

SOUTH AFRICA / JUDGMENT

Ardagh Group S.A v Consol Holdings Proprietary Limited (LM132Dec21) [2022] ZACT 96 (12 May 2022)

[2022] ZACT 96

COURT

Competition Tribunal

BEFORE

Yasmin Carrim, Sha'ista Goga, Andreas Wessels

CASE / FILE NUMBER

LM132Dec21

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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM132Dec21

In the matter between:

ARDAGH GROUP S.A

Acquiring Firm

and

CONSOL HOLDINGS PROPRIETARY LIMITED Target Firm

Panel: Yasmin Carrim (Presiding Member)

Sha'ista Goga (Tribunal Member)

Andreas Wessels (Tribunal Member)

Heard on: 28

April 2022

Order issued on: 29 April 2022

Reasons

issued on: 12 May 2022

REASONS

FOR DECISION

[1] On 29 April 2022, the Competition Tribunal (“Tribunal”) conditionally approved the acquisition by Ardagh Group S.A (“Ardagh”) of 100% of the issued shares in Consol Holdings Proprietary Limited (“Consol”).

[2] The reasons for the conditional approval follow.

Parties to the Transaction and their activities

Primary Acquiring Firm

[3] The primary acquiring firm is Ardagh a private company registered in Luxembourg. Ardagh is the holding company of the Ardagh group of companies. Ardagh is indirectly owned by ARD Holdings S.A (“ARD Holdings”). The majority shareholdings in ARD Holdings are held by Yeoman Capital S.A holding 34% and Paul Coulson holdings 25%.[1]

[4] Ardagh, inter alia, manufactures glass packaging (such as beverage bottles and glass jars) and metal packaging products. The glass packaging business also includes an engineering business which sells glass manufacturing equipment (through its subsidiary Heye International GmbH (“Heye”) and the sale of glass moulds (through its subsidiary UniMould GmbH (“UniMould”).

Primary Target Firm

[5] The primary target firm is Consol a firm incorporated in accordance with the laws of South Africa. The shareholding in Consol is held by Brait Private Equity, Old Mutual Life Assurance Company South Africa Limited, Sanlam Life Insurance Limited, HarbourVest Private Equity Fund, The Public Investment Corporation SOC Limited (Government Employee Pension Fund) and [...] [...].

[6] Consol is a manufacturer and supplier of glass packaging for the food and beverage industries including the beer, alcoholic beverage, wine, fruit juice, soft drinks, mineral water, and spirits industries, as well as for pharmaceuticals and cosmetics industries. Consol also has a small retail presence, supplying (empty) glass containers to various retailers for sale to consumers. Its retail products also include branded water bottles.

[7] Consol has operations throughout South Africa and operates four manufacturing facilities with 11 furnaces and 29 production lines. These four glass manufacturing plants are in Bellville, Western Cape, and Clayville, Nigel, and Wadeville, Gauteng. Consol operates two glass waste processing plants at the Bellville and Clayville facilities from which it processes most of the cullet requirements.

[8] In addition, Consol owns and operates a silica sand mine to supplement / ensure adequate supply of silica sand (the main raw material input) for its glass manufacturing facilities.

- [9] Consol also has subsidiaries and glass manufacturing facilities operating in Nigeria, Kenya, and Ethiopia. Ardagh will thus also acquire (indirect) control over these other African operations.

Proposed Transaction

- [10] The proposed transaction is an international transaction and is notifiable in 4 (four) jurisdictions including South Africa. To date, the proposed transaction has been approved without conditions in Kenya and Nigeria, the filing to Ethiopia is pending.[2]
- [11] In terms of the proposed transaction before the Tribunal, Ardagh intends to acquire 100% of the issued shares in Consol. Post-merger, Ardagh will have sole control over Consol.

Competition Assessment

- [12] The Commission assessed the effect of the proposed merger on the following markets: The upstream international market for the manufacturing and supply of glass equipment and the downstream market for the manufacturing and supply of glass packaging products can also be defined narrowly according to the targeted customers e.g., Food market focusing on wide mouth jars or glass and beverage market looking at narrow mouth bottles.
- [13] The Commission considered the activities of the merging parties and found that there is a horizontal and vertical overlap between their activities.
- [14] The horizontal overlap is in respect of the supply of glass packaging products in South Africa as the merger parties supply glass packaging products in South Africa. However, the Commission found that Ardagh does not have any manufacturing facilities in South Africa and as such the glass packaging supply in South Africa is limited to the exportation by Ardagh to its main customer, [...].
- [15] The vertical overlap arises because Ardagh, through its German-based subsidiary Heye, has supplied glass manufacturing equipment to Consol. Consol used the glass manufacturing equipment procured from Heye to produce glass packaging products in South Africa. There is no local supplier of glass manufacturing equipment in South Africa, and these have to be imported by a specific customer.

