

SOUTH AFRICA / JUDGMENT

DSV Panalpina A/S v Global Integrated Logistics Business of Agility Public Warehousing Company K.S.C.P (LM022May21) [2021] ZACT 52 (19 July 2021)

[2021] ZACT 52

COURT

Competition Tribunal

BEFORE

E Daniels, Y Carrim, T Vilakazi

CASE / FILE NUMBER

LM022May21

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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.: LM022May21

In the matter between:

DSV Panalpina A/S

Primary Acquiring Firm

And

Global Integrated Logistics Business of Agility Public

Primary Target Firms

Warehousing Company K.S.C.P

Panel:

E Daniels (Presiding Member)

Y Carrim (Tribunal Panel Member)

T Vilakazi (Tribunal Panel Member)

Heard on: 19 July 2021

Decided on: 19 July 2021

ORDER

Further to the recommendation of the Competition Commission in terms of section 14A(1)(b) of the Competition Act, 1998 (“the Act”) the Competition Tribunal orders that-

1. the merger between the abovementioned parties be approved in terms of section 16(2)(b) of the Act subject to the conditions attached hereto; and
2. a Merger Clearance Certificate be issued in terms of Competition

Tribunal rule 35(5)(a).

Presiding Member

Mr Enver Daniels

19 July 2021

Date

Concurring: Ms Yasmin Carrim and Dr. Thando Vilakazi

CASE NO: LM022May21

DSV Panalpina A/S

AND

The Global Integrated Logistics business of Agility Public Warehousing Company K.S.C.P.

ANNEXURE A: CONDITIONS

1. DEFINITIONS AND INTERPRETATION

1.1 In this document the following expressions bear the meanings assigned to them below and related expressions bear corresponding meanings—

1.1.1 “Approval Date” means the date referred to in the Tribunal’s merger clearance certificate (Form CT10);

1.1.2 “Commission” means the Competition Commission of South Africa, a statutory body duly established under the Competition Act;

1.1.5 “Conditions” means these conditions contained in this Annexure A, agreed to by the Merged Entity and the Commission;

1.1.6 “Days” mean business days, being any day other than a Saturday, Sunday or official public holiday in the Republic of South Africa;

1.1.7 “DSV A/S” means DSV Panalpina A/S, a public company listed on the Nasdaq Copenhagen Stock Exchange;

1.1.8 “GIL” means the Global Integrated Logistics business of Agility Public Warehousing Company K.S.C.P.;

1.1.9 “Implementation Date” means the date, occurring after the Approval Date, on which the Merger is implemented by the Merging Parties;

1.1.10 “LRA” means the Labour Relations Act No. 66 of 1995 (as amended);

1.1.11 “Merged Entity” means the combined firm resulting from the Merger between DSV A/S and GIL;

1.1.12 “Merger” means the acquisition of control over GIL by DSV A/S;

1.1.13 “Merging Parties” means DSV A/S and GIL;

1.1.14 “Minister” means the Minister of Trade, Industry and Competition, South Africa;

1.1.15 “Moratorium Period” means the period between the Approval Date and the Implementation Date and thereafter, a period of 2 (two) years from the Implementation Date;

1.1.16 “South Africa” means the Republic of South Africa;

1.1.17 “Tribunal” means the Competition Tribunal of South Africa, a statutory body duly established under the Competition Act; and

1.1.18 “Tribunal Rules” means the Rules for the Conduct of Proceedings in the Tribunal.

2. CONDITIONS TO THE APPROVAL OF THE MERGER

2.1 EMPLOYMENT

2.1.1 The Merged Entity shall not retrench any employees in South Africa as a result of the Merger, for the duration of the Moratorium Period.

