



COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM163Aug18

In the matter between:

A newly formed Mauritian limited liability partnership Primary Acquiring Firm

And

The investments of Pan African Infrastructure Development Fund 2 SA and Pan African Infrastructure Development Fund 2 LLC Primary Target Firms

Panel	: Yasmin Carrim (Presiding Member)
	: Mondo Mazwai (Tribunal Member)
	: Andiswa Ndoni (Tribunal Member)
Heard on	: 13 December 2018
Order issued on	: 13 December 2018
Reasons issued on	: 10 January 2019

REASONS FOR DECISION

APPROVAL

- [1] On 13 December 2018, the Competition Tribunal (Tribunal) conditionally approved the large merger transaction whereby the newly formed Mauritian limited liability partnership (MAU LLP) intends to acquire the investments of Pan African Infrastructure Development Fund 2 LLC (PAIDF 2 LLC) and the Pan African Infrastructure Development Fund 2 SA (PAIDF 2 SA), hereunder collectively referred to as the 'merging parties'.
- [2] Our reasons for conditional approval follow.

PARTIES TO THE TRANSACTION

Primary acquiring firm

- [3] MAU LLP is a newly incorporated entity in accordance with the laws of Mauritius and does not conduct any activities.
- [4] MAU LLP will be controlled by PAIDF Fund Manager which is ultimately controlled by Harith Holdings (Pty) Ltd.
- [5] The other acquiring firms are PAIDF 2 SA and PAIDF 2 LLC (collectively referred to as PAIDF 2), Aldwych Holdings Limited and the Government Employees Pension Fund (GEPF). The GEPF holds a substantial shareholding in PAIDF 2 SA.

Primary target firm

- [6] PAIDF 2 SA is an *en commandite* partnership and PAIDF 2 LLC is a Mauritian private limited company which was set-up following PAIDF 1, a South African fund in the form a vesting trust which was established for the purpose of investing in a number of infrastructure projects in the African continent.
- [7] PAIDF 2 SA and PAIDF 2 LLC are closed ended funds which invest in the same underlying investments in terms of a co-investment agreement. PAIDF 1 and PAIDF 2 SA hold various power and infrastructure investments in Africa.
- [8] Of relevance to the proposed transaction is PAIDF 2's investment in Traxtion Mauritius Limited (Traxtion).

PROPOSED TRANSACTION

- [9] The proposed transaction entails a restructuring of the investments under PAIDF 2. The transaction will occur in a number of steps which are outlined as follows: Firstly, PAIDF 2 LLC will be converted into a permanent capital vehicle (PCV) that will be listed onto the Johannesburg Stock Exchange. All investments currently under PAIDF 2 SA will be transferred to PAIDF 2 LLC. Secondly, the current investors of PAIDF 2 SA will exchange their interests in PAIDF 2 SA for shares in PAIDF 2 LLC.

PAIDF 2 SA will then be terminated. Lastly, all the investments under PAIDF 2 LLC will be transferred into MAU LLP. PAIDF 2 LLC will then become a limited partner to MAU LLP through a partnership agreement. After all steps are completed, MAU LLP will have control over the PAIDF 2 investments. The Competition Commission (Commission) submitted that the steps set out above form part of one indivisible transaction.

[10] PAIDF 1 and PAIDF 2 are set to be wound up respectively on specified dates in terms of their constitutional documents. Investors are of the view that it is beneficial to create a PCV that would be open indefinitely for investments by existing and new investors.

[11] The Commission was of the view that the proposed transaction would allow investors to continue investing after PAIDF 1 and PAIDF 2 have been liquidated and investors would be in a position to increase their investments if they wished to do so. Moreover, the restructure will enable the fund to attract new investors.

COMPETITION ASSESSMENT

[12] The Commission assessed the activities of the merging parties and found that the proposed transaction does not result in any new overlaps that were not already in existence prior to the merger.

[13] The Commission notes that the GEPF (through its shareholding in PAIDF 2 SA) holds a non-controlling interest in the Surtees Group of Companies (Surtees Group) (not a party to the proposed transaction) and PAIDF 2 holds a non-controlling interest in Traxtion (a party to the proposed transaction). The Surtees Group and Traxtion are involved in, *inter alia*, the leasing of locomotives, rolling stock for mining industrial freight in Sub-Saharan Africa. The GEPF, through its shareholdings, can appoint two board members on the Surtees board and appoint one board member on Traxtion. The Commission was of the view that the shareholding structure is likely to create a platform for the exchange of competitively sensitive information as a result of the merger.

