

SOUTH AFRICA / JUDGMENT

Marinvest SRL v Messina and Others (LM122OCT19) [2020] ZACT 89 (24 August 2020)

[2020] ZACT 89

COURT

Competition Tribunal

BEFORE

Yasmin Carrim, Fiona Tregenna, AW Wessels

CASE / FILE NUMBER

LM122OCT19

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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM122OCT19

In the matter between:

MARINVEST S.r.l. Primary Acquiring Firm

and

IGNAZIO MESSINA & C.S.p.A and RORO ITALIA S.r.l. Primary Target Firms

Panel : Yasmin Carrim (Presiding Member), Prof. Fiona Tregenna (Tribunal Member), AW Wessels (Tribunal Member)

Heard on : 19 February 2020

Last submission received on : 10 March 2020

Order Issued on : 16 March 2020

Reasons

Issued on : 24 August 2020

Reasons

for Decision

Conditional approval

[1] On 16 March 2020, the Competition Tribunal (“Tribunal”) conditionally approved the proposed transaction involving Marinvest S.r.l. (“Marinvest”) and Ignazio Messina & C.S.p.A (“IM”) and RORO Italia S.r.l. (“SPV”).

[2] The reasons for conditionally approving the proposed transaction follow.

Parties to the proposed transaction

Primary acquiring firm

[3] The primary acquiring firm is Marinvest, a [confidential]. [confidential] is ultimately controlled by MSC Mediterranean Shipping Company Holdings SA (“MSC Holdings”), which is the holding company of the MSC group. In South Africa, MSC Holdings controls Mediterranean Shipping Company Proprietary Limited (“MSC South Africa”).

[4] Marinvest is a holding company and therefore does not have any activities of its own. The MSC group, from a global perspective, is active in passengers maritime transport and the cruise sector, cargo maritime transport, port handling activities and logistics.

[5] For the assessment of the effects of the proposed transaction on competition in South Africa, MSC’s provision of container liner services on various routes to and from South Africa are relevant. These routes are:

- (i) South Africa to / from Europe – which includes the South Africa – Mediterranean routes;
- (ii) South Africa to / from Intra-Africa – which includes the South Africa – East Africa routes;
- (iii) South Africa to / from the Far East; and
- (iv) South Africa to / from the Americas.

Primary target firms

[6] The primary target firms are IM and SPV, collectively referred to as the “target firms”. IM and SPV are wholly owned by Gruppo Messina S.p.A. (“GM”). GM is not controlled by any single firm.

[7] Of relevance to the competition assessment is IM’s provision of

- (i) container- liner services; and (ii) Roll-On-Roll-Off (“Ro-Ro”)[1] shipping services, specifically on the South Africa to / from East Africa routes, as well as the South Africa to / from the Mediterranean routes.

Proposed transaction and rationale

[8] In terms of the proposed transaction, Marinvest will acquire a [confidential]% stake in IM and a [confidential]% stake in SPV, with the balance of the shares in each entity continuing to be held by GM.

- [9] The merger parties submitted that the GM group of companies is in severe financial difficulty and that the primary motivation for the proposed transaction is the preservation of the businesses of the GM group of companies, mainly the IM shipping business. They further submitted that the proposed transaction constitutes a fundamental part of a restructuring plan which aims to ensure the long-term viability of the GM group of companies.

Impact on competition

Relevant markets

- [10] The Competition Commission ("Commission") identified a horizontal overlap in the merger parties' activities in relation to the provision of container liner shipping services, servicing routes to and from South Africa. It considered the

following (narrower) container liner shipping services markets:

- (i) to / from South Africa and Europe;
- (ii) to / from South Africa and Intra Africa;
- (iii) to / from South Africa and the Mediterranean; and
- (iv) to / from South Africa and East Africa ("SAF to / from EAF").

- [11] In relation to the first three of the abovementioned markets, the Commission found that although the merger parties' combined post transaction market shares will be relatively high, the proposed transaction is unlikely to lead to a substantial prevention or lessening of competition in these markets since the merger parties will face competition from a number of competitors with varying market shares, including Maersk, CMA, Safmarine, DAL and NCL. Given that the Commission identified no competition concerns in relation to these markets, we do not deal with these markets in any further detail in these reasons.

Container liner shipping services to / from South Africa and East Africa

- [12] The Commission however found that the proposed transaction leads to competition concerns in the market for the provision of container liner shipping services to / from South Africa and East Africa. Furthermore, third parties, including customers, raised concerns regarding the effects of the proposed transaction on competition in relation to this market.
- [13] In terms of market concentration, the Commission found that the merger parties will have a combined post transaction market share of approximately [85-95]% in this market, based on 2018 volumes, with an accretion of more than [15- 25]%. The merger parties therefore will have a near monopoly in relation to this market with small competitors i.e. Maersk, Safmarine and CMA, collectively accounting for the rest of the market.

