

SOUTH AFRICA / JUDGMENT

Glencore International AG v Optimum Coal Purchase Rights held by BHP Billiton Energy Coal South Africa (Pty) Ltd (018010) [2014] ZACT 29 (17 January 2014) [2014] ZACT 29

COURT

Competition Tribunal

BEFORE

Norman Manoim, Medi Mokuena, Andiswa Ndoni

CASE / FILE NUMBER

018010

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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.: 018010

In the matter between

Glencore International AG

Primary Acquiring Firm

And

Optimum Coal Purchase Rights Held by Primary Target Firm

BHP Billiton Energy Coal South Africa (Proprietary) Limited

Panel : Norman

Manoim (Presiding Member) Medi Mokuena (Tribunal Member) Andiswa Ndoni (Tribunal Member)

18 December 2013 18 December 2013 17 January 2014

Reasons for Decision

Approval

[1] On 18 December 2013 the Competition Tribunal (“Tribunal”) unconditionally approved the merger between Glencore International AG (“GIAG”) and The Optimum Coal Purchase Rights held by BHP Billiton Energy Coal South Africa (Proprietary) Limited (“BECSA”).

Parties to transaction

[4] Glencore is not directly or indirectly controlled by any firm. Glencore conducts its activities in the mining, smelting, processing, marketing and trading of metals and minerals, energy products and agricultural products. It operates on a global scale, marketing physical commodities that it either produces itself using its own industrial assets or that it obtains from third parties for onward sale to various industrial customers.

The primary target firm is the assets comprising of the rights and obligations of BECSA under an agreement for the supply of export coal from Optimum Coal Mine (Pty) Ltd (“OCM”) (“the Coal Purchase Agreement”)(“CPA”) and under an agreement for the management, administration and utilisation of Optimum’s RBC T export allocation.

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[6] The proposed transaction involves the sale, cession and delegation by BECSA to GIAG of all BECSA's rights, title and interest to the following:

- The Coal Purchase Agreement concluded by BECSA with certain subsidiaries of Optimum on 12 September 2007.
- The RCBT Entitlement Management Agreement (“RCBT Agreement”) concluded by BECSA concluded by BECSA with certain Optimum’s counterparties on 12 September 2007.

[7] The proposed transaction will allow Glencore to market the coal produced at Optimum Colliery, which it owns. We were informed at the hearing that as the owner of the Optimum, Glencore has a superior ability to understand the technical, geological and other factors affecting the mine's production. The transaction is therefore more valuable to Glencore than BECSA.[1]

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Competition assessment

[9] The proposed transaction results in a horizontal overlap in the international market for the production and export sales of thermal

coal.[2]

[10]The overlap arises as a result of Glencore producing and supplying thermal coal, and the coal offtake rights relate to the production

and supply of export coal from the Optimum quarries. Also, through its subsidiary, Glencore is a shareholder at Richard's Bay Coal Terminal, and BECSA is also a shareholder at the Richard's Bay Terminal. As such the proposed transaction is tied to the Richard's Bay Coal Terminal export entitlement for the export of thermal coal.[3]

[11]In relation to the overlap, the Commission came to a conclusion that the overlap raises no competition concerns as the post merger market share of Glencore in the international market will be less than 14%, with a market share accretion of less than 1%.[4]

Views of market participants

[12]The Commission received concerns from Eskom and South African Breweries ("SAB") pertaining to the proposed transaction. Since Eskom and SAB's concerns were similar, we shall deal with Eskom's concerns to cover both concerns. Eskom was concerned that the proposed transaction would detrimental to the domestic coal consumers, because post-merger Glencore will have market power and thus have the ability to divert coal allocated to domestic customers such as Eskom, to the export market.[5] Export prices are considerably higher than those that can be obtained on the domestic market.

[13]The Commission assessed Eskom's concerns and submitted that the proposed transaction will not have any negative impact on the domestic market for thermal coal. This is because the proposed transaction does not grant Glencore any additional export capacity, as the current off-take coal is already being exported, and it will simply be purchased by Glencore instead of BEGSA post-merger.[6] Furthermore, "spare capacity" that will be created by the proposed transaction is too negligible to afford Glencore the ability to increase its export of thermal coal.[7]

[14]Also, during the hearing the Merging parties confirmed that whether or not the proposed transaction goes ahead, the coal at Optimum would still go to the export market as long as export prices exceed those of the domestic market. [8]

[15]During the hearing the Merging parties also submitted that the off take coal at Optimum is an export grade which exceeds the grade of coal that Eskom uses at any of its power stations. The type of coai used by Eskom and the type of coal exported by BECSA are therefore not in the same market.[9]

[16]Effectively this transaction is not about the acquisition of export allocation rights. The export allocation is tied to the particular volumes that are supplied in terms of the CPA long-term contract between BECSA and (“OCM”).

Public interest

[17]The proposed transaction will have no adverse effect on employment as post merger nothing will change in respect of the production profile of Optimum[10] in any way. Furthermore, the proposed transaction raises no other public interest concerns.[11]

Conclusion

[18]We are satisfied with the findings of the Commission and thus approve the merger unconditionally.

17 January 2014

DATE

Mr. Norman Manoim

Ms. Medi Mokuena and Ms. Andiswa Ndoni concurring

Tribunal Researcher: Caroline Sserufusa

For the merging parties: Paul Cleland of Werksmans Attorneys

For the Commission: Tshegofatso Radinku

2 See para 4.1 page 44 of the Merger record.

[1] See para 20 page 12 of the Transcript of hearing.

[2] See pages 16-17 of the Commission's Report.

[3] See para 20 page 5 of the Transcript of hearing.

[4] See para 10 page 6 of Transcript of hearing.

[5] See page 755 of the Merger record in correspondence between Eskom and the Commission dated 13 November 2013.

[6] See pages 736-739 in a letter from Merging parties to the Commission addressing Eskom's concerns, dated 26 November 2013.

[7] See para20 page 7 of the Transcript of the hearing.

[8] See para 10 page 11 of the Transcript of the hearing.

[9] See para 20 page 10 of the Transcript of the hearing.

[10] See para 5 page 15 of the Transcript of the hearing.

[11] See page 59 of Merger record.

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