Accordingly, the Commission found that the transaction was unlikely to raise customer foreclosure concerns because all glass manufacturing equipment are imported by the relevant customer into South Africa.[3]

- [16] The Commission concluded that the proposed transaction does not substantially prevent or lessen competition in any relevant market. We concur with the findings.

Third Party Concerns

- [17] During its investigation, the Commission received several concerns from competitors and customers in the market the merging parties are active in. The concerns raised related to, inter alia, the fact that Ardagh might stop producing wide jar bottles or food jars in favour of

narrow neck amber or green beverage bottles and this will affect customers food supply. Further concerns raised were that the proposed transaction will result in the elimination of a potential competitor and that Ardagh could have easily come in as a greenfield entry because of its financial muscle and wide footprint. Moreover, Ardagh could potentially shorten the South African market, given its size, to stimulate and substitute their supply with imports from their international plants leading to potentially heighten barriers to entry into this market and distort competition because of predatory pricing which could result in serious constraints in the local market.

- [18] In response to the concerns raised, the merging parties submitted that the food jar production is a significant part of the target firms' business revenue which Ardagh would like to retain.[4] Therefore, the concern that it will cease to supply food jars is unfounded. The merging parties subsequently agreed to the imposition of a condition in which they commit to continue with the production of food jars for a period of 7(seven) years post-implementation of the proposed transaction.
- [19] Regarding the removal of a potential competitor, the merging parties submitted that the proposed transaction will not result in a removal of a potential competitor, and it will not have the ability to predate, as Ardagh has less than 1% market share in South Africa and had no intention of investing in a greenfield manufacturing plant due to very high barriers to entry. Therefore, it will step into the shoes of Consol, post-merger.[5]
- [20] The Commission was satisfied with the merging parties' response to the concerns raised and concluded that the transaction will not result in the removal of a potential competitor.

Public Interest Assessment

Effect on Employment

- [21] The merging parties submitted that the proposed transaction will not result in any job losses or retrenchments.
- [22] The Chemical, Energy, Paper, Printing, Wood, and Allied Workers' Union ("CEPPWAWU") raised concerns about job security and employment conditions. These concerns were addressed by the merging parties upon meeting with CEPPWAWU and confirmed by the Commission.[6] The Commission and the merging parties agreed to a condition not to retrench any employees for 2 (two) years and the Commission shared the employment condition with the relevant trade unions. None of the trade unions raised concerns regarding the condition except CEPPWAWU. [7]

- [23] CEPPWAWU submitted that the moratorium should be extended to 5 (five) years as the merger will not result in job losses in the first place.[8] The 2 (two) year period is very short and imposing a shorter period indirectly gives the merged firm freedom to retrench employees after the expiry of the period.[9] The merging parties submitted that CEPPWAWU's request was not in line with commitments given in this regard nevertheless they are amenable to extending the moratorium to 3 (three) years in total.

Effect on Spread of Ownership

- [24] The Commission also assessed the effects of the merger on greater spread of ownership.
- [25] The parties indicated that of the 10.6% shareholding held by Sphere, 6.04% is attributable to Historically Disadvantaged Persons ("HDP") shareholders. Thus, Consol has a direct B-BBEE shareholding of 10.79% on a flow-through basis held through various shareholders as follows: Sphere 6.04%, Employee Share Ownership Plan ("ESOP") 4.49%, and management shareholders 0.26%.
- [26] The Commission noted that, Sphere and the Management shareholders will sell their shares in Consol to Ardagh. The ESOP will remain unaffected.
- [27] The Commission raised concerns that the proposed transaction will have a negative effect on the promotion of greater spread of ownership, as it will dilute the HDP shareholding held in Consol. The merging parties submitted that they intend to implement an additional ESOP post-merger to ensure that Consol maintains its direct B-BBEE shareholding percentage of approximately 11% in aggregate on a flow through basis. The New ESOP shall be established to hold 7 % of the issued shares of Consol.[10] The merging parties agreed to the imposition of a condition in this regard. The proposed transaction will therefore not have any negative effect on ownership by HDPs as it will restore the pre-merger levels.
- [28] The Commission also shared the ESOP condition with the trade unions. The National Union of Mineworkers ("NUM") raised certain clarity seeking questions regarding the design of the ESOP.[11] The merging parties have since provided the required clarity, which NUM was satisfied with. CEPPWAWU indicated that it was satisfied with the ESOP condition.

