COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM035Jun23

In the matter between:

LIFE HEALTHCARE GROUP (PTY) LTD	Acquiring Firm
and	
FRESENIUS MEDICAL CARE SOUTH AFRICA (PTY) LTD IN RESPECT OF THE DIALYSIS SERVICES BUSINESS	Target Firm

Panel:	L Mncube (Presiding Member) A Ndoni (Tribunal Member) I Valodia (Tribunal Member)
Heard on:	19 February 2024
Order issued on:	20 February 2024
Reasons issued on:	18 March 2024

REASONS FOR DECISION

Approval

[1] On 20 February 2024, the Competition Tribunal ("Tribunal") conditionally approved the large merger whereby Life Healthcare Group (Pty) Ltd ("Life") will acquire the Dialysis Services Business ("Target Business") from Fresenius Medical Care South Africa (Pty) Ltd ("FMC"). Post-merger, Life will exercise sole control of the Target Business.

Parties to the transaction and their activities

Primary acquiring firm

[2] Life is a wholly owned subsidiary of Life Healthcare Group Holdings Limited ("Life Holdings"). Life Holdings is listed on the Johannesburg Stock Exchange. Life controls several companies including East Rand Dialysis Inc. ("ERD"), Life Vincent Pallotti Orthopaedic Centre (Pty) Ltd, Ligitprops 109 (Pty) Ltd, Life

Esidimeni Group Holdings Ltd and Life Bayview Hospital (Pty) Ltd. We will refer to Life's direct and indirect controlled companies as the "Acquiring Group".

[3] The Acquiring Group has 48 acute care hospitals in South Africa except Limpopo, offering a range of hospital services. The Acquiring Group offers dialysis services through ERD at 31 of its 48 South African hospitals.

Primary target firm

[4] FMC is wholly owned by Fresenius Medical Care Beteiligungsgesellschaft mbH, a German company ("Fresenius Germany"). Fresenius Germany is directly controlled by Fresenius Medical Care AG & Co KGaA.

[5] The Target Business provides dialysis services in South Africa, Namibia, and Eswatini from hospitals, medical centres, and standalone dialysis centres. The Target Business has 45 units in South Africa; 42 freestanding units for chronically ill out-patients and three mobile units for acutely ill in-patients. The Target Business is active in all provinces in South Africa except Limpopo and Northern Cape.

Proposed transaction and rationale

Transaction

[6] According to the Sale of Business Agreement ("the Agreement"), the Acquiring Group intends to acquire the Target Business from FMC as a going concern. Post-merger, the Acquiring Group will have sole control over the Target Business. The proposed transaction has also been notified in Eswatini and Namibia, both of which are still under investigation.

Rationale

[7] The Acquiring Group intends to expand its presence in the market for renal dialysis services through the Renal Integrated Care Programme ("RICP"). The RICP is to establish a market paradigm rather than gain profit. For the Seller, FMC, the dialysis services business in Southern Africa is no longer a core

component of its group strategy. Instead, it will continue to supply dialysis equipment and run a limited number of dialysis centres that it operates in a joint venture with Clinix.

Competition Assessment

[8] Having considered the activities of the merging parties, we note that the proposed transaction raises a horizontal and vertical overlap.

[9] The merging parties overlap horizontally in the provision of dialysis services in South Africa. The merging parties also overlap vertically, in that the Acquiring Group operates acute care private hospitals, and the Target Business provides dialysis services to patients in private hospitals.

Relevant Markets

The upstream market for the provision of acute multidisciplinary private hospital services.

[10] In *Netcare Hospitals Proprietary Limited and Lakeview Hospital*[1], the Tribunal considered that the provision of acute multidisciplinary inpatient private hospital services constituted a separate product market. The Tribunal has also adopted this approach in subsequent cases.[2]

[11] In the current case, without concluding on the relevant market we considered the impact of the merger in the upstream market for the provision of acute multidisciplinary private hospital services.

