

SOUTH AFRICA / JUDGMENT

BidAir Cargo Proprietary Limited v Interloc Freight Services Proprietary Limited (LM201Mar23) [2023] ZACT 70; [2024] 1 CPLR 4 (CT) (1 November 2023) [2023] ZACT 70

COURT

Competition Tribunal

BEFORE

Jerome Wilson SC, Andreas Wessels, Imraan I.
Valodia

CASE / FILE NUMBER

LM201Mar23

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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM201Mar23

In the matter between:

BidAir Cargo Proprietary Limited

Acquiring Firm

And

Interloc Freight Services Proprietary Limited

Target Firm

Panel: Jerome Wilson SC (Presiding Member)

Andreas Wessels (Tribunal Panel Member)

Imraan I. Valodia (Tribunal Panel Member)

Heard on: 22

August 2023

Last submission on: 21 September 2023

Order issued on: 04 October 2023

Reasons

issued on: 01 November 2023

REASONS

FOR DECISION

Approval

- [1] On 4 October 2023, the Competition Tribunal (“Tribuna”) conditionally approved the large merger in terms of which BidAir Cargo Proprietary Limited (“BidAir”) will acquire 100% of the issued share capital of Interloc Freight Services Proprietary Limited (“Interloc”) (the “proposed merger”).

Parties to the merger and their activities

Primary acquiring firm

- [2] The primary acquiring firm is BidAir, a wholly-owned subsidiary of is Bidvest Services Holdings Proprietary Limited (“Bidvest Services”) ultimately controlled by Bidvest Group Limited (“Bidvest”) Bidvest services is, a publicly traded firm.
- [3] BidAir, all the firms controlling it, and all the firms controlled by those firms, will be referred to below as “Bidvest”.
- [4] Of relevance for purposes of this merger assessment logistics activities, specifically (i) the provision of full freighter air cargo services logistics of domestic long distance road transportation services [...].

Primary target firm

- [5] The primary target firm is Interloc. Interlocs shares by Bridges World Wide Proprietary Limited, and as to 46.15% by Mr Patrick Dlamini.
- [6] Interloc carries on business as a provider of consolidation services to courier companies in relation to both domestic air freight and road freight in South Africa. (such as air freight or linehaul) to a common destination.

Proposed merger and rationale

Transaction

- [7] In terms of the proposed merger, Bidvest will acquire the entire issued share capital of Interloc.

Rationale

- [8] The sellers explained that, from their perspective, the transaction provides the means to realise their investment, and to undertake other business activities.

- [9] Bidvest explained that it wishes to expand its business, and to diversify its revenue streams, by offering its customers not only air cargo services but also road freight consolidation services. Bidvest stated that this is necessary in the light of the continued decline of domestic air cargo in South Africa, primarily as a result of increased costs.

Relationship between the parties

- [10] In their merger filing, the merging parties described their relationship as being one of competitors in an “express delivery services” market.
- [11] However, having considered the business activities of the merging parties, the Competition Commission found that their relationship was vertical and not horizontal in nature. In particular, the Commission found that, whereas Bidvest is a supplier of domestic air cargo services and road transportation (linehaul) services, Interloc provides consolidation services in respect of both domestic air freight and road freight in South Africa. Bidvest is thus a supplier of inputs into the consolidation services provided by Interloc.

Relevant markets

Air Cargo Services

- [12] The Commission found that domestic air cargo services comprise of belly cargo and full freighter services. ‘Belly cargo’ airlines whereas refers to the transportation of cargo on full freighters are airplanes that are dedicated to the transportation of cargo only (i.e., they do not carry passengers). In South Africa, domestic belly cargo is provided only by domestic passenger airlines such as Airlink, Cem Air, FlySafair and South African Airways. These domestic passenger airlines offer belly cargo services during daytime hours only. Bidvest is the only domestic full freighter air cargo service provider in South Africa. These services are only available at night time and offer an overnight air cargo service between major cities in South Africa.
- [13] In assessing the relevant product market for the provision of air cargo services, the Commission had regard to European case precedent which has defined a broad market for air transport of cargo encompassing all types of air cargo carriers and including all kinds of transported goods.[1] The Commission proceeded to assess the impact of the merger in a broad market for the provision of domestic air cargo services without reaching a definitive view in that regard.
- [14] As regards the geographic scope of this market, the Commission found that the domestic air cargo services provided by Bidvest and domestic airlines are to/from the major cities within South Africa only (i.e., Johannesburg, Durban, Cape Town, Gqeberha, Bloemfontein and East London). Therefore, again without reaching a definitive view, the Commission assessed the impact of the proposed transaction on the provision of domestic air cargo services within South Africa.

