



COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: 018085

In the matter between:

Microsoft Corporation

Primary Acquiring Firm

And

Nokia Corporation, in particular the Devices

And Services Business of Nokia Corporation

Primary Target Firm

Panel:	Takalani Madima	(Presiding Member)
	Medi Mokuena	(Tribunal Member)
	Anton Roskam	(Tribunal Member)

Heard on: 19 February 2014

Order Issued: 19 February 2014

Reasons Issued on: 14 March 2014

Reasons for Decision – non-confidential version

Introduction

[1] On 19 February 2014 the Tribunal approved the acquisition of the Devices and Services Business of Nokia Corporation by Microsoft Corporation. The reasons for approving the transaction are set out below.

The parties

- [2] The primary acquiring firm is Microsoft Corporation ("Microsoft"), a public company incorporated in accordance with the laws of the United States of America. No single shareholder controls Microsoft directly or indirectly.
- [3] The primary target firm is the Devices and Services Business ("D&S Business") of Nokia Corporation ("Nokia"), a public company incorporated in accordance with the laws of Finland. No single shareholder controls Nokia directly or indirectly.

The Transaction

- [4] The proposed transaction is an international transaction whereby Microsoft will acquire the D&S Business of Nokia. This includes the mobile phones and smart devices business units as well as a design team. The acquisition also includes certain of Nokia's operations namely its devices and services production facilities, devices & services-related sales and marketing activities, related support functions and design rights that are used on the devices being produced by the D&S Business.
- [5] As part of the proposed transaction Nokia will grant Microsoft a [REDACTED] non-exclusive license to certain of its patents with an option to extend in perpetuity. Microsoft will also become a strategic licensee of Nokia's HERE platform and will separately pay Nokia [REDACTED] HERE data services supply agreement.¹

The rationale for the transaction

- [6] The acquisition will transform Microsoft into a devices and services company.

[REDACTED]

[REDACTED]

[REDACTED]

- [7] Nokia indicated that following the transaction [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹ The HERE platform concerns the development of location-based products and services for consumers, as well as content and platform services for device manufacturers, automobile manufacturers, application developers, internet service providers, merchants and advertisers such as HERE Maps, Drive+, Transit and City lens.

Effect on Competition

[8] Microsoft is primarily involved in the design, development and supply of computer software and hardware devices and related services. Nokia is active in the development and supply of mobile handsets (smartphones and feature/basic phones), mobile and fixed telecom networks and associated services and locations-based services.

[9] Microsoft does not sell smart phones or tablets in South Africa while Nokia produces smartphones and feature phones. The proposed transaction therefore does not result in a horizontal overlap. The Commission, however, considered certain vertical aspects of the transaction in relation to:

- Microsoft's activities in the developing and licensing of Operating Systems ("OS) for smart mobile devices and the activities of the D&S Business relating to smart mobile phones;
- Microsoft's activities in the developing and licensing apps for smart mobile devices and the activities of the D&S Business relating to smart mobile devices; and
- Microsoft's activities in the developing and licensing of mail server communication protocols enabling interoperability between Microsoft's mail server software and the activities of the D&S Business relating to smart mobile devices.

[10] For the purpose of assessing the transaction the Competition Commission therefore considered the following relevant markets in South Africa:

- The downstream market for smartphones and tablets;
- The broad upstream market for operating systems ("OPs") for smartphones and tablets;
- The upstream market for mobile productivity apps;
- The upstream market for consumer communication services; and
- The upstream market for email software services

[11] Since there is no horizontal overlap we will only consider the vertical effects of the transaction.

[12] With regard to the vertical relationship post the transaction it is worth noting that prior to this transaction Microsoft and Nokia were in a partnership agreement whereby Nokia delivered mapping, navigation and certain location-based services to the Windows Phone ecosystem², built innovation on the Windows Phone platform in areas such as imaging, contributed expertise on device design and language support, and assisted in driving the development of the Windows phone platform. Microsoft provided Bing search services across Nokia's device portfolio and contributed resources in advertising, gaming, social media and a variety other services. The merging parties also conducted joint developer outreach and application sourcing, to support the creation of new local and global applications. The partnership agreement will not continue post the transaction.

