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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM051Jun15

In the matter between:

City of Johannesburg Metropolitan Municipality	Primary Acquiring Firm
and	
CitiConnect Communications (Pty) Ltd	
BWired (Pty) Ltd	Primary Target Firms

Panel	: Norman Manoim (Presiding Member)
	: Medi Mokuena (Tribunal Member)
	: Andiswa Ndoni (Tribunal Member)
Heard on	: 15 July 2015
Order Issued on	: 15 July 2015
Reasons Issued on	: 14 August 2015

Reasons for Decision

Approval

[1] On 15 July 2015, the Competition Tribunal ("Tribunal") unconditionally approved the merger between City of Johannesburg Metropolitan Municipality ("CoJ") and two target firms CitiConnect Communications Proprietary Ltd ("CitiConnect") and BWired Proprietary Ltd ("BWired").

[2] The reasons for approving the proposed transaction follow.

Parties to transaction

Primary acquiring firm

[3] The primary acquiring firm is the CoJ, which as is well-known, is a local government comprising the metropolitan area of Johannesburg.

[4] The CoJ renders a variety of services through profit generating state-owned companies. This merger relates to the extension of the CoJ's services into telecommunications infrastructure.

Primary target firms

[5] CitiConnect owns a network of telecommunications infrastructure in Johannesburg, known as the Johannesburg Broadband Network which comprises network infrastructure, spurs, fibre, ducting and plant equipment, movable assets and software.[1]

[6] Citiconnect controls the other target firm in this transaction BWired. BWired is the operating company established for the provision of services arising out of the Broadband Network to the CoJ.

Proposed transaction and rationale

[7] The target firms in this transaction were established in order to design and build the Johannesburg Broadband Network and provide services arising from it in terms of a Build, Operate and Transfer Agreement ("BOT Agreement"). The BOT agreement was initially concluded between the CoJ and Ericsson South Africa Proprietary Limited ("ESA"). ESA had transferred the BOT agreement to CitiConnect and BWired. Importantly, according to the agreement, the Johannesburg Broadband Network and all ancillary assets and software would be transferred to the CoJ after a period of 12 years.

[1] CitiConect is in turn controlled by the Wired Connection (Pty) Ltd.

[8] This transaction involves the early transfer of the Johannesburg Broadband Network which involved the purchase of CitiConnect and BWired by Ericsson South Africa Proprietary Limited ("ESA") which will then immediately be on-sold to the CoJ. The early transfer of the network was due to a commercial dispute between the parties; i.e The CoJ elected to terminate this agreement before 12 years had lapsed and take control of the Johannesburg Broadband Network now.

Impact on competition

Horizontal overlap

[9] The target firms operate in the upstream market of wholesale fibre access ("WFA") and the downstream market of wholesale internet access. The Competition Commission found no horizontal overlap between the merging parties, as the CoJ does not operate in either of these markets.

[10] In the upstream market the Commission calculated the market share based on the distance of metropolitan fibre networks owned by wholesale leased lined operators in 2014. The Commission found the target firms enjoy 4% of the market share.[2] Accordingly, due to the small market share as well as the prevalence of competition from Telkom and Dark Fibre Africa, the Commission found that the merger is unlikely to raise competition concerns.

[11] In the downstream market the Commission used the provision of internet services between 2011 and 2013 to calculate market shares. It found CitiConnect and BWired's market shares to be 0.2%. The existence of larger market players such as Telkom and Neotel also assisted the Commission in finding that the proposed transaction would not raise any competition concerns.

Regulatory concerns raised by competitors

[12] During the Commission's investigation various competitors raised concerns about the proposed transaction. In order to lay infrastructure in the Johannesburg Metro competitor firms would have to get permission from the City acting as regulator in order to do so. These permits are referred to as wayleaves. Wayleaves are permits

[2] The Commission and merging parties bundled the two target firms together in their submissions hence our reference to target firms.

required in order to lay fibre on municipal land. The concern from the competitors was that the CoJ had a commercial incentive to deny rivals to its networks this permission to lay fibre within its area of service. Further the CoJ would have an incentive to charge competitors higher prices for digging and laying the fibre cables on municipal ground. Competitors cited examples where two other metros, the City of Tshwane and City of Cape Town Municipality had allegedly done so to illustrate their concerns.

[13] The competitors, Dark Fibre Africa, Link Africa and MTN were invited to participate at the hearing.[3] Although not present at the hearing these concerns were raised with the merging parties by the Tribunal.

[14] In response to allegations that it would withhold permits, the CoJ submitted that it does not have a commercial incentive to do so. It further submitted that potentially aggrieved parties would be protected by legislative checks and balances and any decisions taken on the granting of wayleaves would be subject to administrative review. At the hearing the CoJ further submitted that it was not among the municipalities where complaints concerning the granting of wayleaves were raised.

[16] In determining whether the CoJ, acting as both a player and referee would raise any competition concerns, we find that the issues raised by the competitors are not merger specific as concerns around the issuing of wayleaves could arise regardless of the merger. Whilst admittedly we are not in a position to comment on the effectiveness of the current regulatory structure in the granting of wayleaves, at least *prima facie*, it would appear that there are sufficient regulatory and judicial frameworks in place to cater for disputes that could arise. We further find that imposing conditions would not remedy the concerns raised by competitors as they would not be able to improve on rights already in existence. We are also of the view that the CoJ's incentives remain the same despite the merger, as the infrastructure would in any event have been taken over in terms of the BOT agreement after the 12 year period had lapsed.

[18] We conclude that the proposed transaction does not warrant any conditions and we approve the merger unconditionally.

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[3] MTN indicated that they accepted the merging parties' written response to these allegations.

Public interest

[19] The target firms submitted that 30 retrenchments occurred prior to the proposed transaction but that they were conceived of and implemented prior to the commencement of negotiations between itself and the CoJ.[4] The merging parties confirmed that the proposed transaction will not result in an adverse impact on employment.[5] The proposed transaction further raises no other public interest concerns.

Conclusion

[20] 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.

Norman Manoim — 14 August 2015 **DATE**

Medi Mokuena and Andiswa Ndoni concurring

Tribunal Researcher:	Aneesa Ravat
For the merging parties:	Marianne Wagener of Norton Rose Fulbright and Leanne Kagirin for Citi Connect and BWired and Gerald Duman for City of Johannesburg
For ESA:	Derek Lotter of Bowman Gilfillan
For the Commission:	Maanda Lambani and Lindiwe Khumalo

[4] *Inter alia* Merger transcript page 15.
[5] *Inter alia* merger record page 8.