COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM198Mar22

In the matter between:

Pharma-Q Holdings Proprietary Limited and Imperial Logistics Limited	**Primary Acquiring Firms**
and	
Ascendis Pharma Proprietary Limited, Alliance Pharma Proprietary Limited, Pharmachem Pharmaceuticals Proprietary Limited and Medicine Developers International Proprietary Limited	**Primary Target Firms**

Panel	:	I Valodia (Presiding Member)
	:	A Ndoni (Tribunal Member)
	:	F Tregenna (Tribunal Member)
Heard on	:	1 July 2022
Order issued on	:	1 July 2022
Reasons issued on	:	1 July 2022

REASONS FOR DECISION

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[1] On 1 July 2022, the Competition Tribunal ("Tribunal") conditionally approved the large merger between the Acquiring Firms and the Target Firms. The Acquiring Firms compromise of Pharma Q Holdings (Pty) Ltd ("Pharma Q") and Imperial Logistics (Pty) Ltd ("Imperial Logistics"). The Target Firms comprise of Ascendis Pharma (Pty) Ltd ("Ascendis Pharma"); Alliance Pharma (Pty) Ltd ("Alliance Pharma"); Medicine Developers International (Pty) Ltd ("Medicine Developers"); and Pharmachem Pharmaceuticals (Pty) Ltd ("Pharmachem Pharmaceuticals").

[2] The proposed transaction involves the acquisition by Pharma Q of (51%) and Imperial Logistics (49%) of the issued share capital of the Target firms. Post-transaction, the Acquiring Firms will jointly control the Target Firms.

[3] The reasons for conditional approval follow.

Parties to the transaction and their activities

[4] Pharma Q[1] is active in the manufacture of pharmaceutical products for both the private and public sectors with its primary focus on the hospital markets and it is a pharmaceutical intellectual property and brand owner.

[5] Imperial Logistics[2] is a transport and logistics provider in various African countries, it also supplies contract logistics and freight services in Europe and the United Kingdom. Imperial Logistics' activities (in South Africa and abroad) can be separated into two areas: (i) the provision of market access services to various retail and pharmaceutical customers located in South Africa, including transporting of products; and (ii) the provision of contract logistics services which includes, amongst others, freight management and contract logistics.

[6] The Target Firms are 100% controlled by Ascendis Health SA Holdings (Pty) Ltd ("Ascendis Health"). Ascendis Health is in turn 100% controlled by Ascendis Health Limited ("Ascendis Limited").[3]

[7] The Target Firms through Alliance Pharma and Medicine Developers hold pharmaceutical licenses and dossiers and have no commercial activities. Pharmachem Pharmaceuticals is a dormant firm, and it holds no pharmaceutical licenses. In addition, Ascendis Pharma is active in the marketing and distribution of prescription and over the counter ("OTC") medicines. Ascendis Pharma distributes and markets its own brands in gastrointestinal tract, cough and cold, pain, diabetes, and niche generical therapeutic segments of the domestic pharmaceutical market.

[8] Ascendis Pharma serves the pharmacy retail market segments its customers are retail pharmacies, wholesalers pharmaceuticals, private and government hospitals, and clinics.[4]

Competition Assessment

Market definition and Market shares

[9] The Competition Commission ("Commission") found that there are horizontal and vertical overlaps in some of the merger parties' activities. Therefore, the Commission assessed the effects of the proposed transaction in the following markets:

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[1] It is 51% controlled by Blackchoice Investments (Pty) Ltd. Pharma Q in turn controls the following firms: Pharma Q (Pty) Ltd 100%, [redacted]

[2] It is 100% controlled by DP World Logistics FZE. [redacted] Imperial Logistics does not have a HDP shareholding, but a recent merger condition was that they must impose an ESOP of 5% within 24 months, [redacted]

[3] 48% shareholding in Ascendis Limited is held by HDP shareholders.

[4] The target firms' products cover most therapeutic groups, but it is mainly focused on Gastriprokinetic, anitibotics and Systemic Antihistamine products.

4.1 The market for the supply of Antibiotic (J1E) nationally;
4.2 the market for the supply of Fluoro-Quinolones (J1G) nationally;
4.3 the market for the supply of Gastroprokinetic (A3F) nationally;
4.4 the market for the supply of Systemic Antihistamine (R6A) nationally;
4.5 the upstream market for the contract manufacturing of [redacted] nationally;
4.6 the downstream market for the [redacted] nationally; and
4.7 The market for supply of contract logistics services and pharmaceutical products.

[10] The horizontal overlap occurs in that Pharma Q, and Ascendis Pharma are active in the supply of pharmaceutical products as they are intellectual property owners and possess dossiers for the following products: Fluoro-Quinolones (J1G); Gastroprokinetic (A3F); Systemic Antihistamine (R6A) and Antibiotic (J1E). The Commission found that Pharma-Q will have market shares of less than 25% in these markets and it will remain constrained because there are several competitors in this market such as Aspen and Novartis, Cipla, Mylan, Bayer, Gulf Drug Company, Sun Pharma, and Sanofi.

[11] There are two vertical overlaps that occur, the first is between Pharma Q which is a contract manufacturer of pharmaceutical products, and it provides contract manufacturing for third party pharmaceutical companies, who are intellectual brand owners but do not have manufacturing capabilities. The Target Firms do not manufacture their own products [redacted] The second is between, Imperial Logistics which provides contract logistics services for pharmaceutical products to pharmaceutical companies like Ascendis Pharma.