[14] The Commission further in relation to the above product market analysed the following three factors: (i) the closeness of competition between the merger parties; (ii) barriers to entry into the market and expansion; and (iii) potential customer countervailing

power. Furthermore, in its analysis of the closeness of competition, the Commission considered the following three elements of

competition: (i) transit times i.e. the total number of days it takes to deliver cargo to the end destination; (ii) the type of service offered; and (iii) the frequency of shipping i.e. the service provider's number of trips in a calendar month to the end destination.

Closeness of competition

[15] With respect to transit times, the Commission found that IM directly services the South Africa to / from East Africa routes and takes between 6-10 days to deliver cargo; MSC takes between 9-20 days. MSC historically serviced the

East Coast of Africa as a single round trip but recently altered its service on this route such that its vessels will now travel SAF - EAF

- Middle-East-Indian subcontinent - EAF - SAF. The Commission further found that the abovementioned small market participants take between 21-50 days to deliver cargo on these routes because they utilise the transshipment method. Transshipment refers to the process where containers are transferred from one vessel to another at a specific location, before being shipped off to their intended destination. Transshipment (i) typically occurs when there is no direct shipping route to a particular destination; (ii) is intended to save on shipping costs; and (iii) usually takes place in specialized hubs, such as the Port of Singapore and other major transshipment ports such as Shanghai, Shenzhen, Busan and Hong Kong. Transshipment however leads to increased transit times to the final destination because the containers have to be unloaded and reloaded onto a different ship, which can take considerable time. The Commission indicated that due to port congestion it could take up to a week for a port to completely unload an incoming ship and up to another week to load it onto a new ship going to the final destination.

[16] Based on the above transit time analysis, the Commission concluded that the merger parties are close competitors in relation to the South Africa to / from East Africa routes. This was also confirmed by customers who indicated that they view MSC and IM as close competitors on this route based on their transit times compared to that of the small market participants.

[17] With respect to the type of service, the Commission found that MSC and the small market participants provide full container services, whereas IM provides a combination of Ro-Ro and container services.

[18] With respect to frequency, the Commission found that IM does not service the route as frequently as MSC and the small market

participants do. IM offers services every 19 days on these routes whereas MSC and the small players offer weekly services.

- [19] Certain customers indicated that the merger parties are the two main shipping lines currently serving the East Africa ports with short lead times. As such, the Commission concluded that the proposed transaction will likely reduce the countervailing power of customers in relation to these routes.
- [20] The Commission ultimately concluded that the merger parties are each other's closest competitors in the market for the provision of container liner shipping services on the South Africa to / from East Africa routes since they offer much shorter transit times than the small market participants.

Demand and likely expansion / entry

- [21] In relation to demand for services on the South Africa to / from East Africa routes, the Commission found that the demand on these routes is low and that it has declined since 2014. Moreover, demand on the EAF to SAF route is particularly low. Market participants confirmed that the trade volumes in relation to these two routes are dominant in the direction from South Africa to East Africa and that limited cargo flow is moving from East Africa to South Africa.
- [22] The Commission further considered if the existing small market participants will have the ability and incentive to post transaction

expand their services on the SAF to / from EAF routes. The merger parties contended that any post transaction price increase by them would be thwarted by the threat of new entry or expansion by rivals operating on these routes. The small market participants however submitted that, although they are technically capable of increasing their capacity or reconfiguring their routes to service the SAF to / from EAF routes, they would only do so if favourable market conditions exist i.e. should demand on these routes increase in future. They submitted that expansion or entry in relation to these routes will depend on increased volume and the long-term prospects for sustainability / viability of these routes, as well as how it impacts the costs and the existing service products when adding one or more ports. The Commission found no evidence indicating that the demand on these routes is likely to increase in the near future, as also confirmed by the small market participants.

- [23] In relation to the SSNIP-test[2] i.e. should the merger parties hypothetically post transaction increase the rates on these routes by 5 to 10%, the Commission concluded that it is unlikely that the small market participants would expand or that new players would enter the market due to the current low demand on these routes, which is unlikely to change in the short term.

Excess capacity in sector

[24] The Commission submitted that in general the container liner shipping services sector is currently characterised by significant excess capacity.

[25] The Commission however did not have data relating to excess capacity on the SAF to / from EAF routes. Therefore, on 26 February 2020, the Tribunal issued a directive requesting data regarding the total and excess capacities of all market participants that currently service the South Africa – East Africa and East Africa – South Africa routes. We shall discuss this below.