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[1] Netcare Hospitals Proprietary Limited and Lakeview Hospital Case No: IM193Oct17

[2] Mediclinic Southern Africa (Pty) Ltd And Matlosana Medical Health Services (Pty) Ltd LM124Oct16 and RH Bophelo and Perthpark Properties in respect of the Shares and Claims in Rondebosch Medical Centre (Pty) Ltd and Broadcount Investments (Pty) Ltd in respect of property known as Rondebosch Medical Centre Hospital Case No: LM154Feb20

The downstream market for the provision of dialysis services

[12] The Competition Commission ("Commission") assessed the effects of the proposed transaction in the downstream market for the provision of dialysis services. We did not receive evidence to suggest that we should depart from this way of assessing the downstream market.

Geographic Market

The upstream market for the provision of acute multidisciplinary private hospital services.

[13] Without concluding on the relevant market, we assessed the effects of the proposed transaction on a national and provincial level for the provision of acute multidisciplinary private hospital services.

The downstream market for the provision of dialysis services

[14] Without concluding on the relevant market, we assessed the effects of the proposed transaction on a national and provincial market.

Horizontal issues

Market shares

[15] At a national level, the merging parties will have a combined post-merger market share of about [10 – 15] %. This combined market share suggests that the combined entity would not have substantial market power in a national market. The merged entity will continue to face competition from other dialysis service providers such as National Renal Care, B Braun, Mediclinic Renal and other independent providers.

[16] At the provincial level, the merging parties will have a combined post-merger market share of about [20 – 25] % in the Northern Cape and about [25 – 30] % in the Western Cape. In other provinces, they will have a market share of less than 15%. This combined market share suggests that the combined entity would not have substantial market power in provincial markets. The merged entity will continue to face competition from NRC, B Braun, Mediclinic Renal and other independent providers.

Barriers to entry and expansion

[17] The merging parties submitted that a medium-sized dialysis centre accommodating 18 dialysis sessions per day could cost between R2 and R5 million, whereas a mobile unit could cost R180,000 (the cost of one dialysis machine and a vehicle).

[18] The Commission submitted that at a national level, a license is not required for the establishment of the facility. At a provincial level, the Western Cape and Eastern Cape require regulatory licensing.

[19] We do not conclude on barriers to entry or expansion but note that in the last five years, there has been an increase in the number of dialysis service providers from 260 to 281.

Countervailing power

[20] Customers and competitors who were contacted by the Commission indicated that prices charged by dialysis providers are determined in consultation with medical aid schemes. The Commission submitted that medical aid schemes have countervailing power and that the merging parties will be constrained by this countervailing power.

[21] However, we have not found it necessary to conclude on this point in this case.

Tariffs comparison (Acquiring Group and the Target Business)

[22] Tariffs are negotiated at a national level. In addition, the Commission established that prices charged by the merging parties to their uninsured customers differ by an average of [redacted]%. In their defence, the merging parties submitted that post-merger, funders will not be charged based on either merging party's current tariff structure.

[23] According to the merging parties, self-pay patients make up only [redacted]% of dialysis treatments for the Acquiring Group (ERD) and [redacted]% for the Target Business. Dialysis patients, who are mainly chronically ill, are unlikely to remain self-pay patients for long.

[24] According to the merging parties, the Target Business charges uninsured customers approximately [redacted]% higher prices for chronic haemodialysis and acute haemodialysis and [redacted]% higher prices for daily peritoneal dialysis. The Acquiring Group's chronic haemodialysis prices for uninsured customers are [redacted]% higher than those for insured customers. The price difference between insured and uninsured patients for peritoneal dialysis per day is [redacted]%. In the case of acute haemodialysis, the Acquiring Group charges uninsured customers [redacted]% more than insured customers.

[25] To alleviate any concerns for [redacted] patients, the merged entity has agreed to the condition that, for [redacted], the Acquiring Group will maintain the [redacted] between [redacted] and the [redacted] for [redacted] and [redacted] patients. Annually, the [redacted] shall be [redacted]

Vertical issues

[26] The proposed transaction raises a vertical overlap as the Acquiring Group operates multidisciplinary acute private hospital services and the Target

Business is a dialysis service provider that administers dialysis treatment to patients admitted to acute hospitals.

Input foreclosure

[27] We considered whether the merging parties will have the ability to foreclose their competitors' significant access to acute hospitals.

[28] The Acquiring Group has an estimated market share of about [20 - 30] % in the upstream market for the provision of multi-disciplinary acute private hospital services nationally. Additionally, the Acquiring Group has high market shares in the Eastern Cape (60 - 70%); Gauteng (30 - 40%); and North-West (30 – 40 %). In other provinces, the merging parties have a market share of less than 30%.

