COMPETITION TRIBUNAL OF SOUTH AFRICA

Case no: LM129Nov21

In the large merger between:
CFAO Holdings South Africa Proprietary Limited (Primary Acquiring Firm)
And
EIE Group Proprietary Limited (Primary Target Firm)

Heard on: 02 March 2022

Order Issued on: 04 March 2022

REASONS FOR DECISION

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1. On 4 March 2022, the Competition Tribunal (the "Tribunal") conditionally approved the large merger between CFAO Holdings South Africa Proprietary Limited ("CFAO") and EIE Group Proprietary Limited ("EIE Group"). The transaction involves CFAO acquiring sole control of EIE Group through a subscription and repurchase arrangement.

2. CFAO, the primary acquiring firm, is a South African incorporated private company wholly owned by CFAO SAS – a French firm.[1]

3. The Acquiring Group[2] is involved in the retailing of new and used vehicles and trucks; vehicle servicing; parts and accessories; supply chain and logistics management; as well as car rental services. The Acquiring Group's South African operations are focused on the automotive retail of new and used vehicles and trucks; vehicle servicing; parts and accessories; support to the production and export of vehicles; and car rental services.

4. Of relevance to the proposed transaction, are the Acquiring Group's activities, in the provision of industrial material handling equipment that is used to handle general loads in a warehouse environment ("Mobile Equipment"), through Toyota Industries Corporation ("TICO").[3] In particular, the Acquiring Group manufactures and exports Mobile Equipment which includes forklifts, reach stackers, and pallet trucks to South

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[1] CFAO SAS is, in turn, wholly owned by Toyota Tsusho Corporation ("TTC") a public firm listed on the Tokyo Stock Exchange and the Nagoya Stock Exchange. TTC's shares are widely held and it is not controlled by any single shareholder. Shareholders with more than 5% of TTC's issued share capital are: Toyota Motor Corporation (as to 21.69%); Toyota Industries Corporation ("TICO", as to 11.18%); and The Master Trust Bank of Japan, Ltd (as to 10.45%).
CFAO controls the following South African firms: Toyota Tsusho Africa Proprietary Limited ("TTAF"); Toyota Tsusho South Africa Processing Proprietary Limited ("TTSAP"); Africa Mobility Solutions Proprietary Limited ("AMS"); CFAO Motors South Africa Proprietary Limited ("CMSA"); and Subaru Southern Africa Proprietary Limited ("Subaru SA"). Kapela Holdings Proprietary Limited ("Kapela"), a majority black-owned private equity investor, holds a 25.1% shareholding in each of TTAF and CMSA.

[2] All firms directly and indirectly controlled by TTC are referred to as the "Acquiring Group".

[3] See above footnote 1 for details of TICO holding in CFAO.

Africa; wherein the Acquiring Group supplies Toyota and CT Power branded Mobile Equipment.

5. The primary target firm is EIE Group, a South African private company that is wholly owned by the enX Leasing Investment Proprietary Limited ("enX Leasing").[4]

6. The Target Group[5] is involved in the sale, rental, repair, and maintenance of various original equipment manufacturers' ("OEM") brands of material handling equipment. EIE Group distributes the following material handling brands: Kone Cranes;[6] Terberg;[7] Linkbelt Cranes;[8] Hawker & Ballancell;[9] and HAKO.[10] EIE Group also provides aftermarket services, including service, repairs and maintenance, to customers. Customers are also able to lease equipment from EIE Group on a short or long-term basis.

Competition assessment

7. The Competition Commission ("Commission") found no horizontal overlap in the activities of the merging parties. However, the Commission assessed a pre-existing vertical relationship between the merging parties.

8. SIE, an EIE Group subsidiary, has an existing distribution agreement with TICO in terms of which SIE is the exclusive distributor of Toyota industrial and material handling equipment in South Africa and certain other territories.[11] The equipment supplied by SIE, through sale or lease, includes a wide range of material handling[12] and warehousing equipment.[13] SIE also supplies genuine Toyota forklift parts associated with the equipment through various depots in South Africa and related aftermarket services (service, repairs, and maintenance).

