



COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No:016261

In the matter between:

Holdco

Acquiring Firm

And

**Lanseria International Airport (Pty) Ltd and
Execujet Airline Investments (Pty) Ltd**

Target Firms

Panel : Norman Manoim (Presiding Member)
Medi Mokuena (Tribunal Member)
and Imraan Valodia (Tribunal Member)
Heard on : 29 May 2013
Order issued on : 29 May 2013
Reasons issued on : 26 July 2013
Non-confidential
reasons issued on : 01 October 2013

Non-confidential Reasons for Decision

Approval

[1] On 29 May 2013 the Competition Tribunal ("Tribunal") approved with conditions the merger between Holdco and Lanseria International

Airport ("LIA") and Execujet Airline Investments (Pty) Ltd ("Execujet")¹.
The reasons for approval follow below.

The Transaction

[2] The primary acquiring firm is Holdco a company yet to be incorporated and has not traded. Holdco shareholders are The Public Investment Corporation ("PIC"), Pan African Infrastructure Development Fund ("PAIDF") and a BEE Consortium. Of relevance to this decision is the shareholding of the PIC, held via the GEPF. The PIC also holds shares in Airports Company South Africa ("ACSA") which in turn owns OR Tambo International Airport ("ORTIA"). ORTIA competes in some respects with LIA. This decision deals with competition implications of that cross shareholding.

[3] The primary target firms are Lanseria International Airport (Pty) Ltd and Execujet Airline Investments (Pty) Ltd. LIA is not controlled by any single firm. LIA wholly owns Lanseria Airport 1993 (Proprietary) Limited ("Lanseria Airport"), which in turn wholly owns Johannesburg International Airport (Proprietary) Limited ("JIA") and Solenta Aviation Properties (Proprietary) Limited. Execujet is not controlled by any single firm. Essentially by acquiring the target firms Holdco acquires the business of Lanseria Airport. Lanseria airport is important for two reasons. Its location in Gauteng and its licence which permits it to provide scheduled airline services to international and domestic airlines.

The Transaction

[4] In terms of the Sale of Shares Agreement, Holdco will acquire 50% of the shares in LIA and 100% of shares in Execujet. Subsequent to the implementation of the proposed transaction, Holdco may restructure the target assets so that all of the property and business currently held by LIA other than shares held in Lanseria Airport, will be transferred to

¹ Not to be confused with ExecuJet Aviation Group which is an independent group of companies.

Opco, a newly incorporated company which is wholly owned by Holdco.

The relevant market and the impact on competition

[5] The central issue in this merger is the implication of the joint holding that the PIC has in ACSA and LIA. The Commission has imposed a condition on the merger to prevent information flows between PIC functionaries who will serve on the respective boards or be receivers of information from them. We deal with this issue later in this decision.

[6] At the outset it is worth noting that the offerings of LIA and ORTIA are not identical. While they both offer general and scheduled aviation, LIA's scheduled aviation is only for domestic and regional flights. ORTIA, in addition to scheduled aviation offerings comparative to those of LIA also offers long haul international flights and interlining.²

[7] Prior to considering this we have to decide whether the existing PIC 20% interest in ACSA and the acquired equity in LIA might lead to unilateral or co-ordinated effects post merger.

[8] The PIC has a 37.5% stake in Holdco and thus an effective stake of 37.5% in Lanseria once the business is restructured. The remaining shareholders have stakes of 37.5% by PAIDF and 25% by the BEE consortium.

[9] It is clear that the PIC does not have the ability to exercise sole control over ORTIA via ACSA; nevertheless its 20% stake gives it rights to appoint 3 out of the 12 directors to the board. ACSA's other shareholders are the Department of Transport with 74.6% equity, African Harvest Strategic Investments with 1.4% equity, G10 Investments with 1.21% equity, Staff Share Incentive Schemes with 1.19% equity, Telle Investments with 0.8% equity, Pybus Thirty Four Investments with 0.4% equity and Upfront Investments 64 with 0.4% equity. Given the size of the Department of Transport's shareholding,

² Interlining is a practice managed by individual commercial agreements between airlines and is an efficient process to manage customers' itineraries which require flights on multiple airlines.

the PIC has joint control of ACSA together with the Minister of Transport, and it has a significant financial interest in ACSA. The merging parties do not dispute this.

