



## COMPETITION TRIBUNAL OF SOUTH AFRICA

**Case No: 68/LM/Oct10**

In the matter between:

**JSE Limited**

Acquiring Firm

And

**Momentum Managed Account Platform Holdings (Pty) Ltd**

Target Firm

And

**FirstRand Alternative Investment Management (Pty) Ltd**

Target Firm

Panel : Norman Manoim (Presiding Member),  
Yasmin Carrim (Tribunal Member)  
Andreas Wessels (Tribunal Member)  
Heard on : 4 May 2011  
Order issued on : 05 May 2011  
Reasons issued on : 03 June 2011

### **Reasons for Decision**

#### **Approval**

- 1] On 4 May 2011 the Competition Tribunal ("Tribunal") conditionally approved the large merger between JSE Limited and Momentum Managed Account Platform Holdings (Pty) Ltd and part of the business of FirstRand Alternative Investment Management (Pty) Ltd. The Tribunal's reasons for conditionally approving the transaction are set out below.

## **The Parties to the transaction**

- 2] The acquiring firm is JSE Limited (“JSE”),<sup>1</sup> a company listed on the Johannesburg Stock Exchange. JSE is not directly or indirectly controlled by any of its shareholders, some of which are Public Investment Corporation (12.25%), STANLIB Asset Management Ltd (8.04%), Skagen AS (6.69%) and Kagiso Asset Management (6.26%). It is also important to note that no one shareholder may own more than 15% of JSE Ltd.
- 3] The primary target firm is Momentum Managed Account Platform Holdings (Pty) Ltd (“MAP Holdings”). MAP Holdings is directly controlled by Momentum Group Ltd (“Momentum”). Momentum is in turn directly controlled by FirstRand Limited (“FirstRand”). FirstRand is a public listed company and is not directly or indirectly controlled by its shareholders who include RMB Holdings Ltd (30.06%), FirstRand Empowerment Trust (9.49%) and Public Investment Corporation (8.92%).
- 4] MAP Holdings then controls Momentum Managed Account Platform (Pty) Ltd (“MOMMAP”), which is a managed account platform. MOMMAP is essentially a legal structure and vehicle for making safe investments in hedge funds which makes it possible for multiple investors to invest in one or more of a chosen set of underlying hedge funds which mirror certain desirable hedge funds in the market but are entirely separate and have different assets.
- 5] MOMMAP is the main asset being acquired by JSE in terms of this transaction.
- 6] The secondary target firm is part of the business of FirstRand Alternative Investment Management (Pty) Ltd (“FRAIM”) which currently provides operational services to MOMMAP.
- 7] In terms of the proposed transaction JSE will acquire all of the issued share capital of MAP Holdings and also part of the business of FRAIM.

## **The activities of the parties**

- 8] The Acquiring Firm, JSE<sup>2</sup> is currently the only exchange in South Africa licensed by the Financial Services Board (“FSB”) in terms of the Securities Services Act 36 of 2004 and provides the platform (Trading Venue) for the public sale of shares to investors and also caters for the subsequent trading thereof.
- 9] JSE further provides financial data on shares trading which is utilized in making decisions on investments. JSE also provides for the listing of

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1 <http://www.jse.co.za/Home.aspx>

2 JSE has operated as a market place for the trading of financial products for nearly 120 years. In this time, the JSE has evolved from a traditional floor based equities trading market to a modern securities exchange providing fully electronic trading, clearing and settlement in equities, financial and agricultural derivatives and other associated instruments and has extensive surveillance capabilities. JSE is also a major provider of financial information.

securities, surveillance and risk management.

- 10] The Target Firm, MAP Holdings, is the holding company of MOMMAP.
- 11] MOMMAP, through daily monitoring, valuation and risk management of underlying hedge funds, effectively regulates and provides safer means of investing into hedge funds through constant, sound and operational risk management.
- 12] MOMMAP provides the above services through the essential operational services currently provided by FRAIM, which is the secondary target firm.

### **The Rationale**

- 13] The effective regulation of the hedge fund industry, which is somewhat addressed by MOMMAP, has been an international dilemma which numerous jurisdictions have grappled with for over a decade.
- 14] Hedge funds were thrust into the international spotlight by the global financial crisis and more recently by the scandals and fraud which plague this industry<sup>3</sup> such as Bernard Madoff's \$50 billion hedge fund fraud conviction<sup>4</sup> and the more recent conviction of hedge fund billionaire Raj Rajaratnam.<sup>5</sup>
- 15] There is therefore not only a dire need for the regulation of the hedge fund investment sphere locally, but also internationally and in addressing the above concerns, MOMMAP is an innovation which enables investors to monitor the operation of hedge funds without the complication of introducing a separate legislative framework for such regulation. It can thus be thought of as a private substitute for a gap in public regulation.
- 16] According to the primary target firm, JSE's unique and singular position as described above as well as its vast experience in the financial markets will enable it grow funds under management on MOMMAP exponentially.
- 17] FRAIM, the secondary target firm, recognises that the MOMMAP is not a core business (merely an enabler)<sup>6</sup> and it therefore needs a strong and capable partner to enable it to reach its full potential by making it available to a larger pool of investors.
- 18] MOMMAP's independence has been compromised in the opinion of some investors due to its links to Momentum and FirstRand, who also operate in the hedge fund sphere, through their other business units or related entities. Since the JSE is not a competitor in the hedge fund market, it is perceived as more of a neutral party with the added advantage of being able to attract investors looking for the safety and comfort of a regulated