2.1.2 For the sake of clarity, retrenchments do not include (i) voluntary separation arrangements; or (ii) voluntary early retirement packages, (iii) unreasonable refusals to be redeployed in accordance with the provisions of the LRA; (iv) resignations or retirements in the ordinary course of business; (v) retrenchments lawfully effected for operational requirements unrelated to the Merger; (vi) terminations in the ordinary course of business, including but not limited to, dismissals as a result of misconduct or poor performance; any decision not to renew or extend a contract of a contract worker; and any transfer of employees to the employment of a third party as a result of any sale of business operations, including related assets and liabilities, or any joint venture or similar business arrangements.

3. MONITORING OF COMPLIANCE WITH THE CONDITIONS

3.1 The Merging Parties shall inform the Commission in writing of the Implementation Date of the Merger within 5 (five) Days of its occurrence.

3.2 The Merging Parties shall circulate a copy of the Conditions to all their employees and/or their employee representatives and/or relevant trade unions in South Africa within 5 (five) Days of the Approval

Date.

3.3 As proof of compliance thereof, the Merging Parties shall within 5 (five) Days of circulating the Conditions to all their employees and/or their employee representatives and/or relevant trade unions in

South Africa, provide the Commission with an affidavit by a senior official of the Merging Parties attesting to the circulation of the Conditions and attaching a copy of the notice sent.

3.4 The Merged Entity shall submit a report to the Commission on each anniversary of the Approval Date, setting out its compliance with clause 2.1 of the Conditions, for the duration of the Conditions. This report shall be accompanied by an affidavit, attested to by a director or other suitable person of the Merged Entity in South Africa, confirming the accuracy of the contents of the report.

3.5 Any employee of either of the Merging Parties who believes that the Merging Parties have not complied with or have acted in breach of the Conditions may approach the Commission.

3.6 The Commission may request such additional information from the Merging Parties which the Commission from time to time regards as necessary for the monitoring of compliance with these Conditions.

4. APPARENT BREACH

4.1 An apparent breach by the Merging Parties of any of the Conditions shall be dealt with in terms of Rule 39 of the Commission Rules read together with Rule 37 of the Tribunal Rules.

5. VARIATION OF THE CONDITION

5.1 The Merging Parties or the Commission may at any time, and on good cause shown, apply to the Tribunal for the Conditions to be lifted, revised or amended.

6. GENERAL

6.1 All correspondence in relation these Conditions must be submitted to the following email addresses: mergerconditions@compcom.co.za and ministry@thedtic.gov.za.

DSV Panalpina A/S

(Acquiring Firm)

The Global Integrated Logistics Business Of

(Target Firm)

Agility Public Warehousing Company K.S.C.P.

REASONS

FOR DECISION

[1] On 19 July 2021, the Competition Tribunal conditionally approved a large merger between DSV Panalpina A/S (“DSV A/S”) and The Global Integrated Logistics Business of Agility Public Warehousing Company K.S.C.P. (“GIL”).

[2] DSV A/S intends to acquire GIL from Agility Public Warehousing Company K.S.C.P. (“Agility”). The proposed transaction

constitutes an all-share transaction. Post implementation of the proposed transaction, DSV A/S will exercise sole control over GIL. The proposed transaction will be notified to the competition authorities in Kenya, the European Union (“EU”), the United States of America, Kuwait, Saudi Arabia, Turkey, Russia, Switzerland, the United

Kingdom, Australia, Chile, Columbia, South Korea, China and Brazil.[1]

[3] DSV A/S is a public company listed on the Nasdaq Copenhagen Stock Exchange headquartered in Hedeusene, Denmark.[2] It is a global, light-asset based international freight-forwarding and logistics company that provides land (road and rail), air and sea freight forwarding-services, as well as logistics solutions (e.g., contract logistics services and distribution logistics services). DSV A/S’ activities in South Africa can be categorised into: (i) land, air and sea freight-forwarding services; (ii) contract logistics services; (iii) road / courier services; and (iv) special projects. In South Africa, DSV Africa controls: DSV Africa Holding Proprietary Limited, DSV Skyservices Proprietary Limited, DSV Road Proprietary Limited, DSV Real Estate Johannesburg Proprietary Limited and Globeflight Worldwide Express Proprietary Limited (collectively referred to as “DSV”).

