DEPARTMENT OF TRADE, INDUSTRY AND COMPETITION

NO. 974 **1 October 2021**

COMPETITION COMMISSION

NOTIFICATION OF CLOSED CONDITIONAL MERGER APPROVALS

1 OCTOBER 2020 – 31 MARCH 2021

1. CASE NO. 2018JUL0058: IAPEF2 Education Holdings Limited and RZT Zeply 4472 (Pty) Ltd

In the matter between ***IAPEF2 Education Holdings Limited and RZT Zeply 4472 (Pty) Ltd***, the Commission assessed the merger and concluded that it was unlikely to raise competition concerns. The transaction was structured in two tranches. In the First Tranche the acquiring firm intended to acquire a majority stake in the target firm. This is the leg of the transaction that triggered notification of the merger. In the Second Tranche, the acquiring firm intended to increase its majority stake in the target firm. However, it was unclear when the second transaction was likely to take place. Therefore, the Commission made a recommendation to the Tribunal for the inclusion, as a condition to the merger, a requirement that the merging parties notify the second transaction with the Commission when it occurs. At the time, the Commission was of the view that the implementation of the Second Tranche, and subsequent change from joint to sole control, would require proper evaluation should it occur more than 24 months after the implementation of the first tranche, i.e., the abovementioned merger.

This, the Commission asserted, was because of *inter alia* the potential for changing market conditions. Further, the merging parties agreed that if they acquired control over any competitor of RZT, with a market share in excess of 10%, and that acquisition falls below the prevailing merger filing thresholds at the time, the merging parties would, in writing inform the Commission thereof.

On 25 August 2020, the merging parties submitted a notarised affidavit confirming that the Second Tranche was implemented on 30 July 2020. This practically meant that the merged entity would no longer be required to notify the Second Tranche as a merger (provided it met the merger notification thresholds at the time), as it has implemented the Second Tranche on or before 23 October2020.

Further, the merging parties confirmed that there had been no acquisitions since 23 October 2018, where the merged entity acquired control over any competitor of RZT, with a market share in excess of 10%, regardless of the size of the merger.

Considering the above, the Commission was of the view that the merged entity had duly complied with its obligations as set out in the Conditions and as such, the Conditions were no longer applicable.

2. CASE NO. 2017SEP0003: Sylvania Metals (Pty) Ltd and Phoenix Platinum Mining (Pty) Ltd

In the matter between ***Sylvania Metals (Pty) Ltd and Phoenix Platinum Mining (Pty) Ltd***, the Conditions precluded the Merged Entity from retrenching any employees, save for the five (5) employees that were identified (Affected Employees), for a period of 2 (two) years. On 07 November 2017, the merging parties made the first submission in compliance with the Conditions, indicating that the merger was implemented on 06 November 2017.

On 14 November 2017, the merging parties submitted a compliance affidavit, accompanied by notices sent to employees. According to the notices, the employees were notified of the merger on 07 November 2017. The merging parties submitted the first compliance report on 13 October 2018 confirming that Sylvania Metals had not retrenched any employees. The second compliance report was submitted on 01 November 2019 also confirming that Sylvania Metals had not retrenched any employees. The Commission noted that there were no complaints in relation to the Conditions. Considering the above, the Commission terminated the Conditions as the merged entity has duly complied with its obligations.

3. CASE NO. 2018SEP0037: Tourvest Financial Services (Pty) Ltd and Travelex Africa Foreign Exchange (Pty) Ltd

In the matter between ***Tourvest Financial Services (Pty) Ltd and Travelex Africa*** Foreign ***Exchange (Pty) Ltd.*** The Conditions were as follows:

- Save for the 14 Affected Employees, the Merged Entity shall not retrench any other employees as a result of the merger for a period of two years from the Implementation Date.
- In the event that any retrenchments of Affected Employees include Unskilled Affected Employees, the Merged Entity shall provide each Affected Unskilled Employee with

the allowance of R20 000 for purposes of training, or reskilling, or for seed capital to establish a small business venture (Allowance).