3 JSE Business Case Document MAP, p6.

4 [http://www.forbes.com/2008/12/12/madoff-ponzi-hedge-pf-ii-in\\_rl\\_1212croesus\\_inl.html](http://www.forbes.com/2008/12/12/madoff-ponzi-hedge-pf-ii-in_rl_1212croesus_inl.html)

5 [http://www.washingtonpost.com/business/economy/hedge-fund-billionaire-raj-rajaratnam-is-convicted-of-fraud/2011/05/11/AFN6fRuG\\_story.html](http://www.washingtonpost.com/business/economy/hedge-fund-billionaire-raj-rajaratnam-is-convicted-of-fraud/2011/05/11/AFN6fRuG_story.html)

6 Extract from Minutes of the Meeting of the Board of Directors of FRAIM on 3 February 2009.

investment environment.

- 19] The desired creation of a safe trading environment (for hedge fund investment) will lead to increased hedge fund activity in mainstream asset management.<sup>7</sup> This will in turn lead to an increase in the liquidity of South Africa's financial instruments.

### **Background on the hedge fund industry**

- 20] The hedge fund industry has and still continues to show tremendous growth and it is attracting more and more investors.
- 21] Assets Under Management ("AUM") in hedge funds as at June 2009 were at R39.7 billion demonstrating a 93% growth since 2006.
- 22] The MOMMAP was launched in November 2007 and has since more than tripled its initial number of hedge funds and its AUM.
- 23] Hedge funds account for only 2% of the AUM in South Africa and yet they contribute to 25% of total trading activity.
- 24] Only 1.3% of SA pension fund money is invested in hedge funds as opposed to the global average of 18%. This is due investor cautiousness with regard to hedge funds due to fear of fraud, lack of transparency, a lack of understanding and an unclear regulatory environment.

### **The relevant market and the effect on competition**

- 25] The Competition Commission ("the Commission") described the relevant market as the national market for managed account platform services.
- 26] There is no horizontal overlap between the merging parties. There is a vertical relationship because only the JSE is in a position to supply the crucial financial data necessary for MAP's operations. Secondly, the JSE is not only a monopoly supplier; it is also a regulator of financial markets. It is this relationship that is central to the Commission's concerns in respect of this merger which we go on to consider. At present MOMMAP is the only service provider of its kind however, given that this market is expected to grow exponentially in the future, entry by new players would be likely. The Commission's concerns primarily relate then to prevention of barriers to entry post merger.

### **Theories of Harm identified by the Competition Commission and the Conditions Imposed**

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<sup>7</sup> JSE Business Case Document MAP, p6.

27] The Commission<sup>8</sup> identified three main possible “Theories of Harm” linked to this transaction, namely:

- a. The JSE’s monopoly over information dissemination of all trading information and the audit wide audit powers that flow from this monopoly.<sup>9</sup> This would give the JSE insight into any MAP competitor’s clients and innovations as pointed out by a competitor<sup>10</sup> Further if the JSE refused to supply trading information to a MAP competitor that competitor’s would be almost instantly eradicated.
- b. The possibility of the JSE listing MOMMAP in some manner and thereafter increasing barriers to entry of future rival MAPs through its power over listing rules and the charging of exchange and listing fees.
- c. The possibility of the JSE requiring hedge funds on MOMMAP to switch away from the use of OTC (over the counter) derivatives to SAFEX<sup>11</sup> derivatives contracts in order to drive up listed derivative trades thereby gaining an unfair advantage against prime brokers and banks who are its competitors in the provision of derivative contracts.

28] Merging parties do not agree with the theories of harm as identified by the Commission and indicated their disagreement and the reasons therefore in a letter to the Tribunal, which forms part of the record of this matter.<sup>12</sup>

29] Despite this the merging parties nevertheless have agreed to the conditions imposed by the Commission. For this reason we do not have to decide whether the Commission’s theories of harm are correct. We only have to decide on the assumption that they are correct, whether the conditions negotiated adequately remedy the harms identified.