[12] The Commission reviewed the total size of the upstream market for local manufacturing of Chlornicol (S1A) in 2021[5] and found that Pharma Q has a market share of less than (0.88%) in respect of contract manufacturing. In addition, the Commission found that that there are numerous other manufacturers that are approved by SAPHRA to manufacturer pharmaceutical products which include: Allergan Pharmaceuticals, Wrapsa (Pty) Ltd; Cadila Healthcare; Rusan Pharmaceuticals; and Intas Pharmaceuticals.

[13] In the downstream market for the supply of [redacted] in South Africa the Commission found that the Ascendis Pharma [redacted] As such, the Commission is of the view that the merged entity will not have the ability to foreclose their upstream rivals from accessing an essential customer in the sale of [redacted]

[14] In the market for contract logistics services and pharmaceutical products the Commission assessed foreclosure and found that the Acquiring Group through Imperial logistics has an estimated market share of (18%) in the upstream market for the provision of contract logistics services. They are several alternative

[5] It was estimated to be R14.05 billion. [redacted]

players in the market and their market shares are as follows: DSV Panalpina (36%), UPD (25%), Adcock Ingram (10%), Questmed (5%) and Orion/RTT (3%).

[15] [redacted] As such, the Commission found that no merger-specific customer foreclosure concerns arise and will not assess this further.

[16] When assessing the proposed transaction, the Tribunal did not find any evidence suggesting that the relevant market should be broader than the one defined above. Therefore, the Tribunal concluded that the proposed transaction does not substantially prevent or lessen competition in any relevant market.

Public Interest

Effect on employment

[17] The merging parties submitted an unequivocal statement that the proposed transaction will not result in any retrenchments. The Commission engaged with the employee representative of Ascendis Pharma and the trade unions representatives of the Acquiring Firms, and they did not raise any concerns in relation to the proposed merger.

[18] The Department of Trade Industry and Competition ("dtic") requested that the merger parties commit to a 24-month moratorium on post-merger retrenchments and the merger parties were not amenable to this request.

[19] Given the unequivocal statement, the Commission is of the view that the proposed transaction is unlikely to result in any job losses and we agree with these findings.

Effect on the spread of ownership

[20] The Commission found that the Target Firms have an indirect Historically disadvantaged Persons ("HDP") shareholding of 48.65% shareholding on a flow through basis. The shareholding is held through Ascendis Health. The Acquiring Firms have an effective B-BBEE shareholding of 25.5%. This is because Pharma Q which forms part of the Acquiring Firms is 51% controlled by Blackchoice which is a 100% controlled HDP firm.

[21] Thus, as a direct result of the merger the HDP shareholding in the Target Firms will be diluted by 23.56% from an effective pre-merger B-BBEE shareholding of 48.65% to 25.5% post-merger.[6] Given the 23.56% dilution, the Commission was concerned that the proposed merger does not promote greater spread of ownership by HDP and workers in firms in the market.

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[6] The HDP shareholding in Ascendis Health will remain unaffected by the proposed merger. This is because Ascendis Health will remain listed on the JSE owning several other companies which are not part of the Target Firms.

[22] The Commission received a concern from the dtic in which it indicated that post-merger, the merged entity will have a ±40.71% BEE ownership on a flow through basis which is less than the pre-merger levels. In this regard, the dtic requested that the merger parties to put in place initiatives to promote direct worker ownership in the merged entity that will at least reach the level of BEE ownership in the Target Firms that existed prior to the merger.

[23] In response, the merging parties submitted that the proposed merger will result in the promotion of a greater spread of ownership by HDPs as there is no single HDP shareholder in the Target Firms that directly or indirectly holds more than 10% of the shares in the Target Firms. This shareholding interest entitles the B-BBEE shareholder to only appoint 1 out of a total of 6 directors on the board of Ascendis Limited. This is in contrast with the post-merger scenario in which the merging parties submit that Pharma Q will have a level of *de jure* control over the Target Firms. This will empower Pharma Q with the ability to have management control over the day-to-day operations of the Target Firms as Pharma Q will have the ability to appoint 2 out of the 4 directors in addition to 1 B-BBEE director that will be appointed on the boards of the Target Firms.

[24] In essence, the merging parties submit that the post-merger scenario will result (i) in an indirect HDP shareholding of 25.5%; (ii) in the HDP shareholders having *de jure* control by virtue of the indirect 25.5% HDP shareholding and (iii) in an increased HDP representation on the board of the Target Firms by virtue of the indirect HDP shareholding ("Management Control condition"). Therefore, the HDP shareholders will have meaningful participation in the Target Firms.

[25] As such, the ditc, Commission and the merging parties have agreed to the imposition of the Management Control Condition to maintain the HDP representation on the board of the Target Firms, such that the Acquiring Firms will have no less than 75% HDP board representation in the Target Firms as long as they hold shares in the Target Firms. The conditions attached hereto as Annexure A.

[26] The Commission is of the view that the proposed transaction does raise substantial concerns relating to the promotion of a greater spread of ownership by HDPs as the proposed transaction results in dilution of HDP shareholdings however, the concern has been remedied by the Management Control Condition.

Conclusion

[27] For the reasons set out above, the Tribunal finds that the proposed transaction is unlikely to substantially prevent or lessen competition in any relevant market. The transaction is approved on the condition agreed to by the merging parties to remedy the public interest concern raised.

Signed by:Imraan Valodia
Signed at:2022-08-03 14:44:00 +02:00
Reason:Witnessing Imraan Valodia

Imraan Valodia

Professor Imraan Valodia

3 August 2022

Date

Ms Andiswa Ndoni and Professor Fiona Tregenna concurring

Tribunal Case Manager:	Makati Seekane
For the Merging Parties:	Vani Chetty, Seema Nunkoo and Melinda Pianese
For the Competition:	Tumiso Loate, Tamara Paremoer and Themba Mahlangu