

SOUTH AFRICA / JUDGMENT

Commercial Cold Holdings (Pty) v Sequence Logistics Holdings (Pty) Ltd (LM178JAN23) [2023] ZACT 63; [2023] 3 CPLR 38 (CT) (10 July 2023) [2023] ZACT 63

COURT

Competition Tribunal

BEFORE

Shaista Goga, Mondo Mazwai, Fiona Tregenna

CASE / FILE NUMBER

LM178JAN23

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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM178JAN23

In the matter between:

Commercial Cold Holdings (Pty) Ltd Acquiring Firm

and

Sequence Logistics Holdings (Pty) Ltd Target Firm

Panel: Shaista Goga (Presiding Member)

Mondo Mazwai (Tribunal Panel Member)

Fiona Tregenna (Tribunal Panel Member)

Heard on: 02

June 2023

Order issued on: 09

June 2023

Reasons

issued on: 10 July 2023

REASONS

FOR DECISION

Approval

- [1] On 09 June 2023, the Competition Tribunal (“Tribunal”) conditionally approved the large merger wherein Commercial Cold Holdings Proprietary Limited (“CCH”) intends on acquiring 100% of the issued share capital of Sequence Logistics Holdings Proprietary Limited (“Sequence Logistics Holdings”). Post- merger, CCH will wholly own and control Sequence Logistics Holdings.

Parties to the transaction and their activities

Primary acquiring firm

- [2] The primary acquiring firm is CCH, which is a newly incorporated entity. On implementation of the proposed transaction, CCH will be ultimately controlled by Old Mutual Limited (“OML”) (74,74%) and Bauta Logistics Limited (“Bauta”) (25.25%).
- [3] OML is a listed entity and is not controlled by any single firm or individual. OML holds its interests in CCH through the following:
- 3.1. AIIF4 General Partner Proprietary Limited (“AIIF4”) in its capacity as general partner to the African Infrastructure Investment Fund 4 Partnership (37.37%) and
- 3.2. Old Mutual Life Assurance Company (South Africa) Limited (“OMLACSA”) in respect of the pooled portfolio of assets of the Infrastructural, Developmental and Environmental Assets Managed Fund (“IDEAS”) (37.37%).
- [4] Bauta is a company registered in accordance with the laws of the Republic of Ghana. Bauta is ultimately controlled by Michael Roland Adjetei Osekereh, a Ghanaian national. Bauta was incorporated in Ghana in December 2016 to serve as a platform vehicle for Ramona Partners Limited to build a food logistics business. The Proposed Transaction is the first acquisition in this regard in the sector. Bauta does not have any activities in South Africa.
- [5] OML and Bauta and all the firms that they directly and indirectly control will collectively be referred to as the Acquiring Group.
- [6] Of relevance to this transaction is the controlling interest that the Acquiring Group has in The Logistics Group Proprietary Limited (“TLG”). TLG provides various port and rail services, warehouses, stevedoring facilities and digital transport technology.
- [7] The Acquiring group has acquired the Commercial Cold Storage Group Limited (“CCS”). CCS primarily provides bulk warehousing/primary distribution. This includes bulk frozen (between -10 to -30 degrees Celsius) and chilled (between 2 to 4 degrees Celsius) cold storage warehousing of mainly perishable products as well as related ancillary services (e.g., blast freezing, linehaul transport of products; product sorting; wrapping and strapping; labelling

and stencilling; and weighing). CCS has five cold storage facilities in South Africa, two in Gauteng, two in Cape town, a specialized facility in Cape Town Port (Duncan Dock) that is for the bulk handling of loose fish.

Primary target firm

- [8] The primary target firm is Sequence Logistics Holdings. Sequence is controlled by Freestone Trust (84.84%) and three minority shareholders. Sequence Logistics Holdings wholly owns Sequence Logistics Proprietary Limited ("Sequence"). Sequence controls Salestalk 406 Proprietary Limited ("Salestalk") and Tunney Ridge Proprietary Limited ("Tunney Ridge").
- [9] Sequence Logistics Holdings and Sequence and all the firms that they directly and indirectly control will collectively be referred to as the "Target Firm and/or Sequence Group".
- [10] Sequence Group provides a range of temperature-controlled services. Of relevance to this merger assessment is Sequence Group's temperature- controlled warehouse activities.