[10] The merging parties, however, contend that the PIC would be no more than a joint controlling shareholder of Lanseria. They say this because the PIC stake of 37.5% is insufficient to give it de jure control. When asked at the hearing whether the fact that the PIC's funding commitment was greater than 50% and thus larger than its equity stake might not give it control, the merging parties' answer was that the funding agreements were such that they were arms length and did not confer any special powers of control. Expressed differently if the minorities complied with the funding obligations no additional leverage was acquired over them by the PIC.³ The Commission agreed with these contentions.

[11] We will assume as we have not reviewed these agreements that these contentions are correct. However, the fact that de jure control may not be exercised, does not mean that the PIC could not, if it wished to do so, exercise de facto control over LIA even against the interests of the minorities. The reasons that this might be so are as follows: the PIC is funding these firms; the minorities are all small businesses some of whom are dependent on PIC funding in other transactions not just this one; the PIC brings expertise as specialist investor in this industry; the minorities have no prior experience in the industry; these facts all point to a strong probability that the PIC could exercise unilateral de facto control over LIA should it wish to do so. Nevertheless, it is not necessary for us to decide this point conclusively as even by making this assumption the merger does not raise competition concerns for the reasons that follow.

³ See pages 22 to 29 of the transcript (29 May 2012)

Analysis of possible anti-competitive effects.

[12] Two possible anticompetitive effects will be considered. The first is that the PIC would have an incentive to raise tariffs at LIA because lost customers would be diverted to ORTIA as the only substitute in the area, and the PIC would recover some of the lost profits from its shareholding in ACSA. This is known in the literature as the theory of joint profit maximisation and is considered when a firm has a minority interest in a rival firm. The second is that even if the PIC does not exercise this power at Lanseria as suggested above, its presence on both boards of rival firms could give rise to information sharing that could lead to anticompetitive outcomes.

[13] The Commission only briefly addressed the first issue, due to their conclusion that the PIC would not enjoy de facto control of LIA. We raised this issue at the hearing with both the Commission and the merging parties and in our view we got a satisfactory explanation for why this concern was unlikely.

[14] A strategy by PIC to maximise joint profits from their shareholdings in LIA and ACSA could not include increasing tariffs at ORTIA because these are regulated by the Airports Regulator. Thus the PIC would have to raise tariffs at LIA and recover the profits from lost customers to ORTIA through increased profits from their ACSA shareholding. This is unlikely firstly because the PIC's shareholding is far lower in ACSA than it will be in LIA, and secondly because ACSA outsources a number of services which LIA provides itself and on which it then earns revenues.

[15] ACSA provides all the regulated services and facilities for landing, parking and passenger services at ORTIA. The unregulated services are, however, mostly provided by third parties or the airlines themselves. The unregulated services include ground and ramp handling services for arriving and departing flights (passenger loading and unloading, baggage handling and ramp handling), fuel, aircraft

cleaning, loading of catering, and aircraft ground engineer/technical services. These amount to approximately 87% to 93% of an airline's operating costs at ORTIA.⁴ In contrast LIA itself provides many of the services that ORTIA outsources.⁵ This, to a large degree, undermines the incentive by PIC to raise tariffs at LIA in order to maximise joint profits from both its shareholdings.

[16] Another factor which makes it unlikely that the PIC would use its de facto power to raise tariffs at LIA is that the customer base of LIA is very limited. Currently LIA has only two commercial customers for scheduled domestic airline flights. While it is possible that these airlines might reduce the number of flights incrementally in response to small changes in tariffs, it is more likely that LIA will lose them as customers altogether for any significant increase in tariff. The mechanism of joint profit maximisation in the ordinary context is to make additional profits off the retained customers as well as to retain some profits from lost customers through the shareholding in a competitor. Joint maximisation is likely to fail if all the customers are lost by the firm which increases its price, in this case LIA.

[17] Lastly, and perhaps most importantly, the PIC has committed to acting in a manner diametrically opposed to that which joint profit maximisation would predict. The PIC, as party to the Sale of Shares and Claims Agreement and the LIA Group Relationships Agreement, has committed to contribute to significant investments in LIA. The collective value of these investments is R1.1 billion.⁶ These investments are envisaged to include the expansion of the apron as well as building a new terminal building, control tower, fire station and runway.⁷ These competitive investments targeting increased traffic are inconsistent with a theory which would have LIA increasing tariffs and diverting customers away from LIA to ORTIA.

⁴ Pages 23 and 24 of the Competition Commission Merger Report.