[4] enX Leasing is, in turn, wholly owned by enX Group Limited ("enX Group") - a public company listed on the Johannesburg Stock Exchange. Shareholders with more than a 5% of issued share capital of enX Group are: MCC Contracts Proprietary Limited (as to 33.64%); PSG (as to 10.7%); Prudential (as to 9.8%); Samvenice Trading 1 Proprietary Limited (as to 7.0%); and Sunwood Trading and Investments (as to 5.4%). EIE Group wholly owns: Saficon Industrial Equipment Proprietary Limited ("SIE") and 600SA Holdings Proprietary Limited ("600SA"). Uni-Cape Equipment Proprietary Limited ("Uni-Cape") is a wholly owned subsidiary of 600SA. A condition precedent to the proposed transaction is an internal restructure in terms of which EIE Group is purchasing the balance of the shares it does not own in its subsidiaries (600SA and SIE) from its controlling firm, enX Group. On completion of the internal restructure, EIE Group will hold 100% of the shares in 600SA and SIE and indirectly control Uni-Cape. The Commission considered the internal restructuring, and found it not to constitute a separate notifiable transaction.

[5] Collectively, the EIE Group, SIE, 600SA and Uni-Cape are referred to as the "Target Group".

[6] Specialising in large material handling equipment suited to port operations and container yards.

[7] Supplier of large terminal tractors.

[8] Supplier of large mobile cranes.

[9] Supplier of industrial battery units designed for use in electric material handling equipment.

[10] Supplier of industrial cleaning equipment.

[11] SIE is also the exclusive distributor in Botswana, eSwatini, Lesotho, Malawi, Mozambique Namibia, Zambia and Zimbabwe. It has the non-exclusive distribution rights for Madagascar and Angola.

[12] From a material handling perspective, this includes Toyota counterbalance forklifts (including internal combustion, three- and four-wheel electric forklifts) and skid steer loaders.

[13] From a warehousing perspective, this consists of various warehousing equipment such as pallet trucks, stackers, order pickers, reach trucks and small tow trackers.

9. As mentioned, the Target Group is the exclusive distributor of the Acquiring Group's Mobile Equipment; furthermore, the Target Group does not distribute any Mobile Equipment on behalf of the Acquiring Group's rivals. This being a pre-existing arrangement, the Commission found that the proposed transaction maintains the status quo ante and is unlikely to result in any change in incentives. Therefore, the proposed transaction does not result in any input or customer foreclosure concerns.

10. No market participants raised any concerns with the proposed transaction.

11. For the above reasons, we conclude that the proposed transaction is unlikely to substantially prevent or lessen competition in any relevant market, since there is no horizontal overlap between the activities of the merging parties. Further, no foreclosure concerns arise from the merging parties pre-existing vertical relationship, because the relationship pre-transaction was exclusive, and therefore no third parties are likely to be foreclosed.

Public interest
Employment

12. The merging parties provided an unequivocal undertaking that the proposed transaction will not result in retrenchments.

13. The employees of the Acquiring Group are represented by the National Union of Metalworkers of South Africa ("NUMSA"), Motor Industry Staff Association ("MISA"), and the Transport, Action, Retail and General Workers Union ("THORN"). The Target Group employees are represented by NUMSA, Liberated Metalworkers Union of South Africa ("LIMUSA"), Metal and Electrical Workers Union of South Africa ("MEWUSA") and an employee representative. The Commission contacted the respective trade unions and, according to its report, has not received any submissions from them.

14. The Target Group's employee representative indicated that employees raised concerns with the proposed transaction relating to job security and immediate restructuring. After further consultation, the employee representative confirmed these concerns were addressed.

15. In June 2020 the enX Group undertook a retrenchment process;[14] which the merging parties submitted was necessitated by the substantial negative impact of the Covid-19 pandemic on the Target Group's business. The Commission investigated the retrenchments and found them not to be merger specific; given the evidence provided of the reduction in revenues experienced and the fact that the non-binding offer in relation to the proposed transaction took place a year after the retrenchments were initiated.[15] Without any empiric evidence to the contrary, we find no basis to disagree.