10.1. Sequence Group provides primary distribution services to third parties. This is through bulk frozen and chilled warehouses.

10.2. In addition, Sequence Group provides secondary distribution services and supply chain management solutions. Secondary distribution entails breaking down palletised goods down into smaller or multiproduct batches of goods as and when required by specific customer orders (referred to as "fine picking"). In addition, secondary distribution entails providing line haul and road transportation to and from customers. The Sequence Group owns a fleet of trucks for this purpose.

10.3. They have one facility in Gauteng, one in Cape Town and one in Durban.

Proposed transaction and rationale

Transaction

- [11] CCH intends on acquiring 100% of the issued share capital of Sequence Logistics Holdings. Post-merger, CCH will wholly own and control Sequence Logistics Holdings.

Rationale

- [12] [...].
- [13] From the seller's perspective, the proposed transaction is an attractive opportunity for its shareholders to realise their investments in the business.

Relationship between the parties

- [14] There is a horizontal overlap in the activities of the merging parties as both the Acquiring Group (through CCS and TLG), and the target firm Sequence provide third-party cold storage services.

Relevant markets

[15] There are various considerations defining the relevant market for this transaction.

[16] Firstly, we consider whether chilled and frozen storage form part of the same market.

[17] The merging parties submit that frozen and chilled storage is part of the same market. The Commission's investigation, customer and competitor responses suggest that they form separate relevant markets.

[18] The Tribunal finds that the weight of evidence suggests that they are in separate markets. A customer requiring frozen facilities would not switch to chilled facilities in response to a 5-10% price increase as it serves a distinct purpose. Furthermore, the evidence suggests that suppliers of chilled facilities alone cannot switch their facilities to providing services for customers that require frozen products, though those that have capacity for chilled and frozen can switch more easily.

[19] Secondly, we consider whether primary and secondary distribution forms part of the same market.

19.1. Primary distribution comprises bulk warehousing (typically of palletized goods) and linehaul transport between distribution centres and logistics hubs.

19.2. Secondary distribution includes warehousing, last mile transport and supply chain management. The key differential is that a secondary distributor typically breaks up the pallets into smaller batches of goods delivered to a final customer (instead of a logistic hub), and value-added services including stock and supplier management, demand planning etc.

[20] In terms of the relevant product market, the merging parties submit that primary and secondary distribution form separate markets. However, they consider a broader market for the provision of cold storage services to third parties comprised of both primary and secondary in their analysis.

[21] While the Commission does not find definitively, they also find it likely that there are different markets for primary and secondary distribution based on the following demand side considerations:

21.1. Customers have indicated that there are differences in the services provided and that they would not switch in response to a 5-10% price increase.

21.2. There are different types of customers that use the two services.

21.3. There are price differentials between the two.

[22] Secondary distribution has a different business model and costs to primary distribution and is more expensive to invest in and run. There appears to be no supply side substitution from primary to secondary distribution.

- [23] Based on demand and supply side considerations, the Tribunal finds that it is likely that primary and secondary distribution are in separate markets.
- [24] The third consideration is whether the Duncan Dock facility, which is specialized and is built to handle loose fish, forms part of the relevant market. The facility [...], has different requirements and is not seen as a competitor by other cold storage providers. As such, we believe it can be excluded from the market for the purpose of assessing this merger.
- [25] For purposes of assessing this proposed merger and without definitively concluding on the relevant market, the Commission considered both the i) broad market for frozen cold storage services, comprising both primary and secondary distribution and ii) the market for secondary cold storage services separately. Given the likelihood that there is a separate market for secondary distribution, the Tribunal follows the same approach.
- [26] As regards the relevant geographic markets, the merging parties submitted that the relevant geographic market is regional in scope. They state that a key consideration for customers in choosing a storage provider is that of proximity to their depots and end-users, in addition to flexibility in pricing and quality control assurance. The Commission concluded that the markets for frozen cold storage services may be assessed on both a national and regional basis. This is because for some customers the national footprint appears to be important whereas on the supply side, firms face competition constraint at a regional level.
- [27] The Tribunal considers both regional and national definitions.
- [28] While finding it likely that primary and secondary services form separate markets, for completeness, the Tribunal considers competitive dynamics in the following markets:
- 28.1. A national market for cold storage services including primary and secondary services.
- 28.2. A national market for secondary services.
- 28.3. A regional market for cold storage services including primary and secondary services.