Linehaul Services

[15] In assessing the relevant product market for the provision of linehaul services, the Commission had regard to local case precedent such as Super Group Trading (Pty) Ltd / Lieben Logistics,[2] in which the Tribunal did not conclude on whether there is a broad market for the transportation of all types of goods by road, or narrower markets based on the types of goods being transported and/or the different types of vehicles required in road transportation. The Commission assessed the impact of the merger in a broad market for the provision of linehaul services without reaching a definitive

conclusion in that regard.

[16] As regards the geographic ambit of this market, the Commission found that Bidvest conducts linehaul services both nationally and internationally, and therefore considered a national market for the provision of linehaul services.

Freight Consolidation Services

[17] In assessing the relevant product market for the provision of freight consolidation services, the Commission considered that the provision of consolidation services for domestic freight is a broad product market because Interloc and its competitors provide consolidation services for both air cargo and linehaul transport modes. Therefore, again without reaching a definitive view, the Commission assessed the impact of the merger on the broad market for the provision of freight consolidation services.

[18] As regards the geographic ambit of this market, and again without reaching a definitive view, the Commission assessed the impact of the merger on the provision of freight consolidation services nationally given that Interloc and its competitors provide freight consolidation services nationally.

Competition assessment

[19] Having regard to the vertical relationship between the merging parties, the Commission assessed whether the merger is likely to give rise to any foreclosure concerns.

Domestic air cargo services and provision of consolidation services

Input foreclosure

[20] The Commission considered whether competitors of Interloc (i.e., other consolidators) are likely to be foreclosed from accessing air cargo services post- merger.

[21] The Commission found that, pre-merger, the vast majority of air cargo is provided on an overnight full freighter basis, with the sole provider of full freighter services being Bidvest. The Commission found, however, that courier companies can also procure belly cargo directly from domestic passenger airlines such as South African Airways, CemAir, Airlink and FlySafair. The Commission therefore found that the proposed merger will not change the number of alternatives that are available for the provision of domestic air cargo services.

- [22] The Commission engaged with TransitAir, the only consolidator of domestic air freight in South Africa other than Interloc. TransitAir indicated that, given the significant and continued decline in demand for domestic air cargo, and the established relationships that TransitAir has with a number of smaller courier companies (who are not large enough to contract directly with Bidvest for the provision of air cargo space) it would not be commercially prudent for Bidvest to foreclose TransitAir from access to its air cargo services.
- [23] The Commission concluded on this basis that it is unlikely to be commercially viable for the merged entity to engage in an input foreclosure strategy post- merger against competing providers of consolidation services in respect of air cargo.

Customer foreclosure

- [24] The Commission also considered whether, post-merger, the merged entity could foreclose passenger airlines providing belly cargo services from accessing a customer (i.e., Interloc) and thereby prevent such airlines from being able to continue competing with Bidvest in the upstream market for the provision of air cargo services.
- [25] The Commission found in this regard that domestic passenger airlines are not confined to selling their air cargo services to consolidators such as Interloc, as they frequently deal directly with large courier companies who do not require consolidation services. The Commission also found that, because neither Bidvest nor Interloc provide daytime air cargo services, they will continue to procure belly cargo space directly from domestic airlines post-merger as they are doing currently.
- [26] Based on the above, the Commission concluded that customer foreclosure in relation to Bidvest's competitors in the provision of air cargo services is unlikely to occur post-merger.