- Further, the Allowance shall be applied in accordance with the principles and conditions set out in the Conditions. The Allowance Period would be forfeited after a period of 1 (one) year from the date of retrenchment.

On 21 January 2019, the merging parties submitted that the date of implementation was 15 January 2019 as per clause 4.1 of the Conditions. The merging parties also submitted their circulation affidavit in terms of clause 4.4 of the Conditions. On 15 January 2020, the merging parties submitted its first compliance report to the Commission.

It is apparent from the first compliance report that Tourvest had retrenched ten employees as a result of the merger. This means that Tourvest did not retrench 4 (four) employees who were initially identified for retrenchment when the merger was approved.

In accordance with the Conditions, Tourvest made available, to each employee who was retrenched as a result of the merger and whose qualifications were a Grade 12 / matric or less, an allowance of R20 000 for the purposes of training, or reskilling, or for seed capital to establish a small business venture. In total, three retrenched employees were eligible for the Allowance. One employee made a successful application for the Allowance. The remaining two employees were made aware of their qualification for the Allowance and were afforded an opportunity until the end of the Allowance Period (as defined in the Conditions), to make an application. This period has now lapsed, without any applications being made.

On 25 January 2021, the merged entity submitted its final affidavit and compliance report, in accordance with the Conditions. In the second compliance report, the merged entity confirmed that no further employees have been retrenched as a result of the merger, since the first compliance report submitted to the Commission in January 2020.

The Commission further noted that there were no complaints in relation to these Conditions. Considering the above, the Commission terminated the Conditions given the merged entity has duly complied with its obligations.

4. CASE NO. 2008OCT4025: DCD Dorbyl (Pty) Ltd and Globe Engineering Works (Pty) Ltd

The Competition Tribunal approved the merger between ***DCD Dorbyl (Pty) Ltd and Globe Engineering Works (Pty) Ltd*** on 19 March 2009 subject to conditions. The conditions included a moratorium on retrenchments within the merged entity for a year after the approval date. The Conditions also specified that should the merged entity wish to enter into a long-term lease for the A-Berth area at the Port of Cape Town ("the Property"), it shall notify the Commission and the Transnet National Ports Authority ("TNPA") in writing within 30 days of entering into the lease. The lease would be for no more than 50% of the Property, so that: a) TNPA is able to lease all or portions of the remainder of the Property (the Remainder) to third parties (including the merged entity) on a "common user" basis, subject to TNPA's standard pricing and terms and conditions, and b) the Remainder shall have reasonable access to the quay. The conditions related to the lease were applicable for a period of five (5) years following the merger.

The merged entity reported that it did not retrench any employees during the one-year moratorium period. On 05 March 2014, the Commission received a complaint from Southey Holdings (Pty) Limited t/a Dormac Offshore Engineering (Dormac). Dormac alleged that it made enquiries with FerroMarine Cape (Pty) Ltd (FMC) to book the remaining 50% of the Property that was not to be controlled by DCD Dorbyl, for the period June to September 2014. FMC advised Dormac that as of 20 March 2014, DCD Dorbyl will step into the position of FMC in terms of its rights to use the quayside of the Property to generate turnover against the FMC obligation to TNPA. Therefore, in this respect DCD Dorbyl will hold 100% of the Property and any third party would have to apply to DCD Dorbyl to have access to any portion of the Property. Dormac alleged that DCD Dorbyl and FMC had breached the merger conditions by leasing more than 50% of the Property within the 5-year period.

On 04 April 2014, DCD Dorbyl, in response to the allegations, confirmed that in its interpretation of the merger conditions, the Tribunal order does not govern the conclusion by DCD Dorbyl of a long-term lease for the whole or some portion of the Property if such lease agreement is concluded five years after the Tribunal order. DCD Dorbyl stated that "reasonable access" to the remainder of the Property was not defined by the Tribunal.