⁵ Page 30 of the Competition Commission Merger Report.

⁶ Page 68 of the Competition Commission Merger Report.

⁷ Pages 13 and 14 of the Competition Commission Merger Report.

[18] Thus, in the event that the PIC gains de facto control of LIA as a result of this merger, it is unlikely to lead to a significant lessening in competition in the market through changed incentives for the PIC as a shareholder of LIA.

[19] The second concern centred on the exchange of sensitive information within the PIC and cross directorships on the boards of ACSA and LIA where the PIC nominates the same individuals. This information exchange possibility between two firms which are rivals in respect of some services, was an issue of concern. However this concern has been addressed by the undertakings made by the merging parties which they have agreed to have made a condition for the approval of the merger. These undertakings provide for the housing of the two investments in different divisions of the PIC, along with conditions addressing how competitively sensitive information will be treated in the PIC and a restriction on common directorships.

CONCLUSION

[20] For the reasons above, we approved the merger subject to the conditions in Annexure A of the order in this matter, dated 29 May 2013, and which are attached hereto.



Norman Manoim

01 October 2013

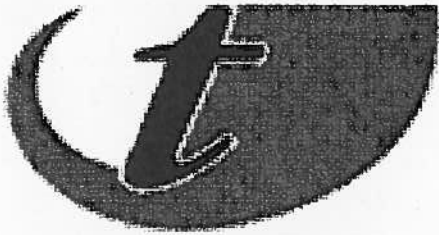
DATE

Medi Mokuena and Imraan Valodia concurring.

Tribunal Researcher: Thabo Ngilande and Andrew Sylvester.

For the merging parties: David Unterhalter S. C. instructed by Norton Rose

For the Commission: Bongani Ngcobo and Lindiwe Khumalo



competitiontribunal south africa

Notice CT 10

About this Notice

This notice is issued in terms of section 10 of the Competition Act.

You may appeal against this decision to the Competition Appeal Court within 20 business days.

Contacting the Tribunal

The Competition Tribunal
Private Bag 828
Sunshine
Pretoria 0132
Republic of South Africa
Tel: 27 12 394 3500
Fax: 27 12 394 0189
e-mail: rtsa@comptrib.co.za

Merger Clearance Certificate

Date: 29 May 2013

To: Norton Rose South Africa

Holdco
and
Lanseria International Airport (Pty) Ltd and Execujet Airline
Investments (Pty) Ltd
Case No: 016261

You applied to the Competition Commission on 20 December 2012 for merger approval in accordance with Chapter 3 of the Competition Act.

Your merger was referred to the Competition Tribunal in terms of section 14A of the Act, or was the subject of a Request for consideration by the Tribunal in terms of section 16(1) of the Act.

After reviewing all relevant information, and the recommendation or decision of the Competition Commission, the Competition Tribunal approves the merger in terms of section 16(2) of the Act, for the reasons set out in the Reasons for Decision.

This approval is subject to:

- no conditions.
- the conditions listed on the attached sheet.

The Competition Tribunal has the authority in terms of section 16(3) of the Competition Act to revoke this approval if

- it was granted on the basis of incorrect information for which a party to the merger was responsible.
- the approval was obtained by deceit.
- a firm concerned has breached an obligation attached to this approval.

The registrar, Competition Tribunal:

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.: 016261

In the matter between:

Holdco

and

Lanseria International Airport (Pty) Ltd and Execujet Airline Investments (Pty) Ltd

Panel: N Manoim (Presiding Member), M Mokuena (Tribunal Member) and I Valodia (Tribunal Member)

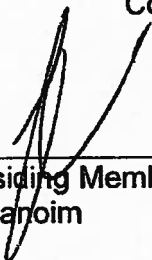
Heard on: 29 May 2013

Decided on: 29 May 2013

ORDER

Further to the recommendation of the Competition Commission in terms of section 14A(1)(b) of the Competition Act, 1998 ("the Act") the Competition Tribunal orders that –

1. the merger between Holdco and Lanseria International Airport (Pty) Ltd and Execujet Airline Investments (Pty) Ltd be approved in terms of section 16(2)(b) of the Act subject to the conditions in Annexure A; and
2. a Merger Clearance Certificate be issued in terms of Competition Tribunal Rule 35(5)(a).