Linehaul services and provision of consolidation services

- [27] The Commission considered whether the merged entity would, post-merger, be likely to foreclose other consolidators from access to linehaul services required for providing consolidation services for road freight.
- [28] The merging parties submitted that Bidvest has a national market share of less than 1% in the market for linehaul services. The Commission also found that Bidvest is not a significant supplier of linehaul services, and that there are numerous alternative providers of linehaul services such as Bakers Transport, Super Group, Imperial Logistics, Barloworld, Value Logistics Grindrod, Unitrans, Crossroads, One Logix, Ni Da, Triton Express, Sequence Logistics, DPD Laser and many others.
- [29] The Commission therefore concluded that input foreclosure concerns are unlikely post-merger insofar as consolidation services for road freight are concerned.

- [30] The Commission also considered whether, post-merger, the merged entity would be likely to foreclose other linehaul service providers from accessing a customer (i.e., Interloc) and thereby prevented such providers from continuing to compete with Bidvest in the linehaul services sector.
- [31] The Commission found in this regard that Interloc is not a significant customer of linehaul services in South Africa, and that linehaul service providers have numerous other customers, including suppliers of mining, agriculture, industrial and fast moving consumer goods and many other customer types.
- [32] The Commission therefore concluded that the merger is unlikely to result in any customer foreclosure as regarding competing providers of linehaul services in South Africa.

Third party submissions

- [33] The Commission received concerns from courier companies such as Value Logistics and RTT/ Courier IT that the merger will reduce the number of alternatives available to them insofar as air cargo services are concerned.
- [34] However, the Commission dismissed these concerns on the basis that the merger would not have any impact on the number of providers of air cargo services, namely Bidvest in relation to overnight full freighter services and domestic passenger airlines in relation to daytime belly cargo services. The Commission also referred to its finding that the merger is unlikely to raise any input foreclosure concerns in relation to competing providers of consolidation services for air cargo.
- [35] The Commission therefore concluded that the concerns raised by third parties did not require any further consideration.

Public interest assessment

Effect on employment

- [36] The merging parties submitted in their merger filing that the proposed merger will have no adverse effect on employment, and that there will be no employment concerns arising post-merger.
- [37] [...]
- [38] The Commission contacted the trade unions and employee representatives of the National Interloc. Both Bidvest and Interloc's employees are represented by Union of Metalworkers of South Africa ("NUMSA"), which did not raise any concerns regarding the proposed merger. However, the employee representative of Interloc indicated that Interloc's employees were concerned about retrenchments post-merger.

[39]

Based on the merging parties submissions, the Commission concluded that the proposed merger will promote employment on the grounds [....].

Effect on the spread of ownership

- [40] The Commission found that Bidvest has 30.72% of its shareholding held by HDPs while Interloc has 46% of its shareholding held by HDPs by virtue of the shareholding of Mr. Dlamini. Consequently, the merger will result in a dilution in HDP ownership at Interloc by approximately 15%.
- [41] The Commission raised this concern with the merging parties and requested them to consider an HDP transaction or employee share ownership programme (“ESOP”) given this dilution.
- [42] Bidvest responded that it had taken a strategic decision not to implement any ESOP or HDP transaction at any of its operations. It also stated that the value of Interloc (relative to Bidvest) did not justify the cost associated with implementing an ESOP or HDP transaction at the merged entity or at Interloc, post-merger.
- [43] The merging parties also submitted that the dilution brought about by the merger is not substantial and that, given that Bidvest has multiple HDP shareholders, there will be a broader spread of HDP ownership in Interloc post-merger than there is pre-merger.
- [44] The merging parties also tendered various commitments as conditions to the approval of the merger, namely sponsoring an HDP to obtain a commercial pilot supplier support, and learnerships for HDP youth. The aggregate value of these commitments is [....].
- [45] The Commission considered that, viewed holistically, the remedies tendered by the merging parties sufficiently addressed the public interest concerns raised by the merger, and therefore recommended that the proposed merger be approved subject to the commitments tendered by the merging parties.

The Tribunal’s assessment

- [46] As regards the Commission’s public interest analysis, the Tribunal does not believe that there is sufficient evidence to accept merging parties submissions that [....].
- [47] The representatives of NUMSA present at the hearing did not raise any concerns and given the merging parties undertaking that the merger will not result in any job losses, we accept that the merger will not have a negative employment effect.[3]
- [48] The Tribunal also agrees with the Commission’s conclusion that , on the facts of this case, the public interest commitments made by the merging parties are adequate.

