

SOUTH AFRICA / JUDGMENT

**Bucyrus Africa Underground (Pty) Ltd and
Another v Bucyrus Mining Services and Mining
Services Business Conducted by Eqstra NH
(Pty) Ltd (29/LM/Mar12, 39/LM/Apr12) [2012]
ZACT 54; [2012] 2 CPLR 433 (CT) (16 July 2012)
[2012] ZACT 54**

COURT

Competition Tribunal

BEFORE

Norman Manoim, Andreas Wessels, Takalani
Madima

CASE / FILE NUMBER

29/LM/Mar12, 39/LM/Apr12

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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: 29/LM/Mar12

39/LM/Apr12

(014753)

In the matter between:

Bucyrus Africa Underground (Proprietary) Limited and

Barloworld South Africa (Pty) LimitedAcquiring Firms

And

Bucyrus Mining Services and Mining Services Business

Conducted by Eqstra NH (Pty) LtdTarget Firms

Panel : Norman Manoim (Presiding Member), Andreas Wessels (Tribunal Member)

Takalani Madima (Tribunal Member)

Heard on : 27 June 2012

Order issued on : 27 June 2012

Reasons

issued on : 16 July 2012

Reasons for Decision

Approval

On 27 June 2012 the Competition Tribunal (“Tribunal”) unconditionally approved the two large mergers between:

Bucyrus Africa Underground (Proprietary) Limited (“Bucyrus”) and the Mining Services Business conducted by Eqstra NH (Pty) Ltd (“Eqstra”); and

Barloworld South Africa (Pty) Limited (“Barloworld”) and the Bucyrus Mining Services Business.

These two separate but related transactions were filed at the Competition Commission (“Commission”) by the merging parties on 20 March 2012 and 2 April 2012 respectively.

In light of the interrelated nature of the above transactions, the Commission filed one Referral with the Tribunal (in relation to both transactions) and the Tribunal has issued one set of reasons.. Our reasons for approving the transactions are set out below.

The parties to the transactions

The acquiring firm in the first transaction is Bucyrus¹ which trades as Caterpillar Global Mining LLC (“CGM”) and is a wholly owned subsidiary of Caterpillar Inc (“Caterpillar”),² a firm incorporated in terms of the laws of the United States of America. In South Africa Caterpillar controls Caterpillar Africa (Pty) Ltd, CGM, FG Wilson (Pty) Ltd and Electro-Motive Diesel and Locomotive Company (Pty) Ltd.

The target firm in the first transaction is the Mining Services Business division of Eqstra. In accordance with the acquisition by Caterpillar,³ Bucyrus had entered into a distribution agreement with the division of Eqstra to continue distributing and providing after-sales services in relation to certain Bucyrus branded products such as drilling equipment, hydraulic excavators and mining trucks. Bucyrus is therefore essentially buying itself out of this distribution agreement.

The primary acquiring firm in the second transaction is Barloworld South Africa, a wholly owned subsidiary of Barloworld (Proprietary)

Limited.⁴ Barloworld is incorporated in term of the laws of the Republic of South Africa and is a Johannesburg Stock Exchange listed multinational industrial brand management company operating in 27 countries with its headquarters in South Africa.

The first target firm in the second transaction is the Mining Services Business which was conducted by Eqstra and acquired by Bucyrus as per the first transaction. The second target firm is made up of (i) the distribution service business of Bucyrus’ surface mining equipment (“Mining Equipment Sales”); and (ii) the underground mining equipment (the “Support

Business”). The above firms are being acquired by Barloworld⁵ and through this transaction Barloworld will be the sole provider of distribution and support services for Bucyrus and Caterpillar branded products in South Africa.

Description and rationale for the transactions

Background to the transactions

Bucyrus and Caterpillar were each involved in prior merger transactions related to the present merger. Bucyrus acquired the mining business of Terex Corporation (“Terex”) in 2010⁶ and Caterpillar acquired Bucyrus International in 2011.⁷ The current transactions are the last phase of the Caterpillar / Bucyrus merger. After the 2011 merger Bucyrus continued to distribute its own products with the exception of those it acquired from Terex as they were distributed by Eqstra and Caterpillar had not yet acquired control of these two classes of products.

