

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case no: LM160Dec22

In the large merger between:

Incubeta Holdings International Limited

Primary Acquiring Firm

And

**Incubeta SA Operations Proprietary Limited;
Incubeta South Africa Proprietary Limited; and
Incubee Investments Proprietary Limited**

Primary Target Firms

Panel:	J Wilson (Presiding Member) L Mncube (Tribunal Member) F Tregenna (Tribunal Member)
Heard on:	13 March 2023
Date of last submission:	3 March 2023
Order issued on:	13 March 2023
Reasons Issued on:	3 April 2023

REASONS FOR DECISION

Introduction

- [1] On 13 March 2023, the Competition Tribunal (“the Tribunal”) unconditionally approved the merger whereby Incubeta Holdings International Ltd (“IHI”) intends to acquire issued share capital in Incubeta SA Operations (Pty) Ltd (“Incubeta Ops”); Incubeta South Africa (Pty) Ltd (“Incubeta SA”) and IncuBEE Investments Proprietary Limited (“IncuBEE”) from Incubeta Holdings (Pty) Ltd (“Incubeta Holdings”) (the seller).

Primary acquiring firm

- [2] IHI is ultimately controlled by [REDACTED]
- [REDACTED]

██████████ the Carlyle Group Inc. ("Carlyle"). Carlyle is not controlled by any firm. ██████████

██████████ IHI does not control any firms in South Africa. IHI, Carlyle and all subsidiaries of Carlyle will collectively be referred to as "the Acquiring Group".

- [3] The Acquiring Group is a global alternative asset manager headquartered in the USA. It manages funds that invest globally across three investment disciplines, namely: (i) Global Private Equity (including corporate private equity, real estate and natural resources funds); (ii) Global Credit (including liquid credit, illiquid credit and real assets credit); and (iii) Investment Solutions (private equity fund of funds program, which include primary fund, secondary and related co-investment activities).
- [4] Of relevance to the proposed transaction are the global activities of the Acquiring Group through Digital Agency Topholding B.V. ("Dept"). Dept is a digital agency that specialises in digital communications and developing marketing and branding strategies and solutions.

Primary target firms

- [5] The Target Firms are Incubeta Ops, Incubeta SA, and IncuBEE. Incubeta Ops is solely controlled by Incubeta Holdings. The shares in Incubeta SA are held by Incubeta Holdings (██████) and IncuBEE (██████). IncuBEE is jointly controlled by the Imvula Trust (with a shareholding of ██████) and Incubeta Holdings (with a shareholding of ██████). Incubeta Holdings is ultimately controlled by ██████████
- [6] The beneficiaries of the Imvula Trust are underprivileged black South Africans students who are provided subsidised tertiary education opportunities, funded by the income from the investments that the Trust generates.
- [7] The Incubeta Group is a global marketing performance group with a particular focus on digital solutions and e-commerce. The Incubeta Group offers a range of digital advertising and media solutions to customers worldwide. The Incubeta Group is a Google Marketing Platform specialist focussing mainly on services in relation to Google platforms (i.e., Google ad network websites, YouTube, Gmail

and others). In South Africa, it operates through Incubeta Ops, Incubeta SA, and IncuBEE.

Rationale

[8] [REDACTED]
[REDACTED]

[9] [REDACTED]
[REDACTED]
[REDACTED]

Competition assessment

[10] The Commission found that there is an overlap between the activities of the merging parties as they are both active in the provision of digital marketing solutions in the e-commerce sector. More specifically, the parties are both active in the following markets: (i) marketing communication services, (ii) media buying services, (iii) (big) data analytics, and (iv) marketing data services. However, the Acquiring Group has not provided these services in South Africa and has not derived any revenue in SA relating to the provision of these services in 2021 and 2022.

[11] The merging parties submitted that, even if Dept's activities in South Africa are considered to overlap with those of the Target Firms, Dept is a fairly new participant with limited activities in South Africa with an estimated market share of less than [REDACTED] whilst the Target Firms have an estimated market share of less than [REDACTED] in each of the four potential markets in South Africa. As such, the combined estimated market share of the merging parties will be less than [REDACTED] with an accretion of less than [REDACTED]

[12] The Commission confirmed these submissions in its merger investigation. The Commission also found that the relevant markets are fragmented with several players, and that switching between different suppliers is easy.

[13] No concerns were raised by customers or competitors regarding the proposed transaction.

[14] Based on the above, the Commission concluded that the proposed transaction is unlikely to lead to any substantial prevention or lessening of competition in any relevant market. We agree with this conclusion.

Public interest

Employment

[15] The merging parties submitted that the proposed transaction will not give rise to any retrenchments in South Africa.

[16] The employee representative of the Incubeta Group confirmed that the employees of the Group were notified of the proposed transaction and did not raise any concerns regarding it.

[17] The Department of Trade, Industry and Competition ("DTIC") requested the merging parties to commit to a 36-month moratorium on post-merger retrenchments. The merging parties submitted that the imposition of employment-related conditions in the context of this merger is unnecessary given their unequivocal statement that the proposed transaction will not give rise to any retrenchments.