- [49] However, insofar as is concerned, the Tribunal was not satisfied that the Commission had sufficiently considered the potential for input foreclosure against competing providers of consolidation services for air freight. As noted above, various third parties also raised concerns in this regard.
- [50] It is common cause in this regard that Bidvest is the only provider of overnight full freighter cargo services in South Africa, and that Interloc is one of two providers of consolidation services for air freight (the other provider being TransitAir). In view, this raises an input foreclosure concern, namely the risk that, post-merger, Bidvest would leverage its monopoly position as a provider of overnight full freighter services to foreclose competitors of Interloc in the downstream consolidator market either by refusing to deal with competing consolidators at all, or by affording Interloc preferential terms of trade.
- [51] As indicated above, the Commission appears to have been comforted by two main considerations, namely (i) that consolidators can also obtain air cargo services from airlines providing daytime belly cargo services, and (ii) that the merged entity would not have an incentive to foreclose competitors of Interloc because of the declining demand for air cargo services in South Africa.
- [52] However, in our view, these considerations do not adequately mitigate the input foreclosure concerns raised by the proposed merger.
- [53] As regards the first factor, it seems clear from the information provided by customers that consolidators (and courier companies) do not regard day-time belly cargo services as fully substitutable with overnight full freighter services. Not only do they operate at different times, but the availability of belly cargo space on passenger airlines is more limited and less reliable than that on It is significant in this regard that approximately 90% of all air cargo is transported by freighter service, and only approximately 10% is transported by day-time passenger airlines. Therefore, these services appear to be differentiated and given the relatively limited supply of day-time belly cargo services in South Africa it seems likely that competing consolidators would not regard day-time belly services in the event that Bidvest pursued an input foreclosure strategy post- merger.
- [54] As regards the second factor relied on by the Commission, we do not believe there is sufficient evidence to conclude that the decline in demand for air cargo services that is currently being experienced in the South African market will necessarily persist indefinitely into the future, especially given the effects of the Covid 19 pandemic and other current world events that might be influencing the current costs of, and demand for, domestic air cargo services. Furthermore, the mere fact that there is declining demand for such services would not, in our view, necessarily dissuade Bidvest from seeking to direct such consolidator traffic as there is from competitors such as TransitAir to Interloc. We also do not share protect it from any input foreclosure strategy that may be pursued by Bidvest post-merger.

- [55] In order to interrogate these concerns further, the Tribunal invited a number of third parties to attend a merger hearing on 22 August 2023 at which the Commission and the merging parties were also afforded an opportunity to provide further evidence, and make further submissions, on the concerns raised by the Tribunal.
- [56] Having considered the further evidence provided, and submissions made, at the merger hearing, the Tribunal remained concerned about the input foreclosure concerns raised by the proposed merger, and therefore requested the Commission and the merging parties to formulate conditions that would adequately mitigate this risk.
- [57] This process eventually resulted in the tender by the merging parties of an additional merger condition that, for a period of five years from the implementation date of the merger:
- [58] The Tribunal was satisfied that, on the facts of this case, these conditions adequately address the vertical concerns raised by the merger, and the Commission confirmed that it would be in a position to monitor and enforce them.
- [59] The merging parties conduct after the end of the five year period will still be subject to scrutiny under the prohibited practice sections of the Competition Act.

Conclusion

- [60] For the reasons set out above, the Tribunal concludes that, in light of the amended conditions that have been tendered by the merging parties, the proposed transaction does not raise significant competition or public interest concerns, and the Tribunal therefore approves the proposed transaction subject to the amended conditions set out in Annexure A hereto.

Date 01 November 2023

Adv. Jerome Wilson SC

Concurring: Prof. Imraan Valodia and Mr. Andreas Wessels

Tribunal case manager : Baneng Naape and Ofentse Motshudi

For the merging parties : Veronica Cadman and Vaschel Naidoo of MVR

Attorneys

For the Commission : Mishkah Abdool Sattar and Wiri Gumbie

- [1] Delta / Air France-KLM / Virgin Group / Virgin Atlantic (Case No: M.8964, dated 12 February 2019), paras 156- 161.
- [2] Super Group Trading (Pty) Ltd and Lieben Logistics (Case No: LM009Apr19), at para 20.
- [3] Also see Transcript page 6.

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