Description of the transactions

The first part of the transaction, as per the Sale of Business Agreement,⁸ entails Bucyrus acquiring the Mining Services Business conducted by Eqstra as an indivisible going concern.

In the second part of the transaction Barloworld will acquire the Mining Equipment Sales and Support Business (currently conducted by Bucyrus) and the Mining Services Business (which is being acquired by Bucyrus from Eqstra in the first part of the transaction).

Post-merger, all Caterpillar products originating from Eqstra, Bucyrus and Caterpillar itself will be distributed solely by Barloworld.

The Rationale for the transactions

Bucyrus which trades as Caterpillar Global Mining wishes to ensure that its mining equipment customers can procure all their required equipment and related support services from its dealer network which is Barloworld.

The sole purpose of Mining Services Business is to distribute Bucyrus branded products such as drills, hydraulic excavators and shovels as well as mining trucks. Bucyrus and Eqstra entered into negotiations to terminate the distribution agreement between them before the termination date in December 2013. Eqstra requires Bucyrus to acquire Mining Services Business because the division becomes redundant without the distribution agreement.

Barloworld, which has been Caterpillar’s appointed dealer network since 1927 is entering into this transaction due to Caterpillar broadening its product offering through its acquisition of Bucyrus in the 2011 transaction. Barloworld seeks to create a one stop shop for all Caterpillar’s mining equipment customers by distributing all the products offered by Caterpillar including those acquired through the Caterpillar / Bucyrus transaction.

Competition Analysis

Because of the interdependence of the above transactions the Commission analysed them as a whole.

The activities of the parties

Bucyrus supplies surface and underground mining equipment and also provides after-sales services for mining related equipment such as draglines, electric mining shovels, highwall mining equipment, hydraulic excavators, high capacity surface mining trucks and other underground mining equipment.

The Mining Services Business conducted by Eqstra distributes and provides after-sales services in relation to the Bucyrus branded products such as drills (rotary blast hole and track drills), hydraulic excavators and shovels as unit rig surface mining trucks.

Lastly, Barloworld distributes leading global brands and provides fleet management, product support and logistics solutions in 38 countries. Brands distributed by Barloworld include inter alia Caterpillar, Avis, Mercedes Benz, BMW, General Motors and Hyster.

Relationship between the activities of the parties / products

Barloworld's activities overlap horizontally with those of the target firm Mining Services Business in the surface mining trucks market.

Bucyrus and Mining Service Business' activities overlap horizontally in the rotary blast hole drills market but the merged entity previously acquired the manufacturing rights and assets in respect of these products and is now acquiring the distribution rights and assets.

There is no overlap between the activities of Barloworld and Bucyrus.

The Commission concluded that the relevant markets to be analysed for the proposed transaction are the national markets for, firstly, the manufacturing of rotary blast hole drills and, secondly, the market for manufacture and supply of surface mining trucks.

Market background

Some of the equipment used in the mining industry is also used in construction hence these markets are grouped together. Players in the market for the manufacture and supply of equipment include multinational companies such as Atlas Copco, Joy Global Africa, Caterpillar, Volvo, John Deere, Bell Equipment, Komatsu, Kawasaki, Hyundai and Hitachi.

Multinationals such as Komatsu, Liebherr, Joy Global and Hitachi undertake their own distribution in South Africa and are integrated from manufacturing to after-sales services. Customers in the above markets include AngloGold Ashanti, Xstrata, Exxaro, BHP, De Beers and Sasol Mining. Customers submitted that after-sales services play a crucial role in the above market⁹ and hence multinationals have established local branches to fulfil that necessity.

Market shares and market concentration

The purchase of mining equipment is generally done through a bidding or tender process¹⁰ where customers set out a tender for the products they require and the market participants then make offers to supply the products at their various prices. As stated at the hearing, if a firm loses out on the bidding process for any one year this can lead to a major shift in market share. Market shares are therefore highly volatile and need to be measured over a five year period (for example) in order to give a more accurate reflection. The Commission consequently determined market shares over a five year period for this analysis.