Competition assessment

- [29] If we consider a single market for cold storage comprising both primary and secondary services, there is a sizeable accretion in the relevant markets as a result of the merger.
- 29.1. The national market for cold storage services: The merged entity will have a [...] share which is an accretion of [...] (by the Commissions estimates).
- 29.2. The national market for secondary cold storage services: The merging parties will have a market share of between [...].
- 29.3. Cold storage services in Gauteng: The merged entity will have a share with an accretion of [...].

29.4. Cold storage services in Cape Town: The merged entity will have a share with an accretion of [....].

- [30] As such the merged party will have a fairly large market share, though it is below the level of statutory dominance. The market is fairly concentrated and there are barriers to entry. However, several customers are large and have countervailing power. Furthermore, the merger is occurring in the context of a market in which there are several other significant competitors including Vector, Digistics, QK/Southland, Etlin and others both nationally and regionally. This suggests that the merged entity will still face various competitive constraints.
- [31] If we consider the markets separately there is limited overlap between the companies as CCS is not present in the secondary market. The merging parties and the Commission note that while providing bulk warehousing, Sequence is more engaged in secondary distribution. Sequence has a share of between [....] of the secondary market, but is the second largest market participant, with Vector a large competitor dominating the market with a share of 76-80%. There is no overlap between the parties in this market and the merger may allow the merged entity to compete better in the downstream market which is extremely concentrated.
- [32] The Commission had considered whether the merger would lead to the removal of a potential competitor in the market for secondary distribution. In particular they considered whether CCS as a potential entrant would be likely to enter in the absence of the merger, and furthermore, whether such entry would lead to greater competition. The merging parties had stated that CCS did not have the operational and practical knowledge to enter the market. [...] Furthermore, it is notable that Sequence itself, as well as other competitors in the market have very small market shares in comparison to Vector and as such it is not clear that greenfields entry would have led to greater competition.
- [33] As such, in overall the Tribunal finds that the merger will not lead to a substantial lessening of competition. If we consider the primary and secondary market together there is an accretion in share, however, there are strong competitors in each of the geographic markets as well as customers with countervailing power, some of whom have the option of self-supply. If we consider separate markets for primary and secondary distribution, there is no overlap in the market for secondary cold storage. Furthermore, it appears that the merger may in fact lead to increased competition in the secondary cold storage market if it strengthens Sequence.

Public interest assessment

Effect on employment

- [34] CCH has made a commitment that it will not engage in merger-specific retrenchments for a period of 2 years from the date of the implementation of the proposed transaction. The merging parties submitted that the primary acquiring firm, CCH, is a newly incorporated company and does not have any employees.
- [35] The employee representative of the Acquiring Group, AIIM, submitted that the employees were notified of the proposed merger and that none have raised any
- [36] The employee representative of Sequence likewise submitted that no major concerns have been received from employees except those relating to job security. According to Sequence's employee representative, the employee's concerns relating to job security are addressed by the merging parties' commitment that there will be no merger specific retrenchments for 2 years post implementing the transaction
- [37] The Tribunal is satisfied that any employment related have been addressed by the merging parties' commitment that no merger specific trenchments will occur for a period of two years post merger.

Effect on the spread of ownership

- [38] The merging parties submitted that the proposed transaction will not give rise to any dilution in the spread of ownership by HDPs in South Africa and will have no negative effect on HDP ownership in South Africa.
- [39] The target firm, Sequence, does not currently have any HDP shareholders. In contrast, the acquiring firm, CCH, is controlled by Old Mutual Limited which has HDP ownership voting rights of approximately 39% and HDP ownership

economic rights of approximately 28% Accordingly the proposed transaction will result in a positive increase in the levels of ownership by HDPs.

- [40] Based on the above facts, the Tribunal agrees with the Commission's conclusion that the proposed transaction does not raise any public interest concerns

Conclusion

- [41] For the reasons set out above the Tribunal approve the proposed transaction subject to condition

Date: 10 July 2023

Ms. Shaista Goga

Concurring: Ms. Mondo Mazwai and Prof Fiona Tregenna

Tribunal case manager: Baneng Naape

For the merging parties: Derushka Chetty and Wade Graaff of Edward

Nathan Sonnenbergs Inc.

For the Commission: Beverley

Chomela, Salma Kagee and Wiri Gumbie

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