In May 2014, Dormac applied for interim relief before the Tribunal in relation to the merged entity's alleged breach of the merger conditions. Dormac also brought a complaint to the

Commission regarding the merged entity's conduct. This complaint as well as the interim relief application was later withdrawn as the merged entity and the complainant reached a settlement.

Considering the above, the Commission terminated the Conditions as they are no longer applicable and have lapsed.

5. CASE NO. 2017AUG0029: Deneb Investments Limited and New Just Fun Group (Pty) Ltd

In the matter between ***Deneb Investments Limited and New Just Fun Group (Pty) Ltd,*** the merger was approved by the Tribunal with various public interest conditions. In the main, the conditions related to a moratorium on retrenchments related to 28 Affected Employees, for a period of 3 years.

The Merged Entity submitted its first compliance report on 13 December 2018. It is apparent from the first compliance report and supporting proof that two of the Affected Employees were no longer employed by the Merged Entity for reasons unrelated to the merger.

The second compliance report was submitted on 13 December 2019 recording that four of the Affected Employees were no longer employed by the Merged Entity or the Subcontractor.

Therefore, by the end of the second anniversary, 5 (five) Affected Employees were no longer in the employ of the Merged Entity. The remaining Affected Employees were still employed by either the Merged Entity or its subsidiary.

The third and final report was submitted on 13 December 2020 recording that nothing changed since the first compliance report in 2018. Save for the 5 (five) employees, all the Affected Employees were still employed by the Merged Entity.

The Commission further notes that there were no complaints in relation to these Conditions. Considering the above, the Commission is of the view that the merged entity has duly complied with its obligations as set out in the Conditions and as such, the Conditions are no longer applicable.

6. CASE NO. 2017JUL0026: Vitas South Africa (Pty) Ltd and Certain Assets of a Group of Companies and Subsidiaries within the Profert Holdings (Pty) Ltd

In the matter between ***Vitas South Africa (Pty) Ltd and Certain Assets of a Group of Companies and Subsidiaries within the Profert Holdings (Pty) Ltd,*** the Commission implemented a divestiture condition requiring Vitas to ensure that it concludes a B-BBEE transaction within a period of 5 years from the implementation date. The employment condition required the merged entity not to retrench any employees as a result of the merger, save for 2 executives who had entered into voluntary separation packages.

From a monitoring viewpoint, the merging parties were required to inform the Commission in writing of the Implementation Date within 5 days of its occurrence.

The Commission notes that since the merger was approved, the merging parties had not notified the Commission about the implementation date to trigger the reporting obligations. The Commission found that the merger has been abandoned and the merging parties did not intend to implement it.

As a result, the Commission requested the merged entity to file a notice of abandonment (Form CC6). To this end, the merging parties submitted the Form CC 6 Notice of Abandoned Merger on 20 April 2018 to formally withdraw the merger.

7. CASE NO. 2018AUG0050: Leroma Investments (Pty) Ltd and The Caltex Mpumalanga South Business of Royal Energy (Pty) Ltd

In the matter between **Leroma Investments (Pty) Ltd and The Caltex Mpumalanga South Business of Royal Energy (Pty) Ltd**, the Conditions required the merged entity to reduce the duration of a restraint of trade between the merging parties from 10 (ten) years to 5 (five) years or as soon as the Acquiring Group has paid back its loan, whichever period is shortest.

The merged entity submitted that shortly after the merger was approved, the merged entity informed the Commission that the parties were seeking to renegotiate certain of the contractual terms. However, the merging parties were unable to reach consensus on the contractual terms and the transaction was ultimately abandoned.

As a result, the Commission requested the merged entity to file a notice of abandonment (Form CC6). To this end, the merging parties submitted Form CC 6 Notice of Abandoned Merger on 01 March 2021 to formally withdraw the merger.