In the market for surface mining trucks,¹¹ Barloworld will be a market leader with a 51% post-merger market share, but notably Bucyrus and Mining Services Business have not sold any surface mining trucks in the past two years. The market share accretion is therefore low for the period reviewed.

In the market for rotary blast hole drills post-merger Barloworld will have a 15% market share and is a new entrant into this market as it is not currently active therein.

Barriers to entry into the above markets are very high. Firstly, in terms of capital costs, labour cost and secondly in terms of regulatory hurdles relating to mining related regulations and legislation.

The countervailing power of customers in the above markets is fairly high as customers are highly sophisticated businesses in their own right and procurement occurs through a bidding process and warranties and availability of maintenance and parts are also key determinants of prices and customer choice.

Furthermore, customers are unlikely to be forced into buying bundled products as there is a prevalence of diversifying products and playing distributors against each other to drive down prices through the bidding process.¹²

Conclusion on competition analysis

Competitors concerns relating to tying and bundling are unlikely to be feasible or sustainable post-merger as the customers in this market tend to spread their risk over a number of products and suppliers and generally will not depend on one supplier for all their product needs.

The Commission found that there is sufficient competition in the market and found no evidence of exclusive distributions agreements.

At the hearing, the Commission also emphasised that the market is characterized by customers with sufficient countervailing power¹³ and they prefer a mix of products and are not really amenable to tying and bundling of product ranges. This is due to the nature of their procurement process which leads to different equipment requirements being awarded to different bidders.¹⁴ For example AngloGold Ashanti uses Caterpillar mining trucks but obtains drills and other products from other competitors.

The Commission therefore found that the proposed merger is unlikely to lead to a substantial lessening or prevention of competition and recommends unconditional approval thereof.

Public Interest

The merging parties submit that they do not anticipate that any retrenchments will occur as a result of the proposed transaction as all employees are being transferred within the merging parties.

At the hearing in response to a question from the Tribunal, Mr Fitzpatrick from Barloworld stated that Barloworld anticipated a possible creation of approximately 1000 jobs being in the near future through the proposed transaction.¹⁵

Conclusion

Having considered the above facts, and bearing in mind that the above transaction are the final phases of transactions which took place in 2011, we accept the Commission's conclusions in their analysis thereof.

The above merger is therefore approved without conditions.

16 July 2012

Norman Manoim DATE

A Wessels and T Madima concurring.

Tribunal Researcher: Songezo Ralarala

For the merging parties: Lucinda Verster of Bowman Gilfillan Attorneys and

Mark Garden and Rick Van Rensburg of Edward Nathan Sonnenbergs

For the Commission: Rakgole Mokolo and Grace Mohamed

¹Bucyrus was acquired by Caterpillar through a transaction which was approved by the Commission in April 2011 see Commission Case No. 2011Jan5584.

²<http://www.caterpillar.com/> Caterpillar is a public company listed on the New York Stock Exchange.

³Footnote 1 Supra.

⁴<http://www.barloworld.com/home>

⁵Barloworld and Caterpillar's business relationship has been in existence since 1927 and Barloworld is Caterpillar's leading dealer in approximately 16 countries in Africa and Europe.

⁶Commission Case No. 2010Jan4894.

7Footnote 1 Supra.

8See page 525 of the record.

9Coal of Africa email at Record page 2386, Exxaro email at Record page 2392, Optimum Coal Holdings email at Record page 2401.

10AngloGold Ashanti email at page 2373 of the Record.

11At the hearing merging parties made submissions that suggest that there are two sub-markets in the market for surface mining trucks being firstly the market for mechanical drive trucks (Caterpillar trucks) and secondly the market for trucks powered by an electric mechanism (Eqstra trucks). The Tribunal took note of this view but we did not make a definitive ruling on the narrower markets for surface mining trucks.

12Commission's Report page 28 footnote 30.

13Transcript page 7.

14Transcript page 18.

15Transcript page 17 – 18.

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