[4] Relevant to the proposed transaction, are DSV A/S’ freight

forwarding services and contract logistics services. As a freight-forwarder, DSV acts as an intermediary between the entity that makes the shipment and the destination for the goods. Although DSV does not carry out the shipments itself, it offers different

transport modes, such as sea / ocean freight, rail freight, road transport and air freight shipment. DSV, like all freight-forwarders,

uses its trusted contacts with carriers and partners from air transport specialists and trucking companies to transoceanic lines,

in order to negotiate the best possible price for their customers. This can include using established commercial routes with regular

frequent departures, or by charter, valuing different offers and choosing the best route that optimises speed, costs and reliability,

considering all the variables necessary for the analysis of each case. Contract logistics consists of the outsourcing of resource

management tasks to a third-party company such as DSV. DSV's contract logistics division handles activities such as designing and planning supply chains, designing facilities, warehousing, transporting and distributing goods, processing orders and collecting payments, managing inventory and even providing certain aspects of customer service.

[5] GIL is controlled by Agility, a public company listed on the Boursa

Kuwait and the Dubai Stock Exchange that is not controlled by any firm. In South Africa, Agility controls Agility South Africa

Proprietary Limited.

[6] GIL is a global freight-forwarder and provider of contract logistics.

It offers ocean, air and road freight, warehousing and distribution, and integrated supply chain services in more than 100 countries. GIL also provides specialist solutions for capital projects, oil and gas, chemicals, and fairs and events logistics. In South Africa, GIL provides (i) land, air and sea freight-forwarding (including advising on national customs and clearance, security, license requirements and regulations related to air and sea freight); and (ii) contract logistics services.

[7] The Commission considered the activities of the merging parties and

found that the proposed transaction results in horizontal overlaps in respect of:

a. The market for the provision of freight forwarding and clearing services: freight forwarding activities by air, sea and land (including advising on national customs and clearance, security,

license requirements and regulations), and

b. The market for the provision of contract logistics and warehousing services.

[8] The Commission did not identify vertical overlaps. However, there is an existing commercial relationship between the merging parties as they provide services to each other on a non-contractual and ad hoc basis. DSV A/S provides customs brokerage services to GIL on a non-contractual and ad hoc basis. GIL provides ad hoc warehousing and air and ocean freight services to DSV A/S.

[9] The national market for the provision of freight forwarding and clearing services: The merging parties submitted that the merged entity will have a post-merger market share of approximately [...],

with an accretion of [...] % in the market for the provision of freight forwarding in South Africa. The Commission found that there is no publicly available information to calculate market shares for the provision of freight forwarding and clearing services. However, the submissions by market participants indicate that there are numerous other companies active in the market for the provision of freight forwarding and clearing services that will continue to constrain the merged entity post-merger. Given this, the merging

parties are unlikely to exercise market power within this market and the proposed transaction is unlikely to raise competition concerns within the market.

[10] The market for the provision of contract logistics and warehousing services: The merging parties submitted that post-merger the merged entity will have a market share of approximately [...] % in the national market for the provision of contract logistics services. The Commission also found that there is no publicly available information

to calculate market shares for the provision of contract logistics and warehousing services, and so it canvassed the views of various

market participants. The views of market participants indicate that there are numerous other companies active in the market for the provision of contract logistics and warehousing services that will continue to constrain the merged entity post-merger. Given this, it was the Commission's view that the merging parties are unlikely to exercise market power within this market and that the proposed transaction is unlikely to raise competition concerns within the market. We agree with the Commission's approach to assessing the market shares, given the paucity of public information.

[11] Since 2015, DSV A/S has acquired three firms active in the logistics sector. More specifically these firms are active in freight forwarding services, contract logistics and supply chain management services, and courier services. Further, as part of its rationale DSV A/S has stated that acquisitions are an integral part of its strategy, and that DSV A/S has a track record of successful integrations.

