



COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM270Mar19

In the matter between

New Holdco

Primary Acquiring Firm

And

Edgars Consolidated Stores Ltd

Primary Target Firm

Panel : Mr E Daniels (Presiding Member)
: Ms M Mazwai (Tribunal Member)
: Mrs M Mokuena (Tribunal Member)
Heard on : 9 May 2019
Order Issued on : 9 May 2019
Reasons Issued on : 13 June 2019

REASONS FOR DECISION

Approval

- [1] On 9 May 2019, the Tribunal conditionally approved the proposed transaction in terms of which New Holdco ("New Holdco") is acquiring control over Edgars Consolidated Stores Ltd ("ECSL").
- [2] Prior to the commencement of the hearing, Mrs Mokuena who was scheduled to sit on the panel had an emergency that required her immediate attention and was excused. The hearing proceeded with only two Tribunal Members sitting on the panel. No objections were raised by the Competition Commission and merging parties all of whom agreed to this arrangement.
- [3] The reasons for the approval follow.

Parties to the transaction

- [4] The acquiring firm, New Holdco (later incorporated as 'K2019216440 (SA) Ltd') was incorporated for the proposed transaction and does not conduct any business activities. It is not controlled by any firm/shareholder(s). However, it is comprised of Edcon's creditors which includes, *inter alia*, banks, international private equity firms, property firms and the Public Investment Corporation (PIC).
- [5] The primary target firm is ECSL, which is ultimately controlled by New Holdco. ECSL controls Edcon Ltd. ECSL, Edcon and all their sister companies will be referred to as the 'Edcon group'.
- [6] The Edcon group is active in the retail sector through various divisions which sell men's, women's and children's wear; fragrances, cosmetic products, homeware and cellular products.

Proposed transaction and rationale

- [7] New Holdco intends to acquire the entire issued shares of ECSL. Post-merger, New Holdco will control ECSL.
- [8] The proposed transaction is essentially a financial restructuring in an attempt to prevent the Edcon group from being placed into business rescue/liquidation proceedings.

Counterfactual

- [9] Before we assess the impact of the proposed transaction on competition and on public interests, it is essential to provide the context in which the proposed transaction is taking place.
- [10] Between 2007 and 2016, the Edcon group lagged behind the market with shrinking sales and profit margins. Due to its underperformance, the Edcon group's debt reached a highly burdensome level, requiring its creditors to refinance their debt into equity in order to save the group. The proposed transaction follows a failed attempt to restructure the Edcon group in 2016. The previous restructure (*Parentco/Edcon*¹ merger) entailed the acquisition of the entire issued shares of Edcon by Parentco in an attempt to restructure the Edcon group and prevent it from being liquidated/placed into business rescue.

¹ *Parentco/Edcon* LM117Sep16.

- [11] The merger was approved subject to conditions that were a result of the engagements between the Edcon group and the Economic Development Department (EDD). The culmination of those engagements was that the EDD and the Edcon group agreed to conditions that sought to promote employment levels and local procurement within the Edcon group post-merger.
- [12] The merging parties submitted, at the time, that the counterfactual was that, absent the proposed transaction, there would be a risk to the retailer which employs approximately 40 000 people. Furthermore, any liquidation/business rescue proceedings of the Edcon group would have far-reaching implications as its retail chains account for a considerable amount of retail space in SA, and it sources a great portion of its clothing from local manufacturers. This would have a negative impact on employment, small and medium businesses (SMMEs) and on the retail sector.
- [13] Based on the above analysis, the Competition Commission concluded that the proposed transaction will provide the Edcon group with capital which will enable it to remain financially viable. This will have a positive effect on employment, SMMEs and on the retail and property sectors.

Impact on competition

- [14] The proposed transaction does not result in any overlaps. The Competition Commission did not definitively define the relevant market. However, it identified the relevant market as the market for the retail of apparel, cosmetics, homeware and mobile cellular products.
- [15] Since no overlaps arise, the Competition Commission found that the proposed transaction is unlikely to substantially lessen or prevent competition in the identified market. We find no reason to disagree with this finding.

