the purpose of implementation and operation of the proposed securitized scheme. The SPV Trust will acquire control over B, and A in turn will control the SPV Trust by virtue of it appointing the trustees of the SPV Trust. The trust, A and B have a relationship of control and as a result, A, will indirectly assume control of securitized assets, which it will acquire. We advised that it appears that the trust, A and B form part of the same group of companies and that as a result, the transaction would not be notifiable.

4. A pledges its shares to B as security for a loan to be provided by B to A. The pledged shares will not exceed 50.1%. A currently holds 36.7% of the issued share capital. B will also acquire minority shares, which will result in it holding 49.9% of

shares in C. The question was whether a security agreement entered into between B and A would constitute a merger. We advised that the security agreement does not appear to constitute a merger. However, upon default by A, B will acquire control over the pledged shares, thus triggering a merger.

5. The transaction had proposed two phases. Firstly, A entered into an agreement with B, in which A will issue to B convertible debentures to subscribe for shares in A. Secondly, A, B and other shareholders in A, will enter into a shareholders' agreement coming into effect on the date of conversion of debentures. We advised that the issuing of debentures on its own did not appear to constitute a merger, but that B acquired de facto control in terms of Section 12(2)(g) due to veto rights relating to the business operation of A. In respect of the second transaction we advised that a merger would be triggered once B converts its debentures into shares.
6. A lends money to a business trust consisting of B, C and D for the purpose of assisting C to comply with its obligations. As security for repayment, C cedes in securitatem debiti all of its rights to claim from its consumers to the trust and the trust cedes in securitatem debiti all of its rights to claim from C to A. Furthermore, A will be entitled to exercise the majority of votes of the board of trustees in the case of default by the trust. The question was whether Chapter 3 is applicable to the lending agreement and whether the transaction constitutes a notifiable merger. Our view was that lending agreements are transactions by banks in the ordinary course of business and that the approach adopted by the Commission in its Practitioner's Update (Issue 5) will be applicable. Thus a bank will have to dispose what it has acquired as a result of default by the debtor within a period of 12 months, failing which it will be obliged to notify the Commission. However, seeing that a trust is not a bank, it is not covered by the approach adopted in respect of banks. Thus the exercise of its right to claim from consumers appears to constitute a merger.

Implementation of a merger prior to approval

A intended to obtain consent to mine minerals from the seller (Holder) in terms of Section 9(1)(b) of the Minerals Act (Act 50 of 1991), before obtaining approval of a merger involving the transfer of the mineral rights by the seller. The question was

whether obtaining such consent pending the approval of the Commission would amount to implementing a merger without the approval of the Commission. We advised that the transfer of mineral rights and the granting of consent to mine by the holder of mineral rights appear to have the same effect, in that the consent in question would grant to A what A would ordinarily not be entitled to. A would exercise the rights that ordinarily belong to the mineral rights holder for the duration of that consent, not on behalf of the holder (seller), but for its (A's) own account. A would be indirectly acquiring control over the rights of the mineral rights holder. The consent technically gives A the right to mine what it is ordinarily not entitled to prior to obtaining the necessary approval for the transfer of mineral rights. Whether such mining commences or not is not relevant. Thus the transaction appeared not only to constitute implementation before approval of a merger, but in itself, the granting of such consent may trigger a merger within the meaning of the Competition Act.

Calculation of threshold

1. A and B are partners with equal shares of 50% each in the partnership. A wishes to buy the other half held by B in the partnership for less than R30 million. The question was whether the whole or only part of the partnership should be considered in determining thresholds contemplated in Section 11 of the Act. In terms of Notice 254 of 2001, the turnover or asset value of the whole partnership, as the target firm, would be considered when determining thresholds, while making provision for deductions allowable to avoid duplication in calculating. The price consideration of R30 million is not relevant in determining the thresholds.
2. A is a new firm owned by investment companies. It had no assets, liabilities or turnover and neither of those investment companies owned any assets or produced revenue until the date of acquisition of B by A. We advised that since the acquirer has no assets nor turnover, the merger will fall within the small merger category if the combined threshold of R200 million is not met and it would not be compulsory for the parties to notify. A, a shelf company controlled by A1 (35%), A2 (27.5%), A3 (20%) and A4 (17.5%) intended to acquire B. A's board consists of seven directors, three appointed by A1, two by A2, with A3 and A4 appointing one each. The parties submitted that for purposes of assessing which firms are deemed to be the "acquiring firms" in terms of the Competition Act, only A1 and

A2 would be regarded as the acquiring firms since they could be said to have material influence over A. We advised that in terms of the agreement between the shareholders submitted to us, all four firms jointly control A. Therefore, in determining thresholds, the assets and turnover value of all four firms controlling A will be taken into account.

3. Another request for an opinion was made on three issues. Firstly, determining the thresholds in circumstances where a newly established firm has made a turnover of R500m within its first three months of operation. Secondly, a transfer of A's business division with a turnover of R50m in the previous financial year to a newly established firm ("B"), which is also a wholly owned subsidiary of A. Thirdly, the acquisition of B, after it has acquired C from A, by another acquiring firm. We advised that the first transaction appears to meet the required thresholds irrespective of the fact that the firm does not have audited financial statements for the immediately previous financial year simply because it had not traded before. The important thing to take into account is the turnover or asset value and if a firm has that, it is sufficient to determine threshold. Financial statements are required mainly to ensure accuracy of the figures used. The second transaction does not appear to constitute a merger in that they both belong to a single economic unit and lastly that if another firm acquires B after A has transferred C to B, the calculation of the turnover or asset value on the part of B (target firm) would take into account those of the recently transferred C.