[12] These acquisitions, which may be viewed as creeping mergers, are often cited as a problem in the context of concentrated industries, with high barriers to entry. In relation to the instant transaction, the Commission noted that although DSV A/S has acquired several firms in the broad logistic sector within South Africa in the past 5 years, the proposed transaction does not appear to significantly increase concentration in the relevant markets (i.e., freight forwarding services and clearing services, and contract logistics and warehousing services market). Considering the seeming growth strategy

via acquisitions, the Commission has said that it will remain watchful in its assessments of further acquisitions by DSV A/S. Given

the above considerations, we agree with the Commission's view that it is unlikely that the proposed transaction raises creeping

merger effects that will likely substantially prevent or lessen competition in any market.

[13] A competitor raised the concern that with regards to contract logistics, DSV A/S is a large competitor with a large customer base. The competitor was concerned that this type of merger could lead to further dominance by DSV A/S in this market, because DSV A/S would have access to a larger customer base. DSV A/S, Imperial, and UPD also have a large footprint in the pharmaceutical logistics market. As this South African logistics services provider submitted, there are barriers to entry in the logistics industry, due to the costs and infrastructure involved in setting up a national footprint and

providing services on a national basis. It is the competitor's opinion that a transaction such as this could have the effect of consolidating the customer base to one service provider. This competitor had also heard that DSV A/S had put in a bid with DB

Schenker, which would further adversely affect competition in the market.

[14] DSV is aware of various media reports from around May 2021 regarding a potential acquisition of DB Schenker. [...] In relation to DSV A/S and the size of its contract logistics operations in South Africa, DSV A/S estimates its market share in South Africa to be low and estimated market share accretion to be even lower. DSV's

South African contract logistics business is nonetheless operated sustainably without relying on 'offshore funding' to price its services below cost or at a level that might be considered unsustainable for DSV. Any global cross-subsidisation would be limited in respect of contract logistics where the services tend to be provided on a local or national basis. Notwithstanding the above, the merging parties submit that smaller local participants in the contract logistics space are still able to compete effectively, as evidenced by the large number of participants active on the market.

[15] The Commission found that no unilateral effects are likely to arise as a result of the proposed transaction given the small accretion and small resultant combined share in the market for contract logistics, along with the presence of a number of competitors. We agree with this analysis.

[16] The Commission also received a notice of intention to participate from the Minister of Trade, Industry and Competition (the "Minister") based on public interest grounds. The Minister proposed a condition

for approving the merger that no merger related retrenchments will take place for a period of 24 (twenty-four) months in South Africa after approval of the merger by the Tribunal.

[17] In view of the merging parties' inability to provide an unequivocal statement on the merger's impact on employment, the Commission was of the view that the proposed merger ought to be approved subject to an employment condition placing a moratorium on merger specific retrenchments for a period of two years. Following engagements between the merging parties and Commission, DSV A/S agreed to the conditions imposing a 24 month

moratorium in respect of all merger related retrenchments, regardless of employee skill level.

[18] We concluded that the proposed transaction is unlikely to substantially prevent or lessen competition in any relevant market. Further, in light of the conditions tendered, the proposed transaction is unlikely to have a negative impact on the public interest.

19 July 2021

Mr Enver Daniels

Date

Ms Yasmin Carrim and Dr Thando Vilakazi concurring

Tribunal Case Manager: Mpumelelo Tshabalala

For the Merging Parties: Aidan Scallan

For the Commission: Reabetswe Molotsi, Zanele Hadebe and Grashum Mutizwa

[1] The transaction has been cleared in Brazil, China, Columbia, South Korea, Turkey, and The United States. The EU filing has been

declared complete with the review period to expire on 3 August 2021.

[2] As of 31 December 2020, the firms holding more than 5% of the total issued share capital in DSV A/S are: Ernst Gohner Foundation (as to 10.72%); Black Rock Inc. (as to 7.82%); Capital Group Companies (as to 5.09%); and Morgan Stanley (as to 5.02%).

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