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8 Utilizing information gathered after conducting interviews with various firms such as ABSA Capital, Nedbank Capital, Investec, Coronation Asset Managers, Novare, PSG, Peregrine and Gen-X Equity.

9 The JSE enjoys, in terms of its contracts with customers of this information, so called audit powers to ensure that the information is not on sold to other parties. Although this audit power is intended to protect the JSE’s proprietary interest in the information, once it becomes the owner of a competing business it does give it access to information about a rival’s business that it would not ordinarily have.

10 Competes with MOMMAP in providing Risk Analysis services.

11 SAFEX Clearing Company (Pty) Ltd, also known as the South African Futures Exchange is controlled by the JSE.

12 The merging parties submitted that the JSE does not have the ability nor the incentive to engage in exclusionary abuse with regards to the listing of securities, exclusionary abuse with regards to the dissemination of JSE information and exclusionary abuse of mandates with respect of the use of OTC versus exchange traded instruments. Further the merging parties state that the JSE is subject to statutory functions and duties which must be fulfilled in light of the purposes of the empowering statute, the Securities Services Act, and the JSE listing requirements. Further the most important constraint to the JSE’s possible abuse of its powers is the damage this abuse would cause to its reputation as an exchange. The damage to be caused by such abuse would further far outweigh any advantages to the JSE due the value of the MAP business relative to the size of the JSE.

## **Conditions (as annexed hereto and marked “Schedule A”)**

- 30] The conditions address the concerns relating to JSE’s monopoly over market information,<sup>13</sup> by compelling JSE to supply market information to existing and future MAP competitors on terms that are no less favourable than those that are effectively offered to any JSE company.<sup>14</sup>
- 31] Further, the conditions prevent the JSE from possibly gaining insight into and utilizing its competitors’ innovations through its wide audit powers,<sup>15</sup> by ensuring that strict confidentiality is undertaken by the auditors performing such duties by creating a “Chinese Wall”<sup>16</sup> or barrier to impede the flow of information between JSE and MAP.
- 32] The above impediment to information flow between MOMMAP and JSE is further strengthened by the condition that the JSE and MOMMAP must remain as separate corporate entities.<sup>17</sup>
- 33] In terms of the conditions<sup>18</sup> a MAP competitor may elect to either be audited by an independent auditor or by internal JSE auditor.
- 34] The conditions further restricts JSE from listing MOMMAP or any related product or investment vehicle there by limiting JSE’s ability to increase Barriers to Entry by amending listing requirement.<sup>19</sup>
- 35] The listing restriction also alleviates the Commission’s concerns over the JSE having too much power due to it (JSE) being both the regulator of the share exchanges and a competitor at the same time.
- 36] Finally, the conditions preclude JSE, for a two year period, from being able to amend investment mandates for the mirror hedge funds.<sup>20</sup>

## **Public Interest**

- 37] This transaction will have no effect on employment.
- 38] The FSB raised no concerns over this transaction and also stated that it is currently in consultation with the National Treasury in considering the appropriate regulatory framework for hedge funds.

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13 This is an essential input in the Managed Account Platform market.

14 Similar to the World Trade Organization’s (“WTO”) Most Favoured Nation Rule aimed at non-discrimination between WTO trading partners, with the effect that the same must be done to all parties in terms of trading conditions and tariffs.

15 Conditions 1 and 2 addresses concerns with regards to information dissemination agreements and JSE’s wide audit powers.

16 The “Chinese Wall” was a term of reference used by the parties at the hearing. It describes the barriers created by the Conditions on the JSE’s ability to have access to their competitors’ innovations and sensitive information.

17 Condition 5.

18 Condition 3.

19 Condition 4.

20 Condition 6 addresses the third theory of harm as referred in para 26 (c) on p5.

## **Conclusion**

39] The conditions which are attached to our reasons are lengthy, technical and complex. For this reason we are comforted by the fact that the Commission in negotiating the conditions had input from those with expertise in this area other than just the merging parties. We were informed that a related rival business and the FSB were consulted. We also, during the course of the hearing, debated the proposals with the merging parties and the Commission and we are satisfied with their responses. Indeed we commend them for efforts they have made to reach a solution that both permits the merger to proceed, which will offer improved service to consumers, whilst dealing with genuine concerns about future competition in this market.

40] The Tribunal is therefore of the view that the conditions sufficiently address the competition concerns raised by the Commission and by third parties.

41] Accordingly, the above merger is approved with conditions.

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**N Manoim**

03 June 2011  
**DATE**

**Y Carrim and A Wessels concurring.**

Tribunal Researcher: Songezo Ralarala

For the merging parties: P McNally S.C. instructed by Webber Wentzel  
Attorneys

For the Commission: Fergus Reid, Genna Robb, Andrew Sylvester and  
Maarten van Hoven