

SOUTH AFRICA / JUDGMENT

Oceana Group Ltd v V&A Cold Store (Pty) Ltd (77/AM/Jul12)

[2012] ZACT 93 (6 November 2012)

[2012] ZACT 93

COURT

Competition Tribunal

BEFORE

Norman Manoim, Andreas Wessels, Medi Mokuena

CASE / FILE NUMBER

77/AM/Jul12

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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: 77/AM/Jul12

(015412)

In the matter between:

Oceana Group LimitedPrimary Acquiring Firm

And

V&A Cold Store (Pty) Ltd PrimaryTarget Firm

Panel : Norman Manoim (Presiding Member) Andreas Wessels (Tribunal Member) Medi Mokuena (Tribunal Member)

Heard on : 20 September 2012

Order issued on : 20 September 2012

Reasons

issued on : 06 November 2012

Reasons for Decision

Conditional approval

On 20 September 2012 the Competition Tribunal (“Tribunal”) conditionally approved the merger between Oceana Group Limited (“Oceana”) and V&A Cold Store (Pty) Ltd (V&A Cold Store).

Our reasons for conditionally approving the transaction are set out below.

Background

This merger was notified to the Competition Commission (“Commission”) on 12 April 2012 as a “small” merger. On 09 July 2012 the Commission approved the proposed transaction subject to certain behavioural conditions. On 23 July 2012 the merging parties however filed a Request for Consideration of the merger with the Tribunal requesting that the transaction should be approved without conditions.

On 06 August 2012 a prehearing was convened at which a timetable was agreed upon for discovery and the filing of witness statements. The matter was set down for hearing from 03 to 13 December 2012.

However on 10 September 2012 the merging parties wrote to the Tribunal stating that they had agreed a set of revised proposed conditions with the Commission and requested the Tribunal to confirm these revised conditions.

On 13 September 2012 a further prehearing was held where the Tribunal issued a directive stating that:

the merging parties must clarify certain issues in their tendered conditions and revert to the Tribunal with a revised draft by 18 September 2012; and

the Commission had to confirm that it had forwarded the revised proposed conditions to customers and competitors of the merging

parties for their comments and that it would revert to the Tribunal with feedback by 17 September 2012.¹

The matter was set down for hearing on 20 September 2012.

Parties to the transaction

Acquiring firm

The primary acquiring firm is Oceana, a public company incorporated in terms of the company laws of the Republic of South Africa. Oceana is listed on both the Johannesburg Stock Exchange (JSE) and the Namibian Stock Exchange (NSX) and therefore is not controlled by a single entity. Oceana’s more significant shareholders include Tiger Brands Limited; Khula Trust; and Brimstone Investment

Corporation Limited. Oceana operates as a holding company and controls a number of firms.²

The transaction contemplates the implementation of the transaction by Oceana through its wholly owned subsidiary Commercial Cold Storage Group Limited (“CCS”). CCS owns and manages eight cold storage facilities in the main industrial centres and harbours in South Africa and Namibia. These facilities are situated at Johannesburg, Cape Town, Durban and Walvis Bay. It provides commercial cold storage and fruit-handling services to third party producers,

importers, exporters, traders, wholesalers and retailers primarily in the frozen food industries, including to the Oceana Group. Of particular relevance to the competition assessment of this transaction is that CCS operates three cold storage facilities in Cape Town; one facility is situated at the quayside in Table Bay harbour and the other two facilities are situated outside of Cape Town harbour in the Cape Town area.

Target firm

The primary target firm is V&A Cold Store, a private company incorporated in terms of the company laws of the Republic of South Africa. Premerger V&A Cold Store is jointly owned by the LG Family Trust (with a 75% interest) and African Marine Products (Pty) Ltd (“AMP”) group (with a 25% interest).

V&A Cold Store operates a cold storage facility situated at the Cape Town quayside at Table Bay harbour in the Western Cape. It provides inter alia fresh fish handling services and cold storage of various types of commodities (such as fish, meat and poultry products) to AMP and third party customers.

Transaction

The transaction involves the acquisition by Oceana, through CCS, of the business of V&A Cold Store as a going concern.