In light of the above, the Conditions are no longer applicable because the merging parties decided not to implement the merger and therefore the Conditions had become redundant.

8. CASE NO. 2019MAR0040: New HoldCo (Pty) Ltd and Edgars Consolidated Stores Limited

In the matter between ***New HoldCo (Pty) Ltd and Edgars Consolidated Stores Limited,*** the merger entailed a new company, registered as K2019216440 (South Africa) Limited, purchasing the entire issued shares of Edgars Consolidated Stores Limited (ECSL). The Edcon Group (ECSL, Edcon Limited and all their subsidiaries) was in financial distress and at risk of being forced into business rescue or insolvency proceedings. The merger was intended to achieve a restructuring and recapitalisation of the debt and equity structure of Edcon Limited.

The conditions of the merger included commitments to increase local procurement, improve BEE participation and ensuring that there are no job losses as a result of the merger.

Subsequently, the Edcon Board resolved to place the company in Business Rescue.

On 3 August 2020, the Foschini Retail Group Proprietary Limited filed a merger in terms of which it sought to acquire Edcon's Jet Business as a going concern, comprising certain identified assets and liabilities. On 7 August 2020, Retailability Proprietary Limited too filed a merger in terms of which it sought to acquire the Edgars Business, controlled by Edcon. On 4 September 2020, the Tribunal approved the *Retailability/Edgars Business* merger subject to a moratorium of job losses for a period of three (3) years from the merger implementation date. On 23 September 2020, the Tribunal approved the *Foschini/Jet Business* merger subject to employment and local procurement conditions, amongst others.

In light of the above, the Conditions in *New Holdco/Edgars* merger are no longer applicable because the merging parties in the *New Holdco/Edgars* merger subsequently sold the business to 2 (two) separate legal entities, i.e., the Retailability Group and the Foschini Group. It therefore follows from the above that the *New Holdco/Edgars* conditions cannot be enforceable, and the Commission accordingly terminated the Condition.

9. CASE NO. 2017SEP0007: Gutsche Family Investment (Pty) Ltd and Fairfields (Pty) Ltd

In the matter between ***Gutsche Family Investment (Pty) Ltd and Fairfields (Pty) Ltd***, the Tribunal approved the merger subject to various conditions. The first Condition pertained to the exercise of what is term the "first option", which would result in GFI obtaining unfettered sole control of Fairfield. According to the Conditions, should the first option be exercised within a period of 2 (two) years from the approval date, GFI should notify the Commission within 10 (ten) business days of exercising the first option by way of affidavit. However, should the first option be exercised after a period of 2 (two) years, GFI shall notify the first option in the form of a new merger filing as prescribed by the Competition Act No. 89 of 1998.

The second Condition required the merging parties to submit signed amended documents, including the amended Memorandum of Incorporation and Shareholders Agreement of Fairfield, reflecting that the exercise of the first option would grant GFI unfettered sole control over Fairfield. The merging parties were required to submit the amended documents within 10 (ten) days of the approval date.

The third Condition precluded the Merged Entity from retrenching any employees at the merged entity for a period of 2 (two) years.

In respect of the first Condition, the Commission notes that GFI was required to exercise the first option by 25 November 2019, which falls within two years as required by the Conditions. GFI submitted an affidavit indicating that the Fairfield Trust elected to exercise the first call option as a component of the first option, effective from 31 August 2019. According to GFI, although this was earlier than originally contemplated in the agreement, it was permissible and the early exercise was compliant with the Conditions, which contemplated that the first option be exercised withing 2 (two) years of the approval date.

In respect of the second Condition, on 31 January 2018, the merging parties submitted a copy of an amended Sale of Shares and Option Agreement as well as a copy of an addendum to the Shareholders Agreement. The Commission notes that the addendum to the Shareholders Agreement granted GFI unfettered sole control of Fairfield.

