

SOUTH AFRICA / JUDGMENT

Competition Commission v Schenker South Africa (Pty) Ltd (96/CR/Nov11) [2012] ZACT 9 (1 February 2012)

[2012] ZACT 9

COURT

Competition Tribunal

BEFORE

Wessels, A Ndoni, M Mokuena

CASE / FILE NUMBER

96/CR/Nov11

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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.:96/CR/Nov11

In the matter between:

THE COMPETITION COMMISSION APPLICANT

And

SCHENKER SOUTH AFRICA (PTY) LTDRESPONDENT

Panel A Wessels (Presiding Member), A Ndoni (Tribunal Member) and M Mokuena (Tribunal Member)

Heard on : 18 January 2012

Order issued on : 01 February 2012

ORDER

The Tribunal hereby confirms the order as agreed to and proposed by the Competition Commission and the respondent, annexed hereto marked "A".

Presiding Member

A. wessels

Concurring: A Ndoni and M Mokuena

THE COMPETITION TRIBUNAL OF SOUTH AFRICA

CC Case No. 2007OCT3236

CT 96/CR/NOV11

In the matter between:

THE COMPETITION COMMISSION

and

SCHENKER SOUTH AFRICA (PTY) LTD

CONSENT AGREEMENT IN TERMS OF SECTION 49D READ WITH SECTION 58(1)(a)(iii) AS READ WITH SECTION 58(1)(b) OF THE COMPETITION ACT, 1998 (ACT NO. 89 OF 1998), AS AMENDED, BETWEEN THE COMPETITION COMMISSION AND SCHENKER SOUTH AFRICA (PTY) LIMITED, IN REGARD ALLEGED CONTRAVENTION OF SECTION 4(1)(b)(i) OF THE

The Competition Commission and Schenker South Africa (Pty) Ltd hereby agree that application be made to the Competition Tribunal for the confirmation of a Consent Agreement in terms of section 58 (1)(a)(Hi) as read with sections 58(1)(b) and 59(1)(a) of the Competition Act, 1998 (Act No. 89 of 1998), as amended, on the terms set out below:

Definitions

For the purposes of this Consent Agreement the following definitions shaif apply:

1.1. "Act means the Competition Act, 1998 (Act No. 89 of 1998), as amended;

1.2. "BAX Global" means Bax Global Ltd which included the BAX group of comoanies that became affiliated to Schenker SA in January 2006. ySKK\ Global Ltd was acquired on 1 January 2006 by Deutsche Bahn AG, the holding company of Schenker South Africa (Pty) Ltd.

1.3. 'Commission" means the Competition Commission of South Africa, a statutory body established in terms of section 19 of the Act, with its principal

place of business at 1st Floor, Mulayo Building (Block C), the dti Campus, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng;

1.4. "Commissioner" means the Commissioner of the Competition Commission, appointed in terms of section 22 of the Act;

1.5. "Complaint" means the complaint initiated by the Commissioner of the Competition Commission in terms of section 49B of the Act under case number

2007OCT3236;

1.6. "Consent Agreement" means this agreement duly signed and concluded between the Commission and Schenker South Africa (Pty) Limited;

1.7. "Schenker SA" means Schenker South Africa (Pty) Limited, a company registered and incorporated in accordance with the laws of the Republic of South-Africa with registration number 1962/003897/07 and with its registered address, alternatively principal place of business at Freight City, 24 Pamona Road, Pamona, Kempton Park, South-Africa;

1.8. "Parties" means the Commission and Schenker SA;

1.9. "Respondents" means the firms subject to the Commission's investigation of the complaint initiated under case number 2007Oct3236, namely Schenker South Africa (Pty)Ltd, Schenker AG Group, Deutsche Bahn AG, Kuehne+Nagel (Pty) Ltd, Kuehne+Nagel Group, Kuehne+Nagel International AG, Expeditors international South Africa (Pty) Ltd, Expeditors International, Panalpina World Transport (Holding) Ltd, UTI South Africa (Pty) Ltd, UTI Worldwide Inc., DHL International (Pty) Ltd, DHL Global Forwarding, DHL International GmbH, Deutsche Post AG, BAX Global Inc., Dascher, Eagle Air Freight Inc., Emery Air Freight Corporation, Geologistics Corporation, Mane Freight, Saima and SAAFF.

1.10. "tribunal" means the Competition Tribunal of South Africa, a statutory body established in terms of section 26 of the Act, with its principal place of business at 3rd Floor, Mulayo building (Block C), the dti Campus, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng.

2. The Complaint and Complaint investigation

2.1. On 2 October 2007 the Commissioner initiated a complaint against Bax, Dascher, Eagle, Emery, Expeditors, Geologistics, Kuehne & Nagel, Mane Freight, Panalpina, Saima, Schenker and UTI in respect of allegations that the respondents, being parties in a horizontal relationship in the provision of freight forwarding services, may have contravened sections 4(1)(a), 4(1)(b)(i) and/or 4(1)(b)(ii) of the Act in that they discussed and agreed to fix the level of various surcharges and accessorial fees.

2.2. The Commission's investigation found, amongst others, that:

2.2.1 United Kingdom Air New Export System Security ("NES"):

During the period October 2002 to around 2005 various freight forwarders including BAX Global Ltd in the United Kingdom participated in discussions aimed at achieving the introduction of a so called NES fee for shipments by air originating in the United Kingdom. The NES fee was to be applied in connection with costs arising through the application of a pre-clearance system introduced by the United Kingdom's customs authorities for shipments leaving the United Kingdom.