[29] The Commission submitted that the merging parties will continue to face competition from other vertically integrated players such as National Renal Care and Mediclinic Renal. Additionally, the dialysis providers do not have to operate in acute hospitals, but can also operate from stand-alone facilities. As a result, [redacted]% of Target Business' operations are conducted on its standalone facilities, while only [redacted]% are conducted on mobile facilities located at various acute private hospitals.

[30] The merged entity has agreed to an open-access condition, to continue to permit third-party dialysis services providers reasonable access to the Acquiring Group's hospitals on a mobile basis for five years to administer acute renal dialysis treatments.

[31] The merged entity has agreed to a further condition that Life Hospitals shall not interfere with the clinical discretion of nephrologist residents in its hospitals to refer patients as set out in the Health Professions Act, No. 56 of 1974. The nephrologists operating at Life Hospitals shall be free to refer patients to their preferred dialysis centres.

[redacted]

[32] The Agreement contains a [redacted] on the Target Business' [redacted]. The merging parties argued that since the [redacted] it is highly unlikely that the [redacted] the South African dialysis services [redacted]. Further, the Acquiring Group is entitled to reasonable [redacted] in respect of its [redacted] of more than [redacted] in the [redacted]. A condition has been imposed that the merging parties [redacted] the relevant [redacted].

Third-Party concerns

[33] Where relevant concerns were raised by customers and competitors, we have taken them into account where appropriate in the competitive assessment above.

Conclusion on competition assessment

[34] Having regard to the information above, and in light of the conditions, we do not consider it likely that the proposed merger will result in a substantial prevention or lessening of competition in any relevant market.

Public interest

Employment

[35] FMC currently employs 529 employees and the Target Business accounts for 400 employees. All 400 employees will be transferred as a going concern in terms of section 197 of the Labour Relations Act No.66 of 1995. FMC submits that the proposed transaction may result in about 10 employees ("Affected Employees"), mostly professionals being retrenched (e.g. legal, human resources, IT, and compliance).

[36] The applicable trade unions were contacted by the Commission and the Commission did not receive a response from any of the trade unions. The Employee representatives made submissions but did not wish to intervene formally. The DTIC requested a 36-month moratorium on employment.

[37] The merging parties have agreed to a condition that apart from the Affected Employees, there is a three-year moratorium on all other merger-related retrenchments.

Effect on particular industry or sector

[38] The merging parties proposed the following conditions, the Acquiring Group shall commit capital expenditure on the Target Business of R[redacted] over five years and the relevant provincial health departments in each province in which the Merged Entity provide dialysis services with a maximum of 8,350 chronic hemodialysis treatments for public sector patients. These conditions were accepted by the Commission.

Effect on the promotion of a greater spread of ownership to increase the levels of ownership by historically disadvantaged persons and workers in firms in the market

[39] Life Holdings is a level 3 B-BBEE contributor and FMC does not have any shareholding held by Historically Disadvantaged Persons (HDPs). Life EST Employee share trust ("EST") holds [redacted]% shareholding in Life. For [redacted], the merging parties submitted that the [redacted] who will be joining the [redacted] and meet the qualifying criteria of the [redacted] will be permitted to participate.

[40] We conclude that the proposed transaction does not raise any other public interest concerns.

Conclusion

[41] In light of the reasons outlined above, we conclude that, given the conditions, the proposed transaction does not substantially lessen or prevent competition or raise public interest concerns. We therefore approve the proposed transaction, subject to the conditions outlined in Annexure A.

Signed by:Liberty Mncube
Signed at:2024-04-03 15:25:01 +02:00
Reason:Witnessing Liberty Mncube

L-Mncube

18 March 2024

Presiding Member **Date**

Prof Liberty Mncube

Concurring: Ms Andiswa Ndoni and Prof. Imraan Valodia

Tribunal case managers:	Moleboheng Mhlati and Baneng Naape
For the merging parties:	Natasha Rachwal and Nick Altini of Herbert Smith Freehills
For the Commission:	Nonhlanhla Msiza, Themba Mahlangu and Wiri Gumbie