According to the merging parties this transaction has been incorporated as a related but separate transaction into the Sale of Fishing Assets Agreement through which Oceana intends to acquire, inter alia, shares, assets and interests from various entities within the AMP group of companies, Phambili Fishing (Pty) Ltd and Bato Star Fishing (Pty) Ltd. The latter transaction is referred to as the “fishing transaction”, which was filed separately to this transaction and is still under consideration by the Commission.

Oceana, as rationale for the transaction, submitted that it had little desire to acquire V&A Cold Store but that the sellers wish to dispose of V&A Cold Store with the fishing interests that Oceana is intending to acquire in the above-mentioned separate but related fishing transaction.

From the sellers’ perspective, the LG Family Trust decided to sell V&A Cold Store due to the fact that the managing director who established and has been growing the business has emigrated to the United States. In order to mitigate financial risk, the LG Family Trust thought it prudent to dispose of V&A Cold Store to an entity with experience in running similar cold storage facilities.

Competition analysis

As is evident from the above description of the merging parties’ activities, their activities overlap in respect of the provision of cold storage space and related services. From a geographic perspective the activities of the merging parties overlap in the broader Cape Town area. We note that since both CCS and V&A Cold Store have facilities at the quayside in Table Bay Harbour in Cape Town, the Commission

focused its analysis on this narrower market.

The Commission defined the relevant markets as (i) the broader Cape Town market for the cold storage of packaged fish and packaged non-fish products; and (ii) the quayside market for the handling and cold storage of loose fish as well as packaged fish (mainly) destined for the export market ("the quayside market").

The Commission concluded that the transaction raises no likely competition concerns in the broader Cape Town market for the cold storage of packaged fish products and packaged non-fish products since customers have a sufficient number of post-merger cold storage alternatives in this market. We have no reason to doubt this conclusion and do not deal with this market in any further detail.

However, in relation to the above-mentioned quayside market the Commission found that the merger results in a significant market share accretion with the merged entity's post-merger market share being approximately 75%. The Commission furthermore found that the barriers to entry are high in this market due to inter alia a lack of space in the harbour for expansion of existing operations and potential entry of new players. The Commission further found that customers have very little countervailing power in this market because of a lack of cold storage alternatives at the quayside. It further found that the transaction would result in the removal of an effective competitor at the quayside. The Commission therefore concluded that the constraint which V&A Cold Store constituted in respect of the supply of storage and handling services at the quayside will be removed as a result of the transaction with likely negative competition effects. In order to address these competition concerns, the Commission recommended that certain conditions should be imposed on the merged entity to ensure that third party cold storage customers would have adequate access, on a non-discriminatory basis, to the merged entity's cold storage facilities at the quayside.

We concur with the Commission's assessment of likely anti-competitive effects resulting from the transaction in relation to the above-mentioned quayside market.

The Tribunal at the hearing requested clarity regarding certain key terminology used and certain time periods referred to in the Commission and merging parties' proposed remedies, as well confirmation of the merging parties' market shares in the affected market(s) and the capacity utilisation of the merging parties' relevant cold storage facilities in-house and by third parties respectively. We were satisfied with the responses given. The merging parties subsequently submitted a set of further revised tendered conditions, which we have accepted.

We ultimately imposed the following conditions on the merged entity to address the identified competition concerns relating to the quayside market:

The Quayside Firms³ shall ensure that utilisation by Oceana and its subsidiaries does not exceed 50% (or an equivalent of 7 250 pallet spaces) of the storage capacity at their quayside facilities.

Such restriction on own capacity utilisation may be exceeded in the event of a bona fide increase in demand for quayside cold storage facilities by Oceana or its subsidiaries provided that such increase has no Negative Impact⁴ on third party fish customers' access to the cold storage facilities of the Quayside Firms for the duration of such bona fide increased demand.