Information exchange

- [14] As noted above, post-merger PAIDF 2 will be a limited partner in MAU LLP. It will not have any management control or partake in the day-to-day decisions of MAU LLP. However, the GEPF will possess the right to receive quarterly reports detailing information pertaining to new investment activities and any changes to asset portfolios as well as financial information and valuation of assets. In addition, the GEPF will be able to appoint a member onto the investment committee. The information received by members of the investment committee is quite detailed and falls within the classification of competitively sensitive information.
- [15] The Commission is of the view that the current shareholding structure may be used as a platform for the exchange of competitively sensitive information between the Surtees Group and Traxtion. As such, the Commission concluded that the merger must be approved subject to information sharing conditions that limit the flow of commercially sensitive information between the Surtees Group and Traxtion.
- [16] At the hearing, the merging parties understood the information exchange concerns raised by the Commission and were of the view that the proposed conditions are a practical measure that address the Commission's concerns. As such, no objections were raised against the imposition of the conditions.
- [17] In summary, the conditions set out that for as long as the GEPF may nominate members onto the Board of the Surtees Group and MAU LLP, Harith General Partners must ensure that no persons nominated by the GEPF on the PVC board serves on any of the companies in the Surtees Group. No person nominated by the PIC as a director of Harith General Partners is to be nominated on any board or management of the Surtees Group of companies. Further, Harith General Partners must ensure that any of the GEPF's nominees appointed on the PCV board signs confidentiality undertakings confirming that all competitively sensitive information in respect of Traxtion is not shared with any of the appointed board members of the Surtees Group of companies. For ease of reference and convenience, the conditions are attached to our reasons hereto marked "**Annexure A**".
- [18] In light of the above, we had no reason to differ with the Commission's findings.

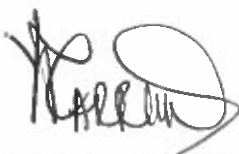
PUBLIC INTEREST

[19] The merging parties submitted that the proposed transaction would not have any negative effect on employment. The merging parties are merely investment funds with no direct employees and the funds are managed by Harith Fund Managers. From the above, the Commission concluded that the proposed transaction is unlikely to raise any employment concerns. We agreed with the above.

CONCLUSION

[20] In view of the above, the proposed transaction will not result in any substantial lessening or prevention of competition in any market. The concerns relating to the flow of competitively sensitive information are adequately addressed by the conditions. In addition, the proposed transaction does not raise any employment concerns or result in adverse effects on any of the public interest grounds.

[21] Accordingly, we conditionally approved the merger.



Ms Yasmin Carrim

10 January 2019
Date

Ms Mondo Mazwai and Ms Andiswa Ndoni concurring.

- Tribunal Case Manager : Ndumiso Ndlovu
- For the Merging Parties : H Irvine of Falcon & Hume
- For the Commission : M Aphane and S Molefe



CONFIDENTIAL

2018AUG0009

Mauritian Limited Liability Partnership

And

The investments of Pan African Infrastructure Development Fund 2 LLC and Pan African Infrastructure Development Fund 2 SA

CASE NUMBER: LM163Aug18

CONFIDENTIAL CONDITIONS

1. DEFINITIONS

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

- 1.1 "Acquiring Firm" means a newly formed Mauritian limited liability partnership ("MAU LLP"),
- 1.2 "Approval Date" means the date referred to in the Tribunal's merger Clearance Certificate (Form CT10);
- 1.3 "Commission" means the Competition Commission of South Africa;
- 1.4 "Competition Act" means the Competition Act No. 89 of 1998, as amended;
- 1.5 "Competitively Sensitive Information" includes but is not limited to:
 - 1.5.1 pricing – including, but not limited to, pricing of specific products within those overlapping relevant markets, prices/ discounts / rebates offered to specific clients and planned reductions or increases;
 - 1.5.2 margin information by product or client;
 - 1.5.3 cost information;
 - 1.5.4 information on specific clients and client strategy, including information with respect to the sales volume of clients;