Relevant counterfactual

[26] The merger parties submitted that the GM group of companies is in severe financial difficulty and has been since [confidential]. On [confidential], GM and IM and their financial creditors executed an agreement (“the Restructuring Agreement”) implementing a restructuring plan aimed at restoring the financial viability of GM and IM (“the Restructuring Plan”). The Restructuring Plan provides inter alia that the MSC group acquires, by means of a [confidential]% of the shares of IM. The merger parties submitted that the proposed transaction constitutes a fundamental part of the Restructuring Plan which aims to ensure the long-term viability of the GM group of companies.

[27] The merger parties further indicated that the GM group of companies’ financial position has been persistently deteriorating

[confidential]. They submitted that there has been an [confidential]. They further submitted that [confidential]. Thus, according to the merger parties, absent the proposed transaction, GM and IM will be liquidated and will subsequently exit the market.

[28] The Commission in its assessment of the relevant counterfactual confirmed that IM and GM are in debt and are likely to be liquidated

if the proposed transaction is not implemented.

[29] In relation to the potential sale of the target firms’ assets in the event that they are liquidated, the Commission found that since the relevant assets mainly are vessels, they may have some probable value of being acquired in one form or another. However, given that the container shipping sector in general is characterised by excess capacity, it is uncertain whether or not such assets will indeed be acquired by third parties. The Commission further noted that since vessels are mobile assets that can be easily deployed to other trade routes, even if the target firms’ assets are acquired by a third party following a liquidation sale, there is no guarantee that the assets will be utilised for operating the SAF to / from EAF routes given the current low demand on these routes. The Commission therefore concluded that it is uncertain whether the relevant assets would remain or exit the relevant market.

Remedies

[30] Although the merger parties disputed the Commission's findings, they tendered certain behavioural remedies to address the Commission's competition concerns. The Commission recommended that the proposed transaction should be approved subject to the tendered behavioural conditions[3] (described as "ring-fencing" conditions) and certain public interest conditions. The tendered "ring-fencing"

conditions were inter alia:

(i) The IM South Africa Business will be kept separate from the MSC South Africa Business and no steps will be taken to integrate or otherwise align the activities or conduct of IM and MSC's respective South African Operations.

(ii) The day-to-day affairs and business of IM's South African Operations shall be managed by IM, in accordance with its business trading policies and practices as at the Closing Date, except as may be necessary to comply with any changes in applicable law or good industry practice.

(iii) The IM South Africa Business shall exercise, in its sole discretion, final and determinative power regarding the strategic marketing and/or pricing policies of IM's South African Operations and will operate the South African Operations in the Ordinary Course of Business independently of MSC.

(iv) MSC and IM shall ensure that none of the MSC representatives (or representatives of MSC affiliate companies) appointed to the board of directors of IM shall be engaged in the direct day-to-day management of the IM South Africa Business.

(v) MSC and IM shall ensure that no Competitively Sensitive Non-Public Information of the IM South Africa Business are discussed at IM board meetings unless the MSC board representatives (or representatives of MSC affiliate companies) first recuse themselves from such discussion.

(vi) MSC and IM shall establish "information barriers" between the operations of the IM South Africa Business on the one hand, and MSC, on the other hand.

[31] The tendered ring-fencing conditions will apply for as long as MSC has shareholding in IM.

[32] Based on the above the merger parties argued that the proposed transaction will not result in a reduction in the number of operators on the relevant routes since IM will continue to operate separately. They further submitted that MSC is only acquiring a partial stake in IM and GM.

[33] The Commission however noted that even if the acquiring and target businesses are functionally maintained separate, the post transaction incentives of GM and MSC will nevertheless change and be aligned. We concur with the latter.