Effect on particular industrial sector or region

- [29] The merging parties submitted that the proposed transaction will not have any negative effect on Consol's local procurement as the majority of Consol's inputs are locally procured. Where goods are locally available, it is not generally economically efficient for Consol to import goods from abroad. The merging parties further submitted that Consol's existing support of local procurement will continue following implementation of the Proposed transaction.[12]
- [30] The merging parties further submitted that the proposed transaction will not reduce glass packaging manufacturing capacity in South Africa. This is because the merging parties committed to an investment to increase manufacturing capacity by recommissioning the

construction of the N2 Furnace Project, which will create 180 direct jobs. Approximately [...] months after the finalisation of the N2 Furnace, they will commence construction of the N3 Furnace, which will result in the creation of another additional 140 direct jobs. The merging parties submit that the construction of the N3 Furnace constitutes a significant additional investment in glass manufacturing capacity in South Africa that Ardagh is willing to undertake in the context of implementing the proposed

transaction.[13]

[31] Ardagh will continue to rely on the skills and knowledge already within Consol, as the proposed transaction will facilitate a transfer of additional skills and knowledge from Ardagh to Consol and its employees. [14]

[32] The merging parties further committed that Ardagh is focused on ensuring that the local communities surrounding its facilities are uplifted through its work and sustainability initiatives, particularly in the economic aftermath of the Covid-19 pandemic.

The ability of national industries to compete in international markets

[33] The merging parties submitted that the vast majority of Consol's production in South Africa is satisfied by local demand and

approximately [...] of Consol's South African production is exported from South Africa to neighbouring countries. Furthermore, the glass packaging is heavy and fragile, which results in high logistics and handling costs, and import taxes may also apply. The import of glass packaging is economically feasible only in circumstances where the product is sourced from countries with low production costs. As a result, the proposed transaction will not lessen the level of exports from South Africa and will therefore have a neutral effect in relation to the ability of the South African glass packaging manufacturing industry to compete internationally[15]

Effect of a merger on the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive

[34] The merging parties submitted that the proposed transaction will have no negative impact on the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive. Moreover, Ardagh will maintain Consol's existing glass recycling initiatives which facilitate and result in socio- economic, supplier and enterprise development and promote

environmental sustainability.[16]

- [35] Ardagh committed to supporting glass recycling, increasing glass recycling rates, diverting glass cullet from landfills, and assisting informal glass collectors. Ardagh will ensure that Consol continues to purchase recycled glass or cullet for use in its operations in the ordinary course, with preference given to HDPs, provided that the cullet is able to be procured on commercially reasonable terms (particularly with respect to quality standards, availability, and reasonably competitive commercial terms).

The Hearing

- [36] The Tribunal identified some inconsistencies in the draft conditions proposed by the merging parties and the Commission regarding duration of the monitoring period. In response, the Commission agreed that the duration of monitoring food jars was longer than the period covered in the monitoring clause. The Commission submitted that it would not have any difficulty with amending the monitoring period to align with the duration of the food jar condition.
- [37] In relation to the implementation of the ESOP to be established in line with the design principles, the Tribunal questioned why the required engagement process between the parties and the Commission was not included in the conditions and only appeared in the monitoring clauses. In response, the Commission and the merging parties were amenable to amending the clauses in relation with the Tribunal's request.

Other public interest concerns

- [38] The proposed transaction raised no other public interest concerns.

Conclusion

- [39] We find that the proposed transaction is unlikely to substantially prevent or lessen competition in any relevant market. The transaction however was approved on the conditions agreed to by the merging parties.

Date: 12 May 2022

Ms Yasmin Carrim

Ms Sha'ista Goga and Mr Andreas Wessels concurring.

Tribunal case managers: Makati Seekane and Sinethemba Mbeki.

For the merging parties: Adv C Avidon, instructed by Judd Lurie of Bowmans and Martin Versfeld and Shawn van der Meulen of Webber Wentzel Attorneys.

For the Commission: Busisiwe Ntshingila and Themba Mahlangu.

- [1] Ardagh does not have any shareholdings by Historically disadvantaged Persons. In addition, Ardagh does not have any Employee Share

Ownership Plan.

- [2] Merger Recommendations, p4 of 78, para [2].
 - [3] Merger Recommendations, p11 of 78, para [31].
 - [4] Merger Recommendation, p41 of 78, para [86].
 - [5] Merger Recommendation, p41 of 78, para [86].
 - [6] Merger Record, p950 of 947.
 - [7] Merger Recommendation, p56 of 78, para [146].
 - [8] Merger Recommendation, p56 of 78, para [146].
 - [9] Merger Record, p942 of 947.
 - [10] Merger Recommendations, p57 of 78, para [149].
 - [11] Merger Record, p944 of 947.
 - [12] Merger Recommendations, p60 of 78, para [163].
 - [13] Merger Recommendations p59 of 78, para [157], para [158] and para [159]. See also Annexure A: Conditions.
 - [14] Merger Recommendations, p61 of 78, para [170] and para [170].
 - [15] Merger Recommendations, p63 of 78, para [176] and para [177].
 - [16] Merger Recommendations, p63 of 78, para [179].
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