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- 1.5.5 marketing strategies;
- 1.5.6 budgets and business plans; and
- 1.5.7 agreements and other (non-standard) terms and conditions relating to the supply and distribution of relevant products and services;
- 1.6 "Commission Rules" means the Rules for the Conduct of Proceedings in the Commission;
- 1.7 "Conditions" mean these conditions;
- 1.8 "Days" mean business days, being any day other than a Saturday, Sunday or official public holiday;
- 1.9 "GEPF" means the South African Government Employees Pension Fund;
- 1.10 "Harith General Partners" means Harith General Partners (Pty) Ltd;
- 1.11 "Implementation Date" means the date on which the Proposed Transaction is implemented by the Merging Parties;
- 1.12 "Merging Parties" mean the Acquiring Firm and the Target Firm;
- 1.13 "PAIDF 2" means Pan African Infrastructure Development Fund 2 LLC and Pan African Infrastructure Development Fund 2 SA;
- 1.14 "PIC" means the Public Investment Corporation SOC Limited;
- 1.15 "PCV" means the permanent capital vehicle, being PAIDF 2 LLC;
- 1.16 "PCV Boards" means after Implementation of the Proposed Transaction, the board of directors of PCV and the investment committee of the general partner of MAU LLP, which post-merger, will be responsible for evaluating and making decisions relating to any investments and/or disposals proposed to be made in accordance with the applicable investment policy;
- 1.17 "Proposed Transaction" means the acquisition of control of the Target Firm by the Acquiring Firm, as set out in greater detail in the joint competitiveness report submitted to the Commission as part of the merger filing;
- 1.18 "SSIH" means Sub-Saharan Industrial Holdings (Pty) Ltd;

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- 1.19 "Surtees Holdings" means Surtees Group Holdings (Pty) Ltd;
- 1.20 "Surtees Group Companies" means SSIH, Surtees Holdings and the Surtees operating companies held by Surtees Holdings;
- 1.21 "Target Firm" means the investments of PAIDF 2;
- 1.22 "Traxtion" means Traxtion Mauritius Limited; and
- 1.23 "Tribunal" means the Competition Tribunal of South Africa.

2. RECORDAL

- 2.1 On 08 August 2018, the Commission was notified of a large merger whereby a newly formed Mauritian limited liability partnership ("MAU LLP") intends to acquire the Target Firm, being the investments of PAIDF 2. This is a financial restructuring to align with the future investment strategy of PAIDF 2 and its investors.
- 2.2 The Commission found that the GEPF, an investor in the PCV, has a non-controlling investment in the SSIH group of companies which compete with Traxtion, one of the investments of PAIDF 2, in which PAIDF 2 has a non-controlling interest. The Commission is concerned that these structural links might facilitate coordination between these firms after Implementation of the Proposed Transaction.
- 2.3 The Commission found that the GEPF holds a [REDACTED] SSIH and a further indirect interest in SSIH through a special purpose vehicle ("SPV"). The PIC has a discretionary mandate to manage the affairs of GEPF in relation to its investment in SSIH. SSIH holds an 80% interest in Surtees Holdings, which in turn has an interest in the Surtees group of companies (being the operational entities). GEPF does not hold any shareholding directly in Surtees Holdings, or any of the Surtees group companies. This interest afford the PIC the ability to appoint two directors on to the board of the SSIH and one to the board of the Surtees group of companies
- 2.4 GEPF currently holds an interest in PAIDF 2. It holds this interest directly, and not through PIC and accordingly, PIC does not have a discretionary mandate over this investment by GEPF.

2.5 After implementation of this Proposed Transaction, GEPP will be the majority shareholder in the PCV (GEPP will hold this interest directly and not through PIC) and the PCV will merely be the limited partner of MAU LLP. Accordingly, the PCV (and therefore GEPP) will not exercise any form of control over MAU LLP or its underlying investments, as control of MAU LLP resides with the general partner (PAIDF Fund Manager).

2.6 However:

2.6.1 currently, PAIDF 2 is entitled to appoint [redacted] directors to the board of directors of Traxtion and PAIDF Fund Manager (the general partner of PAIDF 2) determines who these directors must be (these directors are not employees of or affiliated with either GEPP or PIC). Post Implementation, MAU LLP (the Acquiring Firm) will be entitled to appoint 2 directors to the board of Traxtion, but again, PAIDF Fund Manager (as the general partner of MAU LLP) will determine who those two directors will be.

2.6.2 GEPP and the SPV are each entitled to appoint a single director on the board of SSIH (although due to PIC's discretionary mandate, it is PIC and its employees that decide who to appoint as directors of SSIH and that receive information pertaining to SSIH and Surtees Holdings). This position will remain unchanged after Implementation; and

2.6.3 PIC currently holds a [redacted] interest in Harith General Partners (Pty) Ltd ("Harith General Partners"). Harith General Partners ultimately controls the Acquiring Firm and the Target Firm. PIC is entitled to appoint [redacted] out of the [redacted] directors of Harith General Partners.