- [34] The Commission further noted that the proposed transaction raises a structural competition concern in relation to the SAF to / from EAF routes. It said that typically it would not consider behavioural remedies to address a structural competition problem but that in this case it accepted the merger parties' tendered behavioural remedies in the context of the relevant counterfactual of the target firms likely being liquidated absent the proposed merger and the nature and characteristics of the relevant market(s).
- [35] The Tribunal during the hearing raised various issues with the parties including if the Commission canvassed the proposed behavioural remedies with third parties, specifically those customers and competitors that raised concerns regarding the effects of the proposed transaction on competition. Given that the Commission did not prior to its recommendation test its recommended behavioural remedies in the market, the Tribunal issued a directive requesting that the Commission canvass the proposed behavioural conditions, and any potential alternative conditions, with third parties including customers who have expressed concerns regarding the proposed transaction and competitors.
- [36] The customers subsequently contacted by the Commission indicated either that it is difficult to comment on the conditions, that they have no further comments, or that they have no further concerns given the tendered conditions. Sasol's submission on the proposed remedies was nuanced. It said that it supports the tendered conditions "as a minimum requirement for the merger to proceed". It further indicated that the conditions "may not necessarily prevent 'above normal' [price] increases even if no collusion takes place and all conditions are complied with", but that "the conditions are robust enough to avoid blatant exploitation of the merger". It appears that Sasol took comfort from "the knowledge that the competition authorities will be watching how pricing decisions are made (through the reporting obligations)" and that this "will hopefully offer some semblance of independence ...".[4]
- [37] The merger parties' post transaction near monopoly position in the market for the provision of container liner shipping services to / from South Africa and East Africa (see paragraph 13 above) together with the material (financial) interest being acquired by Marinvest in the target firms (see paragraph 8 above) will alter and in our view to a significant degree align the merger parties' post transaction incentives and decisions (inter alia in relation to pricing and / or other elements of competition such as transit times, the type of service offered and the frequency of shipping – the latter three elements all being publicly available information in the market) - even if the merger parties are separately managed through "ring-fencing" conditions. Given the above, the Tribunal has reservations about the effectiveness of the tendered behavioural remedies as a means to address the significant competition concerns resulting from the proposed transaction in relation to container liner shipping services to / from South Africa and East Africa. As indicated above customers contacted by the Commission however saw value in the tendered conditions and the role that the Commission will play in monitoring those conditions. We shall elaborate below on how we strengthened the monitoring conditions and altered the variation clause in the conditions

that we have imposed.

[38] We decided to conditionally approve the proposed transaction mainly based on the Commission's finding regarding the relevant

counterfactual i.e. that the target firms have severe financial difficulties and that they are likely to be liquidated if the proposed transaction is not implemented. Furthermore, we had regard to the fact that the proposed transaction will have certain positive public interest effects (see public interest section below).

[39] We also had regard to the market characteristics of the relevant market(s) and the container liner shipping services sector in general. This includes that (i) the container liner shipping services sector in general is characterised by excess capacity; (ii) customer demand for services on the South Africa - East Africa routes currently is low and the routes do not attract high volumes. The low demand is particularly prevalent in relation to the East Africa to South Africa route, where there currently, relatively speaking, is significantly lower demand and more excess capacity than on the South Africa to East Africa route; and (iii) IM has excess capacity on the South Africa - East Africa routes and the small market participants also have some excess capacity on these routes.

[40] As mentioned, we strengthened the monitoring of the conditions and altered the variation clause of the conditions. We included an additional monitoring condition that the Commission may reasonably request any additional information from IM or MSC which the

Commission from time to time deems necessary for the monitoring of compliance with the conditions and their effectiveness.

[41] Furthermore, we altered the variation clause that was contained in the proposed conditions since the proposed clause excluded the Commission and contained a jurisdictional error. The altered variation clause states: "The Commission, IM or MSC (or MSC affiliate companies) may at any time, on good cause shown, apply to the Tribunal for the Conditions to be lifted, revised or amended."

[42] Customers should monitor potential post transaction price increases and / or service deterioration, specifically in relation to the SAF to / from EAF routes, and contact the Commission if they have complaints.

Public interest

[43] In relation to the effects of the proposed transaction on employment, the merger parties submitted that GM is a failing business and that absent the proposed transaction GM's operations will cease, resulting in the retrenchment of IM's [confidential] South African employees. The Commission concluded that the proposed transaction would save jobs in South Africa given that the target firms absent the proposed transaction will go into liquidation and close down.

- [44] The merger parties tendered the condition that there will be no merger-specific retrenchments at IM South Africa for a period of three years post transaction. The Commission recommended this condition and we approved the proposed transaction subject to this condition.
- [45] The merger parties further tendered the condition that for a period of three years post transaction, IM and IM South Africa will continue to use the services of their existing South African small and medium sized suppliers on the same terms and conditions that existed pre-transaction. In this context “existing” means having a valid agreement with IM or IM South Africa as at the date of approval by the Tribunal. This condition was recommended by the Commission and we approved the proposed transaction subject to this condition.

Conclusion

- [46] For the above reasons, we have approved the proposed transaction subject to the conditions attached hereto as Annexure A.

DATE: 24 August 2020

AW Wessels

Yasmin Carrim and Prof Fiona Tregenna concurring

Tribunal Researcher: Ms Busisiwe Masina

For the merger parties: Mr Aidan Scallan of ENS Africa

For the Commission: Mr Billy Matamela and Mr Themba Mahlangu

- [1] Ro-Ro vessels are designed to carry wheeled cargo such as cars, trucks and trailers.
- [2] A small but significant non-transitory increase in price.
- [3] The tendered remedies are similar to the remedies imposed by COMESA in its conditional approval of the proposed transaction.
- [4] Sasol’s submission of 27 February 2020 in relation to the proposed remedies.

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