[14] 103 employees being retrenched with 26 employees having accepted voluntary severance packages
[15] The Commission also noted that the non-binding offer was initially sent on 15 March 2021 whereas the retrenchment processes (i.e., the Labour Relations Act No 66 of 1995 section 189 process) were initiated in March 2020 and executed in June 2020

Ownership

16. The proposed transaction results in a reduction in ownership by historically disadvantaged persons ("HDPs") in that the Target Group's shareholding is indirectly held as to 41.69% by HDPs;[16] whereas the Acquiring Group, through its subsidiaries, has 25.1% of their shareholdings held by HDPs. The Commission found that the merger would result in the level of HDP ownership over the Target Group reducing by 18.74% to 25.1%. To remedy this concern, the merging parties notified the proposed transaction with an undertaking to identify a broad-based black economic empowerment ("B-BBEE") partner to acquire up to 25.1% of the issued shares directly in the EIE Group.

17. The Minister of the Department of Trade Industry and Competition ("dtic") participated in the Commission's investigation on grounds related to employment and spread of ownership. The dtic proposed conditions relating to the re-employment of retrenched employees and the establishment of an employee share ownership program, in addition to the B-BBEE undertaking tendered by the merging parties. The dtic did not participate further in proceedings before us.

18. The panel sought clarity whether the proposed 25.1% B-BBEE shareholding in the Target Group promotes a greater spread of ownership more or less that the pre-merger HDP shareholding in the Target Group. According to the Commission, the Target Group's HDP shareholding post-merger will be 50.25%. This was reckoned by taking the Acquiring Group's 25.1% HDP shareholding and the proposed 25.1% B-BBEE shareholding in EIE Group. The merging parties clarified the post-merger position, that the Target Group will not strictly be "held" as to 50.25% (as found by the Commission) by HDPs. This is because the 25.1% HDP shareholding is not directly held by CFAO but by its subsidiaries. Since the Target Group will become a subsidiary of CFAO, the HDP shareholding of the Target Group will not be 50.2%. However, the 25.1% B-BBEE shareholding in the Target Group will be directly held.

19. We concluded, without making a definitive finding on this, that the introduction of a 25.1% B-BBEE shareholder in the Target Group post-merger with direct economic interests in the EIE Group, together with the Acquiring Group's existing indirect HDP shareholding (of 25.1%) through its subsidiaries, taken as a whole, will not negatively impact on a greater spread of ownership in the Target Group.

20. The merging parties' undertaking to implement a B-BBEE-ownership transaction whereby 25.1% will be held directly in the Target Group by an HDP shareholder was imposed as a condition to the approval of the merger.

Conclusion

21. We found that the proposed merger is unlikely to lead to a substantial prevention or lessening of competition. Further, the proposed merger will not have a negative impact on employment. Additionally, we concluded without making a definitive finding, that the

[16] The Target Group (referred to as the Target Companies in the submission) derive their B-BBEE accreditation on a flow-through basis from the enX Group. The 43.84% HDP ownership attributed to the Target Group by the Commission is based on the B-BBEE verification certificate of the ultimate holding company, enX Group as of 31 August 2021, whereas the latest certificate (15 December 2021) provided to the Commission reflects this as 41.69%.

proposed conditions as agreed between the Commission and the merging parties concerning the greater spread of ownership are acceptable.

22. We approved the proposed transaction subject to conditions, set out in Annexure A.

MMazwai

13 April 2022

Ms Mondo Mazwai **Date**

Dr Thando Vilakazi and Professor Fiona Tregenna concurring

Tribunal Case Manager:	Leila Raffee and Mpumelelo Tshabalala
For the Merging Parties:	Burton Phillips, Kgomotso Mmutle, Robert Wilson, and Andriza Liebenberg of Webber Wenzel on behalf of the CFAO; Derek Lotter and Caroline Fairon of Bowmans on behalf of EIE Group
For the Commission:	Wiri Gumbie, Nonhlanhla Msiza, and Tamara Paremoer