Presiding Member
N Manoim

Concurring: M Mokuena and I Valodia

CONFIDENTIAL**Holdco/ Lanseria Airport International (Pty) Ltd and Execujet Airlines Investments (Pty) Ltd****CC CASE NUMBER: 2012Dec0757**

CONDITIONS**1. Definitions**

The following expressions shall bear the meanings assigned to them below and cognate expressions bear corresponding meanings –

- 1.1. "Acquiring Firms" means Holdco;
- 1.2. "Act" means the Competition Act 89 of 1998, as amended;
- 1.3. "ACSA" means Airports Company South Africa Limited;
- 1.4. "Approval Date" means the date referred to in the Competition Tribunal Order;
- 1.5. "Commercial reasons" means reasonable principles of commerce, or bona fide reasons, taken into account in arriving at a decision in the ordinary course of business;
- 1.6. "Competitively sensitive information" includes all pricing information including but not limited to prices charged at the airports, rebates, discounts and planned increases or decreases; cost information for services at the airports; information on specific clients and client strategies including information on sales volumes of clients; marketing strategies of each airport; investment strategies; budgets, Business Models and Business Plans;
- 1.7. "Commission" means the Competition Commission of South Africa;
- 1.8. "Conditions" means these conditions;
- 1.9. "GEPF" means Government Employee Pension Fund;
- 1.10. "Merger" means the acquisition of control over LIAs' business by Holdco;
- 1.11. "Merging Parties" means Holdco and LIA.
- 1.12. "LIA" means Lanseria Airport International (Pty) Ltd and Execujet (Pty) Ltd.
- 1.13. "PIC" means Public Investment Corporation SOC Limited.

2. Recordal

- 2.1. The Commission has found that the Merger will substantially lessen competition within the meaning of section 12A (1) of the Competition Act.
- 2.2. Given that PIC's presence on both the boards of LIA and ACSA could facilitate the sharing of competitively sensitive information between the two companies that could increase the likelihood of anti-competitive coordination between the two firms. .
- 2.3. The acquiring firm has therefore agreed to the following undertakings in order to address any expressed concerns on the sharing of information and in the event of default by the BEE Consortium.

3. Conditions to the approval of the merger

3.1 For as long as PIC can appoint a director to the board of ACSA:

- 3.1.1 It shall not appoint any common directors to the boards of LIA and ACSA;
- 3.1.2 It shall ensure that its investments in LIA and ACSA are housed in different divisions/departments with adequate security and confidentiality safeguards preventing the sharing of competitively sensitive information. The ACSA investments shall be part of the PIC's Real Estate Management Committee whereas the LIA investment shall be part of the Isibaya Fund;
- 3.1.3 It shall ensure that any competitively sensitive information is only reported to the respective investment committees in closed door sessions and such information is aggregated.
- 3.1.4 In the event of a default by the BEE Consortium in terms of the Loan Facility Agreement concluded between the PIC acting on behalf of GEPF and Acapulco Trade and Invest 164 (RF) (Pty) Ltd, the PIC shall, within 30 days notify the Commission of the acquisition of the BEE shares irrespective of whether or not such transaction meets the thresholds for notification in terms of the Act.

3.1.5 It shall not, prior to obtaining the approval by the Competition Authorities of its acquisition of the BEE shares, implement the transaction by exercising any of the rights accruing to such shares or in any manner whatsoever.

3.1.6 No information regarding any negotiation between LIA and any airline customer or prospective airline customer concerning the terms and conditions (including tariffs) for the provision of services by LIA shall be conveyed to the PIC's respective investment committees until such time as those negotiations have been concluded or terminated.

4. Monitoring of compliance with the Conditions

4.1. The PIC shall implement the undertakings contained in clauses 3.1.1, 3.1.2, 3.1.3 and 3.1.6 above within 10 business days of the approval of this merger. As proof of compliance thereof, it shall submit an affidavit by the Chief Executive Officer attesting to implementation of the undertakings contained above.

4.2. Should the PIC dispose of its interest in either LIA or ACSA it shall inform the Commission of such disposal within 30 days of concluding a sale agreement, and submit a copy of the final sale agreement as proof thereof.

4.3. An apparent breach by the Merging Parties of any of the Conditions shall be dealt with in terms of Rule 39 of the Rules for the Conduct of Proceedings in the Commission.

4.4. The Commission may on good cause shown by the merging parties, lift, revise or amend these Conditions.

All correspondences in relation to the conditions shall be submitted to the following email address:
mergerconditions@compcom.co.za.