Information Exchange

- [16] The Commission assessed the possibility of New Holdco being used as a conduit to exchange competitively sensitive information. This is because the shareholders of the merged entity compete with each other outside of New Holdco in the markets for the provision of financial and banking services and rentable retail space. The Competition Commission, however, found that none of the competing shareholders will have the requisite shareholding to appoint a board member in the New Holdco Board of Directors. Therefore, the Competition Commission concluded that the proposed transaction is unlikely to facilitate the exchange of competitively sensitive information. We agree with the Competition Commission's assessment in this regard.

Public interest

- [17] The proposed transaction does not raise any public interest concerns. Given the counterfactual, the proposed transaction safeguards the public interest aspects ventilated above. The conditions imposed in the 2016 restructuring were intended to last for five years. The conditions imposed in the current proposed transaction encompasses the principles of the 2016 conditions and ensures that they run for a further period of five years from the date of approval of the proposed transaction.
- [18] Like the 2016 conditions, the current conditions aim to address three issues, viz., (i) Employment; (ii) Procurement of South African (SA) brands by the merged entity; and (iii) Black Economic Empowerment (BEE). In relation to employment the merged entity, subject to its financial position, will endeavour to implement measures to avoid job losses at non-management level and to offer alternative placements in equivalent positions to employees who lose their jobs due to the consolidation of the Edcon group's stores.
- [19] In relation to the procurement of SA brands, the merged entity will expand its procurement from SA suppliers as part of its Import Replacement Programme. Lastly, in relation to BEE, it is important to note that Edcon group's financial predicament has eroded the value and benefits due to the Edcon Staff Empowerment Trust and its beneficiaries. Through the proposed transaction, the merging parties will introduce a replacement scheme that will safeguard the rights and interests of those beneficiaries.
- [20] The Competition Commission contacted the relevant trade unions representing the employees of the Edcon group for comment, namely, the South African Commercial, Catering and Allied Workers Union (SACCAWU) and the South African Clothing and Textile Workers Union (SACTWU). The unions endorsed the proposed transaction with ancillary suggestions that certain clauses be deleted.

SACCAWU

- [21] SACCAWU suggested the deletion of clauses 2.3 and 5 of the conditions. Clause 2.3 sets out the background and recordal of the conditions whereas clause 5 addresses the BEE aspect. SACCAWU suggested the deletion of clause 2.3 because it was of the view that it waters down any commitments contained in the merger notification.² It suggested the deletion of clause 5 because it was of the view that the Edcon group may use its precarious financial position to make changes to the Edcon Staff Empowerment Trust.

² Merger Record, page 1140.

SACTWU

[22] SACTWU suggested the deletion of clause 2.3 because it was of the view that it creates a substantial *caveat* on any commitments made by the merging parties.³

Merging parties

[23] In relation to the suggested deletion of clause 2.3, the merging parties submitted that the clause serves to contextualise the commitments and undertakings in the conditions.⁴ This is of particular relevance in the context of the proposed transaction given the nature of the undertakings and commitments which were not intended to address any merger specific concerns.

[24] In response to SACCAWU's suggestion to delete clause 5, the merging parties submitted that should Edcon group be placed into business rescue or liquidation proceedings there will be no prospect of the Edcon Empowerment Trust recovering any value ascribed to its current equity in Edcon.⁵ Conversely, should the proposed transaction successfully be implemented, the replacement scheme is intended to safeguard the interests of its beneficiaries as the Edcon group will continue to comply with the requisite BEE laws and codes of good practice. The unions were satisfied with the merging parties' submissions and raised no further concerns.

EDD

[25] The EDD has expressed its support for the proposed transaction and notes that the conditions reflect the Edcon's group commitment to foster and develop a competitive production environment in SA.⁶

[26] Taken as a whole, the Competition Commission found that the proposed transaction has no negative effects on competition and the public interest. We find no reason to disagree with this finding.

³ Merger Record, page 1149.

⁴ Merger Record, page 1152.

⁵ Merger Record, page 1154.

⁶ Merger Record, page 1181.

Conclusion

[27] 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 subject to conditions attached hereto as "Annexure A".



Mr Enver Daniels

13 June 2019

Date

Ms Mondo Mazwai concurring.

