COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: 39/LM/Jul10

In the matter between:

South Africa Infrastructure Fund Trust	**Acquiring Firm**
And	
Infrastructure Concessions South Africa (Pty) Ltd	**Target Firm**

Panel	:	Andreas Wessels (Presiding Member) Medi Mokuena (Tribunal Member) Andiswa Ndoni (Tribunal Member)
Heard on	:	19 August 2010
Order issued on	:	13 September 2010
Reasons issued on	:	15 November 2010

Reasons for Decision

APPROVAL

[1] On 13 September 2010, the Competition Tribunal ("Tribunal") unconditionally approved the transaction involving South Africa Infrastructure Fund Trust and Infrastructure Concessions South Africa (Pty) Ltd. The reasons for the approval follow below.

PARTIES TO THE TRANSACTION

[2] The primary acquiring firm is South Africa Infrastructure Fund Trust ("SAIF"), a trust formed and registered in accordance with the laws of the Republic of South Africa. SAIF is not controlled by any firm. The management and control of SAIF vests in the governing board comprising six trustees, who are

appointed by the investors in SAIF. SAIF has one wholly-owned subsidiary, namely South Africa Infrastructure Fund Investments (Pty) Ltd.

[3] The primary target firm is Infrastructure Concessions South Africa (Pty) Ltd ("ICSA"), a private company incorporated under the laws of the Republic of South Africa. ICSA is jointly controlled by Novovilla S.L. ("Novovilla"), a company incorporated in accordance with the laws of the Kingdom of Spain, and Compania Espanola de Financiacion del Desarrollo, Cofides, S.A. ("Cofides"), also a company incorporated in accordance with the laws of the Kingdom of Spain. Novovilla and Cofides each own 50% of the issued share capital in ICSA. ICSA was incorporated as a special purpose vehicle for the purpose of holding 50% of the issued share capital of Bakwena Platinum Corridor Concessionaire (Pty) Ltd ("BPCC").[1]

DESCRIPTION OF THE PROPOSED TRANSACTION

[4] In terms of the structure of the proposed transaction, Novovilla and Cofides will sell their shares in ICSA to SAIF, African Infrastructure Investment Fund 2 ("AIIF2") and Kagiso Infrastructure Empowerment Fund ("KIEF"). SAIF will acquire 66.24% of the issued share capital in ICSA; AIIF2 will acquire 28.94%; and KIEF 4.82%. On completion of this transaction SAIF will by virtue of its shareholding control ICSA.

ACTIVITIES OF THE MERGING PARTIES

[5] SAIF is an investment fund whose purpose is to invest its assets and investments in accordance with its investment objectives and investment policy guidelines. SAIF's principal investment objective is to act as a capital-raising vehicle for investment in infrastructural projects within Southern Africa. As part of its mandate, SAIF has participated in consortia that tendered for toll road concessions and currently holds non-controlling stakes in the following concession projects:

- N3 Toll Concession (Pty) Ltd ("N3TC"), which holds a concession to design, construct, finance, operate and maintain the N3 road between Cedara and Heidelberg;
- Trans African Concessions (Pty) Ltd ("TRAC"), which holds a concession to design, construct, upgrade, operate and maintain 440

[1] The other shareholders in BPCC are SAIF (29.69%); Public Investment Corporation (7.81%); Old Mutual Assurance Co. (South Africa) Ltd (5.18%); WBHO Construction (Pty) Ltd (3.55%); Kagiso Infrastructure Empowerment Fund (2.99%); and The Royal Bafokeng Nation (0.78%).

kilometres of the N4 toll road from Witbank in South Africa to Maputo in Mozambique; and

- BPCC, which holds the concession to design, build, finance, operate and maintain 95 kilometres of the N1 running from Pretoria northwards to Bela Bela and 290 kilometres of the N4 running from Pretoria westwards to the Botswana border (hereinafter referred to as the "Platinum Highway" or "Platinum Route").

[6] ICSA is an investment holding company with its investments engaged in the business of the construction of transport infrastructure and government concessions. As stated in paragraph [3] above, ICSA has a 50% shareholding in BPCC which has a concession contract with the South African National Roads Agency Limited (SANRAL).[2] At present BPCC's activities under this contract involve discharging its obligations to operate and maintain the Platinum Highway and to charge and collect tolls from vehicles using this highway.[3] It outsources these functions to one or more third parties.

RATIONALE FOR THE PROPOSED TRANSACTION

[7] SAIF submitted that the acquisition of a controlling stake in ICSA (and indirectly in BPCC), poses it with an attractive investment opportunity for the fund whose mandate is to invest in infrastructure projects. ICSA submitted that its current shareholders want to dispose of their equity in order to *inter alia* free up capital to be used in other construction projects.