In the event that such bona fide utilisation by Oceana or its subsidiaries exceeds 50% and is likely to have a Negative Impact on third party fish customers' access to the cold storage facilities of the Quayside Firms, the Quayside Firms shall:

provide written notice to third party fish customers indicating the extent of the increased capacity utilisation and its expected duration;

provide written notice to the Commission indicating the extent and reasons for the increased capacity utilisation and its expected duration;

ensure that the written notice is given as soon as reasonably possible and, whenever possible, at least 72 hours before the commencement of the increase in capacity utilisation; and

limit their increased capacity utilisation to a period of six weeks which period shall commence from the date of the increase in the capacity utilisation.

The Quayside Firms shall not discriminate in favour of Oceana's downstream subsidiaries to the competitive disadvantage of third

party fish customers who utilise quayside facilities for the storage of loose fish and frozen packaged fish, other than on a basis that is permissible in terms of the provisions of section 9(2) of the Competition Act⁵;

The Quayside Firms shall prepare a standard price list, discount and/or allowances structure. The volume discounts offered by the Quayside Firms shall be the minimum discounts available to all customers willing and able to meet such volume commitments. A copy of the Quayside Firms standard price list, discount and/or allowance structure must be provided to the Commission within one month of the Approval Date⁶; and

The Quayside Firms shall inform all their third party fish customers utilising quayside cold storage facilities by way of written notice, of the above conditions within two weeks of the Approval Date. To this end, the Quayside Firms must provide an affidavit by a senior official attesting to the notification and provide a copy of the said notice to their customers to the Commission within one month of the Approval Date.

The Quayside Firms shall inform all future third party fish customers by way of written notice of the above conditions upon initial request for cold storage and handling services at the quayside.

The above conditions, excluding the utilisation cap (see paragraph 22.1 above), shall remain in place for as long as the Acquiring Firms have control over V&A Cold Store. The restriction on own capacity utilisation (see paragraph 22.1 above), shall expire in the event that capacity for cold storage at the quayside available to third party fish customers increases by 50% of the Quayside Firms' facilities, or by 7 250 pallet spaces.

The above-mentioned imposed conditions are proportionate to the competition concern identified in relation to the quayside market and should ensure that third party cold storage customers have adequate access to the merging parties' cold storage facilities at the quayside after this merger. We further note that the Commission's investigation of historic utilisation of the merging parties' quayside cold storage facilities indicated that these were generally underutilised and that capacity was available to third party fish customers. The imposed conditions further prevent discrimination in terms of the Act in favour of the merged entity's downstream activities (see paragraph 22.2 above) and furthermore stipulate that there must be transparency around cold storage pricing and volume discount structures (see paragraph 22.3 above). The latter pricing transparency will, according to the Commission, assist with the post-merger monitoring of the imposed conditions.

Public Interest

The merging parties submitted that the transaction will have no negative effect on employment since no retrenchments will arise as a result of the transaction.⁷ The transaction raises no other public interest concerns.

Conclusion

We accept the Commission's competition and public interest analyses of this transaction and its conclusions. We further accept that, on the information submitted, the imposed conditions sufficiently address and are proportionate to the likely anti-competitive effects arising from the transaction in relation to the quayside market. We therefore approve the transaction subject to the above highlighted behavioural conditions. The full set of imposed conditions is attached hereto as "Annexure A".

06 November 2012

Andreas Wessels DATE

N Manoim and M Mokuena concurring

Tribunal researcher: Songezo Ralarala

For the merging parties: Daryl Dingley and Martin Versfeld of Webber Wentzel

For the Commission: Adv Michelle Le Roux instructed by the State Attorney with Maya Swart

1The Commission reverted to the Tribunal on 17 September 2012 with regards to the responses obtained from the contacted customers and competitors. See Commission's letter to the Tribunal dated 17 September 2012.

2See merger record page 22. Also see <http://www.oceana.co.za/divisions/default.php>.

3Quayside Firms means the entities which provide cold store facilities at the quayside as a result of the merger. See paragraph 1.10 of the imposed conditions.

4Negative Impact means refusal by the Quayside Firms of full or partial access to their quayside facilities to third party fish customers. See paragraph 1.9 of the imposed conditions.

5Act No. 89 of 1998, as amended.

6The date of the Tribunal's order.

7See pages 3, 13, 37, 58 and 73 of the merger record. Also see paragraph 9 of the Commission's merger report.

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