Tribunal Case Manager : Kgothatso Kgobe

For the Merging Parties : M Garden of ENS

For the Commission : A Mfuphi and W Gumbie

ANNEXURE A: CONDITIONS

CT CASE NUMBER: LM270Mar19

CC CASE NUMBER: 2019Mar0040

NEW HOLDCO

and

EDGARS CONSOLIDATED STORES LIMITED

CONDITIONS TO THE APPROVAL OF THE MERGER

1. DEFINITIONS

Unless inconsistent with the context, the words and expressions set forth below shall bear the following meanings and cognate expressions shall bear corresponding meanings.

- 1.1. **“Approval Date”** means the date referred to in the Tribunal’s merger clearance certificate (Form CT 10) in respect of the Proposed Transaction;
- 1.2. **“Broad-Based Black Economic Empowerment Act”** means the Broad-Based Black Economic Empowerment Act, Number 53 of 2003, as amended;
- 1.3. **“Commission”** means the Competition Commission of South Africa, a statutory body established in terms of section 19 of the Competition Act;
- 1.4. **“Competition Act”** means the Competition Act, Number 89 of 1998, as amended;
- 1.5. **“DTI”** means the Department of Trade and Industry of South Africa;
- 1.6. **“ECSL”** means Edgars Consolidated Stores Limited, registration number 1946/022751/06;
- 1.7. **“Edcon Group”** means ECSL, OpCo and all of their subsidiaries;

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- 1.8. **“EDD”** means the Economic Development Department of South Africa;
 - 1.9. **“Edcon Staff Empowerment Trust”** means that Edcon Staff Employment Trust created in July 2005 as part of the Edcon group’s black economic empowerment programme, which holds 10,6% (ten comma six percent) of the issued share capital of Edcon Holdings Limited.
 - 1.10. **“Government”** means the Government of the Republic of South Africa; in particular the EDD and DTI, duly represented by their respective Directors General;
 - 1.11. **“IDC”** means The Industrial Development Corporation of South Africa SOC Limited, a public corporation registered in the Republic of South Africa;
 - 1.12. **“Merging Parties”** means NewHoldCo and ECSL;
 - 1.13. **“New HoldCo”** means a new company formed for the purposes of the Proposed Transaction which is yet to be incorporated;
 - 1.14. **“NGO”** means a non-profit organisation, operating independently of any government, with an interest in promoting the textile and apparel industry value chains in South Africa;
 - 1.15. **“OpCo”** means Edcon Limited, registration number 2007/003525/06;
 - 1.16. **“Previous Conditions”** means the conditions attached as Annexure A to the Tribunal’s order in relation to the financial restructuring of the Edcon Group, dated 23 November 2016, under case number LM117Sep16;
 - 1.17. **“Proposed Transaction”** means the acquisition of control over ECSL by New HoldCo, as contemplated in the transaction notified to the Commission under Commission Case Number 2019Mar0040;
 - 1.18. **“Small Enterprises”** has the meaning set out in the National Small Enterprises Act, Number 102 of 1996;
 - 1.19. **“Tribunal”** means the Competition Tribunal of South Africa, a statutory body established in terms of section 26 of the Competition Act;

2. BACKGROUND AND RECORDAL

- 2.1. On 13 March 2019, the Merging Parties notified the Commission of a large merger involving the acquisition by New HoldCo of ECSL.
- 2.2. The Edcon Group is in financial distress and at risk of being forced into business rescue or insolvency proceedings. The Proposed Transaction is intended to achieve a restructuring and recapitalisation of the debt and equity structure of OpCo so as to provide a stable platform for the planned turnaround of the Edcon Group.
- 2.3. Notwithstanding the challenges (both financial and otherwise) facing the Edcon Group, the Merging Parties are cognisant of the important role it plays in the South African economy and undertake to use their best efforts to pursue and achieve the public interest objectives set out below, it being recognised that the Edcon Group operates in a difficult trading environment and the extent of progress against these public interest goals will be influenced by external circumstances (such as prevailing macro and micro economic conditions and trading conditions) and internal circumstances (such as the state of the Edcon Group's financial position and operating performance).