THE MARKETS AND IMPACT ON COMPETITION

Merging parties' submissions

[8] The merging parties submitted that the relevant markets affected by the proposed transaction are the markets for (i) the provision of road access along the Platinum Route as a whole and (ii) the provision of such services along segments of the Platinum Route. According to the merging parties, BPCC's competitors are any other parties that own, or control access to,

[2] SANRAL is mandated under the National Roads Act 1998 to develop, maintain and manage South Africa's national road network as well as to plan, design, construct, operate, rehabilitate and maintain the roads. As part of its mandate, SANRAL is responsible for the awarding of contracts for toll road concessions and toll road operations.

[3] BPCC was dormant at the time that the tender process relating to the Platinum Highway took place and was not involved in the tender for the project. The participants in that tender were members of a consortium (comprising construction companies and financial institutions) which utilised BPCC as a special purpose vehicle for holding and operating the concession granted by SANRAL once the tender was awarded.

roads that serve as alternative roads to the Platinum Highway/Route along the whole or any part thereof. The merging parties further submitted that since the N3TC and TRAC roads are not in close proximity to the Platinum Highway, they are unable to offer road users an alternative to the Platinum Route and therefore do not compete with BPCC in the relevant market (i.e. the provision of road access along the Platinum Route). On this basis, the merging parties concluded that there is no horizontal overlap between their activities.

[9] Despite the fact that there was no case law cited or other evidence provided in support of the merging parties' above-mentioned market delineation, the Commission accepted it without conducting any further market investigation (also see paragraph [11] below).

[10] The merging parties in an additional submission to their merger filing submitted that SAIF does not have the expertise and knowhow to participate in the market for toll road operations in the form of management and maintenance of toll gates and roads.[4]

Tribunal's assessment

[11] In order to gain a better understanding of the market dynamics, the Tribunal at the hearing of 19 August 2010 and in a subsequent letter of 20 August 2010 instructed the Commission to obtain SANRAL's views on *inter alia* the level at which competition takes place in the affected market(s), as well as the likely effects of the proposed transaction on competition in those markets.

[12] Representatives of the Commission and SANRAL met on 03 September 2010[5] and the Commission on 09 September 2010 submitted a supplementary report to the Tribunal. The Tribunal assessed this additional information and issued its order on 13 September 2010.

[13] SANRAL stated that competition for a particular road concession takes place at the time that the road is constructed. SANRAL further informed the

[4] See letter from Webber Wentzel Attorneys dated 24 August 2010.
[5] Meeting held with Mr. Koos Smit, Engineering Executive of SANRAL.

Commission that a contract for the construction/upgrade of a particular national road, which includes a concession for the maintenance of the road for a period of 30 years, is awarded by means of a tender process. Considering the high costs of road construction and maintenance these projects are generally too expensive to be funded by individual firms and too risky for SANRAL to award to singular firms. Therefore a concession consortium, which generally includes construction companies, sponsors, equity providers, lenders and service providers such as engineers, would normally tender for the road construction and concession contract. Construction companies and other service providers derive benefit from the immediate project whereas equity providers and lenders have more long term interests in securing returns. SANRAL furthermore advised that once the construction part of the tender is complete, certain members of the original tender consortium may wish to dispose of their shareholding in the consortium as they may not be interested in long term returns. These parties may sell their shares in the consortium to investors that were not initially successful in being awarded the tender.

[14] After assessing the information received from SANRAL, the Commission concluded that competition takes place "for" the market, i.e. at the stage of awarding a concession contract by means of tender and not "in" the market, i.e. at a road access level. There is, however, no need for us to define the exact parameters of the relevant product/service markets in this case, since it does not affect our assessment of the potential effects of the proposed deal on competition, as explained below.[6]

[15] SANRAL's view was that the merging parties are "equity parties" in a consortium (as described above). SANRAL furthermore confirmed that the proposed transaction does not raise any post merger competition concerns in any market since there are numerous alternatives to SAIF in a concession consortium context. SANRAL identified the competitors of SAIF in this context as *inter alia* African Development Bank; Capital Alliance Life Limited; the Development Bank of Southern Africa, Eskom Pension and Provident Fund; International Finance Corporation; Investec Asset Management, Kagiso

[6] The Tribunal in the large merger involving Murray & Roberts Ltd and Concor Ltd (Case no: 101/LM/Oct05) defined a national market for the provision of facilities management services, which is described as involving the provision of management, administration and technical services with regard to property belonging to third parties. It was further held that this market can be divided into two sub-markets, viz. (i) toll road concessions and (ii) toll road operations.

Infrastructure Investments; Public Investment Corporation; Standard Bank Group Retirement Fund; as well as numerous other alternatives.

[16] Based on the above information, we conclude that this merger is unlikely to substantially prevent or lessen competition in any potential relevant market.

PUBLIC INTEREST

[17] The merging parties confirmed that the proposed deal will have no effect on employment.[7] Furthermore, no other public interest issues arise from the proposed transaction.

CONCLUSION

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

15 November 2010
DATE

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Andreas Wessels

Medi Mokuena and Andiswa Ndoni concurring

Tribunal Researcher:	Ipeleng Selaledi
For the merging parties:	Webber Wentzel Attorneys
For the Commission:	Mogalane Matsimela (Mergers & Acquisitions Division)

[7] See *inter alia* page 5 of the record.