4. A and B, respectively, owns 51% and 49% of the issued share capital of C. A intends to acquire the 49% share holding held by B. A will after the acquisition become the sole controller of C. The question was whether the transaction falls within the merger notification threshold contemplated by the Competition Act. We advised that on the part of the target firm, we would take into account the assets and/or turnover value of the joint venture ("C") in its totality. On the acquiring firm side it makes sense to only take into account 51% of the turnover generated by C as part of turnover of the acquiring firm, but that since the amount would have already been taken into account on the target firm, it would be appropriate to deduct it from the turnover generated by the acquiring firm for purposes of determining the combined value. Based on the figures provided, the transaction would fall below the merger notification thresholds.

Proposed vertical and horizontal arrangements

1. A and B are parties in a vertical relationship as provided for in the Competition Act. They intended to enter into an agreement in terms of which A will exclusively supply a certain raw material, namely Q, to B in the country. The information submitted indicated that A manufactures certain raw materials, which it sells to the manufacturers of product "C". B is one of the manufacturers of product "C". A and B intended to enter into an exclusive supply agreement only in respect of Q. B is the only firm which apparently uses Q. The question was whether or not the proposed transaction would have anti-competitive effects. We advised the parties that it is not possible to indicate with certainty what the likely effect would be, without information on the market that is necessary to determine the effect. We stated, however, that an exclusive vertical arrangement would have anti-competitive effects in the market if the nature of the agreement is such that it forecloses the market and creates barriers to entry. We further stated that if A is dominant, a case of abuse of dominance may as well come to the fore. We also mentioned that where there are efficiency or technological gains outweighing the anti-competitive effects, such conduct may be permissible.
2. A and B (a group of farmers) proposed to enter into an agreement in terms of which would provide financial assistance to B in order to produce a crop which is B's main activity. As a form of security for repayment, B shall supply their entire crop produced in that season through such assistance to A for packaging and distribution exclusively. The question was whether the proposed supply arrangement would constitute anti-competitive conduct. We expressed the view that the transaction could have anti-competitive effects that infringe Section 8(d)(i) or 8(c) and even Section 5 for that matter. The effect of the transaction was similar to those in the Patensie case, except that the control structure was different in this one. This meant that the farmers would not be able to do their own marketing or packaging, or do that through another company of their choice. What was also a concern was that more than half of the crop producers in the region concerned were to be locked into this agreement and further negotiations were in progress with other farmers not yet agreed with in principle. Also, the arrangement could have exclusionary effects in the market by depriving the new entrants access into

the packing market. We therefore advised that to an extent that the above effects would result, the proposed arrangement would fall foul of the Competition Act.

3. A and B are parties in a vertical relationship and wish to enter into an exclusive agreement. In terms of that agreement B will offer towing services to A and its affiliates country-wide upon request. For the duration of the agreement A will utilize only the services of B and its authorised agents. The question was whether or not the proposed agreement would have anti-competitive effects. We advised that an arrangement like this is not necessarily anti-competitive, but that it may have anti-competitive consequences upon its implementation and depending on what the market looks like. We pointed out that the worst-case scenario is that it could result in market foreclosure, possible elimination of price competition and creation of barriers to entry on both market levels. Also, if one of the parties to the agreement could be found to be dominant on its level of the market, it could possibly amount to the abuse of dominance by creating exclusionary acts, if such could not be justified on technological or efficiency grounds. Though such arrangements are not per se anti-competitive, a lot depends on the nature of the market, the product/services on which exclusivity is sought upon, as well as other factors such as the number of players and the effect on the competition and on consumers.
4. A and B, who are competitors in the film industry, wished to negotiate jointly with the publisher to change the manner and terms upon which directory adverts are published. This would also relate to the negotiation of prices that the publisher should charge in respect of those adverts. The question was whether A and B's action will contravene the provisions of the Competition Act. We advised that though joint actions by competitors are not necessarily anti-competitive, we view them with caution because of the relationship of the parties concerned. They need to be scrutinised carefully to ensure that they do not become a guise for collusion or result in anti-competitive consequences, whether intended or not. Seeing that A and B are competitors and the nature of their negotiations appears to involve prices, their actions may fall foul of Section 4(1)(b)(i) as indirect price fixing or fixing of trading conditions.
5. A ("a processors organisation") proposed an export incentive scheme, which was to take place nation-wide in an industry within which A operates. The structure

of the sector consisted of B (“a controlling body”) who will monitor and act as a referee for the scheme. B has 24 members, A nominates 12 of those members and C (“a producers organisation”) nominates the remaining 12. There would be a levy contributed to the scheme by members in order to assist when exports are not doing well and to promote exports on an ongoing basis. Both A and C are equally represented in B. The question in respect of a request was whether the scheme in question will comply with the Competition Act or not. We advised that the structure of the scheme and the scheme itself seem not to raise anti-competitive concerns. However, it is important to monitor the activities upon the implementation of the scheme to ensure that it does not result in such unintended consequences that would fall foul of the Competition Act.

6. A and B, competitors in the airline industry, entered into a code share agreement in terms of which they agreed to co-ordinate their business activities for carrying passengers with the parties being described as the marketing and operating carriers, depending on the circumstances. If A is described as the operating service at any point, B will be regarded as the marketing service, and vice versa. For instance, if A carries passengers of B, instead of the customers paying A for those services they will pay B, who will in turn pay A a specified amount agreed between themselves. We advised that code share agreements are not in themselves anti-competitive or a contravention of the Competition Act; instead they may allow entry of smaller airlines into the industry and thus make the markets more efficient. We advised however that code share agreements could only be assessed properly on their effect on the market, the information of which was not available. We further advised that such an agreement may fall foul of Section 4(1)(b)(i) (“price fixing”) if it relates to fixing a price charged to customers by the two competitors.

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