3. REPLACEMENT OF THE PREVIOUS CONDITIONS

As from the Approval Date, the conditions set out herein shall replace the Previous Conditions which shall cease to be of force and effect.

4. SOUTH AFRICAN INPUTS

- 4.1. ECSL and OpCo are committed to fostering and developing a more competitive production environment in South Africa through –
 - 4.1.1. continuation of the Import Replacement Programme which entails expanding OpCo's procurement from South African suppliers (including small, medium and large enterprises);

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- 4.1.2. building relationships with South African suppliers of products for re-sale in OpCo's stores to *inter alia* mitigate the risk of exchange rate fluctuation, secure faster supply chain turnaround and cater for local consumer preferences; and
 - 4.1.3. participation in initiatives by *inter alia* Government, IDC and NGOs aimed at improving capacity and competitiveness and to create jobs in the textile and apparel industry value chains in South Africa.
- 4.2. In furtherance of the commitments set out in paragraph 4.1 above, OpCo will run –
- 4.2.1. quality assurance information sessions with South African producers to assist them in manufacturing world class products at competitive local prices; and
 - 4.2.2. orientation sessions with Small Enterprises in South Africa to assist them in doing business with OpCo.
- 4.3. In furtherance of the commitments set out in paragraph 4.1 above, ECSL and OpCo will engage with South African suppliers and manufacturers relevant to the Edcon Group's operations in South Africa with the aim of exploring opportunities –
- 4.3.1. to expand production for the domestic market;
 - 4.3.2. to accelerate OpCo's local procurement; and
 - 4.3.3. for partnerships, initiatives and programs to build the capacity, technological capabilities (including equipment and intellectual property requirements) and competitiveness of those local suppliers and manufacturers,
- including, where appropriate, working with Government, IDC and/or NGOs.
- 4.4. To give effect to the above, for a period of 5 (five) years from the Approval Date, OpCO commits to meeting on a biannual basis with representatives of the EDD and other public entities that may be invited by the EDD from time to time, which may include the DTI and IDC, to help identify local sourcing opportunities and measures that can improve the competitiveness of local suppliers and manufacturers.

5. **BEE**

- 5.1. The financial difficulties of the Edcon Group have wholly eroded the value of and benefits attributable to the Edcon Staff Empowerment Trust and its beneficiaries.
- 5.2. Through the Proposed Transaction, the Merging Parties will ensure that a replacement scheme is introduced to safeguard the rights and interests of the beneficiaries of the Edcon Staff Empowerment Trust.

6. **EMPLOYMENT**

Subject to external circumstances (such as prevailing macro and micro economic conditions and trading conditions) and internal circumstances (such as the state of the Edcon Group's financial position and operating performance), the Edcon Group will use its best endeavours to implement measures aimed at avoiding involuntary retrenchments, particularly amongst non-management related store staff, including offering employees of stores that are closed down equivalent positions in alternate stores.

7. **MONITORING OF COMPLIANCE WITH THE CONDITIONS**

- 7.1. For a period of 5 (five) years from the Approval Date, OpCo shall, within 30 (thirty) days of each anniversary of the Approval Date, provide to the Commission and the EDD a report detailing its efforts in pursuing and achieving the public interest objectives set out in clauses 4, 5 and 6 above.
- 7.2. Any person who believes that the Merging Parties have not complied with these conditions may approach the Commission. In the event that the Commission determines that there has been an apparent breach by the Merging Parties of these conditions, the matter shall be dealt with in terms of Rule 39 of the Rules for the Conduct of Proceedings in the Commission.
- 7.3. All correspondence in relation to these conditions must be submitted to the following email address: mergerconditions@compcom.co.za.
- 7.4. For the avoidance of doubt, with effect from the Approval Date, OpCo's reporting obligations to the Commission and EDD set out in clause 5 of the Previous Conditions shall be replaced by the reporting obligations set out in this clause 7.

8. VARIATION

- 8.1. The Merging Parties or the Commission shall be entitled, on good cause shown, to apply to the Tribunal for a waiver, relaxation, modification and/or substitution of any of these conditions at any time after the Approval Date.