OPs and smartphones in South Africa

[13] Microsoft's operating system, Windows phone, is currently used by Nokia Lumia smartphones and its Windows RT is the operational system used in Nokia's recently launched Nokia tablets.

[14] In South Africa Nokia has a market share of approximately 10% in the supply of smartphones and Microsoft's operational system approximately 11% of the total smartphones market. Other significant players are Android at 72% and iOS at 6%. Since Microsoft produces operational systems only to smartphones and tablets, the proposed transaction affects the smartphones segment in which Nokia has a low market share and faces strong competition from competitors such as Apple and Samsung, all of which have their own operating systems. Moreover, Microsoft indicated that in order to expand its ecosystem and thus compete with Apple and Google ecosystems it had to increase the number of users of Windows phone devices and developers of apps for devices. It thus has an incentive to continue to offer its operating systems to OEMs. This is also markets where product development and innovation are crucial in order to stay competitive.

² Ecosystems comprise a broad set of software products and services (including OS functionality, applications and cloud services) running on multiple devices such as smartphones, tablets and PCs. None of these elements compete in isolation, rather, they are all part of a broader ecosystems that compete with each other to attract users, device makers and application developers.

[15] Based on this we conclude that the proposed transaction is unlikely to result in input or customer foreclosure with respect to the upstream OPs market and the downstream smartphones and tablets market.

Development of apps, consumer communication services, email services and smartphones

[16] According to the merging parties the supply of apps and email services do not influence the users' choice of which mobile device to purchase given that such functionalities are made available for several operational systems, including competitors of Microsoft platform (Windows). Microsoft therefore has a strong incentive to continue making its email services and apps available to users of devices running other OSs and to users of Windows Phone devices produced by third party OEMs. Microsoft also does not offer "must have" mobile apps and there is a large range of apps and communication services that compete with the apps and services offered by Microsoft.

[17] Barriers to entry for developers of communications apps are extremely low and new entry occurs frequently from both large companies and small independent developers.

[18] Base on the above the Tribunal is of the view that the ability and incentive to engage in foreclosure strategies is unlikely in the upstream market for apps, consumer communication services, email services and the downstream market for smartphones and tablets.

Patent license Agreement

[19] In terms of the proposed transaction Microsoft will acquire over 8500 design patents from Nokia to protect the "look and feel" of Nokia devices, but none of these rights are technology or utility Patents. Nokia will also transfer 60 patent licences or benefits under those licenses to Microsoft. Microsoft will obtain a non-exclusive perpetual license to Nokia patents and certain non-patent IP used in the transferred business. Competitors will therefore not be prevented from licensing such patents as well.

[20] According to the merging parties Microsoft is licensing rather than acquiring these patents as it is cheaper to license patents. Moreover, Microsoft does not need to acquire the patents to obtain the coverage needed. None of the patents

can be considered essential and Nokia will offer the licences to third parties in the market.

Public interest

[21] The merging parties confirmed that they have not assessed staffing needs but indicated that they are able to confirm that there are no retrenchments planned as a consequence of the proposed transaction.

Conclusion

[22] Based on the above I find that the transaction is unlikely to result in input or customer foreclosure in the offering of OS services or in relation to apps, communication services and email services for smartphones and tablets. Following the existing 2011 partnership agreement between Nokia and Microsoft this transaction also does not present a new incentive to the merging parties to foreclose rivals from using patent licenses.

[23] In light of the above I find that the transaction is unlikely to result in a substantial lessening or prevention of competition in the relevant markets. In addition the proposed transaction raises no public interest issues.

[24] I accordingly approve the proposed transaction.



Takalani Madima

14 March 2014

Date

Medi Mokuena and Anton Roskam concurring

Tribunal Researcher: Rietsie Badenhorst

For the merging parties: Bowman Gilfillan

For the Commission: Kholiswa Mnisi