[18] Based on the above, the Commission found that the proposed transaction is unlikely to have a negative effect on employment, and that no employment conditions are required. We agree with this conclusion.

Spread of ownership and other public interest issues

[19] The Commission found that Acquiring Group does not have any shareholding held by Historically Disadvantage Persons ("HDPs").

[20] With respect to the Target Firms, the Commission found that Incubeta Ops does not have any HDP shareholding; Incubeta SA has an effective HDP shareholding of [REDACTED] by the Imvula Trust (through its [REDACTED] shareholding in IncuBEE); and IncuBEE has a direct [REDACTED] HDP shareholding by the Imvula Trust.

[21] The merging parties confirmed that the HDPs shareholding held by the Invula Trust in IncuBEE and Incubeta SA will remain post-merger. The parties also submitted that the Invula Trust will have a better entrenched contractual standing to protect its investment and ownership in IncuBEE. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[22] The merging parties also indicated that, prior to completion of the proposed transaction, Incubeta SA will acquire the entire business and assets of Incubeta Technology SA (Pty) Ltd (“Incubeta Technology”) which is currently 100% owned and controlled by Incubeta Holdings (the seller). This implies that post-merger the Invula Trust will have an effective financial interest of [REDACTED] (via its indirect holding in Incubeta SA) in the business of Incubeta Technology which it did not have before the merger.

[23] The merging parties explained that Incubeta Holdings has a [REDACTED] employee benefit trust (the Incubeta Employee Benefit Trust). The Incubeta Employee Benefit Trust comprises of a total of [REDACTED] participating employees across various entities within the Incubeta group globally. [REDACTED]

[REDACTED]

[24] On the basis of the above, the merging parties submitted that the proposed transaction will not have a negative effect on ownership by HDPs and workers in South Africa.

[25] The DTIC submitted that the proposed merger does not adequately address section 12A(3)(e) of the Competition Act 89 of 1998, as amended (“the Act”) because the exit of a South African employee from the Incubeta Employee Benefit Trust will dilute worker ownership. The DTIC submitted that, in order to offset this dilution, the merging parties should at a minimum consider an employee share ownership plan (“ESOP”) of 5% for a broad base of the Target Group’s South African employees.

[26] In response, the merging parties submitted that the employee in question is a non-HDP member of senior management within the Incubeta group who

currently resides in [REDACTED], and that he has voluntarily decided to exit the Incubeta group because it offers him the opportunity to extract value from his shareholding and years of service with the Incubeta group. The merging parties also submitted that the marginal and indirect reduction in worker ownership in the South African operations of the Incubeta group by virtue of the relevant employee's exit is not substantial in the context of the public interest assessment relevant to the proposed transaction.

[27] The DTIC also submitted that, given that the Invula Trust has benefited [REDACTED] black South African students in tertiary education over the 18 years since inception, the bursary scheme should be scaled up in line with expected future income of the Trust. In particular, the DTIC submitted that the merging parties should commit to increase the number of bursaries awarded annually and also commit to these being full bursaries covering tuition, books, transport, accommodation, and incidental costs as applicable.

[28] In response, the merging parties submitted that, given that the Invula Trust is not an active participant in the proposed transaction, there was no basis for the DTIC's proposal. In this regard, the merging parties submitted that any remedy imposed on merging parties must address harms that are merger-specific and be appropriate, proportional, rational and justifiable in terms of the evidence provided. The parties submitted that, in this case, there was no evidential basis for the imposition of the proposed conditions on the Invula Trust.

[29] The DTIC submitted further that, given the preferred service provider/partner status of the Target Group in terms of Google Marketing Platforms globally, the merger parties should commit to B-BBEE initiatives in the South African technology/media industry focused on HDP small and medium sized businesses. In particular, the DTIC submitted that the merged entity should commit to initiatives to promote B-BBEE in South Africa equivalent to at least 2% of its annual net profit after tax.

[30] In response, the merging parties submitted that this proposal would be very costly and administratively burdensome to implement, would threaten the commercial viability of the proposed transaction, and that there was again no evidential basis to justify such a condition.

[31] The Commission found that, taken as a whole, the proposed transaction will not have a negative effect on public interest issues, and therefore recommended that the proposed transaction be approved without conditions.

[32] We agree with this conclusion. Based on the evidence referred to above, it does not appear to us that the proposed transaction is likely to have any substantial negative public interest effects, and there is accordingly no warrant for the imposition of any public interest conditions on the approval of the transaction.

Conclusion

[33] We conclude that the proposed transaction is unlikely to substantially prevent or lessen competition in any relevant market or to have a substantial negative public interest effect.

[34] In the circumstances, the Tribunal unconditionally approves the proposed transaction.

Signed by: Jerome Wilson
Signed at: 2023-04-03 13:10:57 +02:00
Reason: Witnessing Jerome Wilson

Jerome Wilson

3 April 2023

Adv Jerome Wilson SC

Date

Prof Fiona Tregenna and Prof Liberty Mncube concurring

Tribunal Case Managers:	Theodora Michaletos
For the Merging Parties:	Tayla Theron, Zaid Bhayat and Richardt van Rensburg of ENSafrica
For the Commission:	Billy Mabatamela and Themba Mahlangu