2.2.2. Air Automated Manifest System ("AMS") fee from Germany:

During July 2004 freight forwarders including Schenker Deutschland AG, (a company affiliated to Schenker SA) in Germany participated in discussions aimed at achieving the introduction of a so called AMS fee for shipments by air to the US originating in Germany. Discussions also related to the approximate level of the AMS fee. The AMS fee was to be applied in connection with costs arising

through the application of a pre-clearance system introduced by the US customs authorities for shipments to the US.

2.2.3 Chinese air Currency Adjustment Factor ("CAF"):

During the period July 2005 to March 2006, freight forwarders including Schenker China Ltd. and BAX Global (China) Co. Ltd. in China agree with competitors on the introduction of a currency adjustment factor or CAF of 2.1% for shipments by air originating in China. The CAF was designed to compensate freight forwarders for the losses incurred following a change in the value ratio of the US dollar to the Chinese renminbi.

2.2.4 Hong Kong air Peak Season Surcharge {"PSS"}:

During the period August 2005 to May 2007 various freight forwarders including Schenker International (H.K.) Ltd and BAX Global Limited (Hong Kong) in Hong Kong participated in discussions aimed at exchanging information, such as start and end dates and approximate amounts, regarding the introduction of a peak season surcharge or PSS for shipments by air originating in Hong Kong, Macau and south China. The PSS was designed to compensate freight forwarders for the rate increases imposed upon them by the air carriers during busy periods for air cargo shipments.

2.3 In light of its findings, the Commission took a decision to refer its findings of conduct in contravention of section 4(1)(b)(i) to the Tribunal for adjudication.

3. Statement of conduct by Schenker SA

Schenker SA acknowledges that the conduct described above constitutes a contravention of section 4(1)(b)(i) of the Act and admits that it benefitted from such conduct.

4. Administrative Penalty

4.1 In accordance with the provisions of section 58(1)(a)(iii) as read with sections 59(1)(a), 59(2) and 59(3) of the Act, Schenker SA is liable for and has agreed to pay an administrative penalty in the amount of R959 000,00 (nine hundred and fifty nine

thousand Rand), which amount constitutes 5% of the relevant turnover in 2007.

4.2 Schenker SA will pay the amount set out in paragraph 4.3 above to the Commission within seven days of the date of confirmation of this Consent Agreement as an order of the Tribunal,

4.3 This payment shall be made into the Commission's bank account, details of which are as follows:

Bank name: Absa Bank Branch name: Pretoria Account holder: Competition Commission Fees Account Account number: 4050778576 Account type: Current Account Branch Code: 323 345 4.4 The penalty will be paid over by the Commission to the National Revenue Fund in accordance with section 59(4) of the Act. 5. Agreement Concerning Future Conduct 5.1 Schenker SA agrees to cooperate with the Commission in relation to the prosecution of the. conduct described in this Consent Agreement. Without limiting the generality of the foregoing, Schenker SA specifically agrees to: Provide witnesses to testify in the complaint referral (if any) in respect of alleged contraventions covered by this Consent Agreement; and

To the extent that it is in existence, and has not already been provided to the Commission, provide evidence, written or otherwise, which is in its possession or under its control, concerning the alleged contraventions contained in this Consent Agreement. Schenker SA agrees that it will refrain from any conduct that may contravene section 4(1)(b) of the Act.

Schenker SA undertakes to develop and implement a compliance programme, with corporate governance, designed to ensure that all its relevant employees are aware of the provisions of the Competition Act and do not contravene them; and to submit a copy of the aforementioned compliance programme outlined above to the Commission within 90 business days of the date of confirmation of this Consent agreement as an order of the Tribunal. 6. Full and Final Settlement This agreement is entered into in full and final settlement and, upon confirmation as an order by the Tribunal, concludes all proceedings between the Commission and Schenker SA and its affiliates relating to any alleged contravention of the Act that is the subject of the Commission's investigation under Case No. 2007Oct 3236. Dated and signed at Pomana on the 23 day of January 2012 Schenker South Africa (Pty) Ltd For the Commission Competition Commissioner

Bank name: Absa Bank

Branch name: Pretoria

Account holder: Competition Commission Fees Account

Account number: 4050778576

Account type: Current Account

Branch Code: 323 345

4.4 The penalty will be paid over by the Commission to the National Revenue Fund in accordance with section 59(4) of the Act.

5. Agreement Concerning Future Conduct

5.1 Schenker SA agrees to cooperate with the Commission in relation to the prosecution of the. conduct described in this Consent Agreement. Without limiting the generality of the foregoing, Schenker SA specifically agrees to:

Provide witnesses to testify in the complaint referral (if any) in respect of alleged contraventions covered by this Consent Agreement; and

To the extent that it is in existence, and has not already been provided to the Commission, provide evidence, written or otherwise, which is in its possession or under its control, concerning the alleged contraventions contained in this Consent Agreement.

Schenker SA agrees that it will refrain from any conduct that may contravene section 4(1)(b) of the Act.

Schenker SA undertakes to develop and implement a compliance programme, with corporate governance, designed to ensure that all its relevant employees are aware of the provisions of the Competition Act and do not contravene them; and to submit a copy of the aforementioned compliance programme outlined above to the Commission within 90 business days of the date of confirmation of this Consent agreement as an order of the Tribunal.

6. Full and Final Settlement

This agreement is entered into in full and final settlement and, upon confirmation as an order by the Tribunal, concludes all proceedings between the Commission and Schenker SA and its affiliates relating to any alleged contravention of the Act that is the subject of the Commission's investigation under Case No. 2007Oct 3236.

Dated and signed at Pomana on the 23 day of January 2012

Schenker South Africa (Pty) Ltd

For the Commission

Competition Commissioner

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