2.7 The Commission is concerned that the structural links described in paragraph 2.6 above could potentially facilitate the sharing of Competitively Sensitive Information among these competitors in the locomotive industry.

2.8 In order to safeguard against any potential sharing of Competitively Sensitive Information in future, the Commission has proposed the Conditions, which the merging parties have consented to.

Conditions for the approval of the merger

3.1. Board seats and management

3.1.1. For as long as:

3.1.1.1. SSIH holds an interest in Surtees Holdings and the GEPF (or the PIC acting on the behalf of the GEPF) may nominate Individuals to the board of directors of SSIH; and

3.1.1.2. the GEPF may nominate individuals to the PCV Boards,

Harith General Partners shall ensure that:

3.1.1.3. no person nominated by the GEPF to the PCV Boards serves, is nominated to and/or appointed on any board or management committees or sub-committee of any of the Surtees Group Companies; and has not served on such board or committee for a period of 12 (twelve) months prior to being nominated by GEPF to the PCV Boards; and

3.1.1.4. no person nominated by PIC as a director of Harith General Partners, is nominated to and/or appointed on any board or management committees or sub-committee of any of the Surtees Group Companies.

3.2. Information flow restriction

3.2.1. Harith General Partners shall procure that:

3.2.1.1. any nominees of the GEPF appointed to the PCV Boards shall sign a confidentiality undertaking confirming that the nominee shall keep confidential any Competitively Sensitive Information in respect of Traxtion which is obtained by virtue of their appointment to the PCV Board and shall not share such Competitively Sensitive Information with PIC or any of the PIC's nominees appointed on the boards of the Surtees Group Companies; and

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- 3.2.1.2. any nominees of PIC appointed to the Harith General Partners board of directors shall sign a confidentiality undertaking confirming that the nominee shall keep confidential any the Competitively Sensitive Information which is obtained by virtue of their appointment to the board of directors of Harith General Partners and shall not share such Competitively Sensitive Information with any of the PIC's nominees appointed on the boards of the Surtees Group Companies.

4. MONITORING OF COMPLIANCE WITH THE CONDITIONS

- 4.1. The Merging Parties shall inform the Commission of the Implementation Date within 5 (five) Days of it becoming effective.
- 4.2. Within 40 (forty) Days of the Implementation Date, Harith General Partners shall submit to the Commission an affidavit, deposed to by its authorised representative –
- 4.1.1. listing the names of the GEPF representative/s on the PCV Board;
 - 4.1.2. confirming that the GEPF's representatives on the PVC Board meet the requirements set out in clause 3.1 above;
 - 4.1.3. confirming that a copy of these Conditions have been circulated to the GEPF's representative/s on the PVC Board; and
 - 4.1.4. attaching a copy of the signed confidentiality undertaking referred to in clause 3.2.1 above.
- 4.3. Should the GEPF's representatives on the PCV Board change, Harith General Partners shall provide the Commission with an affidavit deposed to by an authorised representative –
- 4.3.1. setting out the name/s of the new nominee/s; and
 - 4.3.2. attesting to compliance with clauses 3.1 and 3.2.1 of the Conditions.
- 4.4. The Merging Parties shall submit an affidavit deposed to by a director of the Merging Parties on the anniversary of the Implementation Date confirming compliance with clause 3 of the Conditions.

5. DURATION OF THE CONDITIONS

5.1. These conditions shall apply for as long as:

5.1.1. SSIH holds an interest in Surtees Holdings and the GEPF (or the PIC acting on the behalf of the GEPF) may nominate individuals to the board of directors of SSIH; and

5.1.2. the GEPF may nominate individuals to the PCV Boards.

6. VARIATION

6.1. The Merging Parties may at any time, on good cause shown, apply to the Tribunal for the Conditions to be lifted, revised or amended.

7. BREACH

7.1. In the event that the Commission receives any complaint in relation to non-compliance with the Conditions, or otherwise determines that there has been a breach by the Merging Parties of the Conditions, the breach will be dealt with in terms of Rule 37 of the Tribunal Rules read together with Rule 39 of the Commission Rules.

8. GENERAL

8.1. All correspondence in relation to the Conditions shall be submitted to the following email address: mergerconditions@compcom.co.za.