In respect of the third Condition, the merging parties submitted affidavits accompanied by email copies, on 12 February 2018, attesting to the circulation of the merger approval and Conditions on 26 January 2018 to the employees and the applicable trade union.

On 07 March 2018, the merging parties submitted that the implementation date was 05 March 2018, therefore requiring that an affidavit on each anniversary of the implementation date be submitted for a period of 2 (two) years.

The first compliance report was submitted on 29 January 2019, confirming that the merging parties had not retrenched any employees. The merging parties submitted their second compliance affidavit on 30 March 2020 confirming that they had not retrenched any employees for the duration of the Conditions.

The Commission is not aware of any retrenchment complaint in relation to these Conditions. Considering the above, the Commission terminated the Conditions as the merged entity has duly complied with its obligations as set out in the Conditions.

10. CASE NO. 2017MAR0010: Maersk line a/s (Maersk line) and Hamburg Südamerikanische Dampfschiffahrts-Gesellschaft KG (HSDG)

In the merger between ***Maersk line a/s (Maersk line) and Hamburg Südamerikanische Dampfschiffahrts-Gesellschaft KG (HSDG)***, the Tribunal approved the merger subject to various conditions in order to address possible coordinated effects that could arise as a result of the merger. The Conditions required that Maersk Line ensure that HSDG withdraws from a vessel sharing agreement.

Furthermore, the Merging Parties were also required that they will not, within 3 (three) years from the Implementation Date, become members of any vessel sharing agreement on VSA on the East Coast of South America trade route.

On 04 December 2017, the merging parties made a submission to the Commission indicating that the merger was implemented on 30 November 2017.

Pertaining to the notice of withdrawal, on 07 December 2017, the merging parties submitted copies of withdrawal notices from various vessel sharing agreements. Thus, the Conditions effectively lapsed on 30 November 2020. Considering the above, no reporting obligations remain, and the Commission is of the view that the merged entity has duly complied with its obligations as set out in the Conditions.

11. CASE NO. 2016OCT0554: *New GX Capital Holdings (Pty) Ltd and Dartcom SA (Pty) Ltd*

In the matter between ***New GX Capital Holdings (Pty) Ltd and Dartcom SA (Pty) Ltd****,* the Conditions required that Dartcom continue to supply various products to its customers on similar terms and conditions as before the merger for a period of three (3) years from Implementation Date of the Merger.

On 13 February 2017, the merging parties submitted an affidavit confirming compliance with the requirement that Dartcom circulate a copy of the Conditions to all affected customers of the various products. The merging parties further confirmed that the Merger was implemented on 4 April 2017.

It should be noted that the Conditions imposed in this matter were largely self-monitoring in that the customers were expected to report to the Commission the instances where there is non-compliance with the Conditions. Furthermore, there was no monitoring provision requiring the merging parties to report on annual basis to the Commission about progress made in implementing the Conditions.

Considering the above, the Conditions lapsed on 04 April 2020. Furthermore, the Commission has not received any complaints from the customers of the merging parties citing non-compliance. Therefore, the Commission is of the view that that the merging parties have fully complied with the conditions.

12. CASE NO. 2017JUN0058: Lambda Corporation and CR Bard Incorporated

In the matter between ***Lambda Corporation and CR Bard Incorporated***, the Conditions precluded the Merged Entity from retrenching any employees at the merged entity for a period of 3 (three) years. The merging parties submitted the first compliance report on 06 December 2018 confirming that the merged entity had not retrenched any employees. The second compliance report was submitted on 13 December 2019 also confirming that the merged entity had not retrenched any employees. The third and final report was submitted on 09 December 2020, confirming that the merged entity did not retrench any employees for the period of the Conditions.

The Commission is not aware of any retrenchment complaint in relation to these Conditions. Considering the above, the Commission is of the view that the merged entity has duly complied with its obligations as set out in the Conditions.