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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: 018911

In the matter between:

SEABOARD OVERSEAS TRADING & SHIPPING (PTY) LTD AND SEABOARD OVERSEAS LTD

Primary acquiring firm(s)

And

THE OILSEED BUSINESS OF THE ATLAS TRADING AND SHIPPING DIVISION OF GRINDROD TRADING (PTY) LTD; AND THE OILSEED BUSINESS OF ATLAS TRADING DIVISION OF GRINDROD TRADING (ASIA) PTE LTD

Primary target firm(s)

Panel	: Anton Roskam	(Presiding Member)
	: Imraan Valodia	(Tribunal Member)
	: Medi Mokuena	(Tribunal Member)
Heard on	: 27 August 2014	
Order Issued on	: 27 August 2014	
Reasons Issued on	: 22 September 2014	

Reasons for Decision

Approval

[1] On 27 August 2014 the Competition Tribunal ("Tribunal") unconditionally approved an acquisition by Seaboard Overseas Trading and Shipping (Pty) Ltd and Seaboard Overseas Ltd of the oilseed business of the Atlas Trading

and Shipping Division of Grindrod Trading (Pty) Ltd and the Atlas Trading Division of Grindrod Trading (Asia) Pte Ltd.

[2] The reasons for unconditionally approving the transaction follow hereunder.

Parties to the Transaction

Primary acquiring firm

[3] The primary acquiring firms are Seaboard Overseas Trading & Shipping (Pty) Ltd ("SOTS") and Seaboard Overseas Limited ("SOL"), collectively referred to hereinafter as "Seaboard". Seaboard is involved in the trading of grain and oilseed products[1] in South Africa and globally.

[4] SOTS has its principal place of business in Umhlanga South Africa and is controlled, as to 100% of its issued share capital, by SOL. SOL is headquartered on the Isle of Man and is controlled by Seaboard Corporation, a company incorporated in the United States of America and listed on the New York Stock Exchange with its shares widely held.

Primary target firm

[5] The primary target firms are the oilseed businesses of

1. The Atlas Trading and Shipping Division of Grindrod Trading (Pty) Ltd; and
2. The Atlas Trading Division of Grindrod Trading (Asia) Pte Ltd,

hereinafter jointly referred to as "Atlas".

Both Grindrod Trading (Pty) Ltd and Grindrod Trading (Asia) Pte Ltd are ultimately controlled by Grindrod Limited, a firm listed on the Johannesburg Securities Exchange with its shares widely dispersed.

[1] Oilseed products include soybean meal, sunflower meal, canola oilcake, rape seed oilcake, cotton oilcake etc. Seaboard is however only active in the trade of soybean meal and sunflower pellets, not the full gamut of oilseed products.

Proposed Transaction

[6] The proposed transaction involves Atlas transferring to Seaboard all forward purchase and sale contracts[2] to which Atlas is a party, and all soybean meal and sunflower pellets held by or on behalf of Atlas. In exchange, Atlas is to be paid a share of all profits generated from the contracts being transferred to Seaboard.

[7] In addition, the proposed transaction is subject to certain conditions precedent, the most relevant, for our purposes, being:

- The merging parties entering into a further written agreement in terms of which Atlas transfers its 30% stake in a local crushing plant called Russelstone Protein (Pty) Ltd ("Russelstone") to Seaboard[3];
- The conclusion of a restraint of trade in terms of which Atlas is restrained from purchasing or selling oilseed products and on-selling into or in South Africa for a specified period; and
- The conclusion of a contract between Island View Storage ("IVS") and Seaboard in terms of which a right of last refusal is granted in favour of IVS[4].

[8] The Commission originally expressed concern with the condition precedent relating to the right of last refusal afforded IVS but having been assured by the merging parties that they certainly account for less than 1% market share within the global market for the shipping of dry bulk goods[5], the Commission's concerns were allayed. Further, the duration of the right of last refusal is limited to three years.

[2] This includes certain other financial instruments too.
[3] The plant is capable of crushing soybeans and producing soybean meal locally.
[4] The material terms essentially confer on IVS the right to view, with the option of bettering, any offer received by Seaboard for the shipping of dry bulk goods to South Africa.
[5] This market share figure was reiterated by the merging parties' representative, Mr Mark Garden, at the Tribunal hearing of 27 August 2014.

Rationale

[9] It is submitted that increased competition, volatile currency fluctuations and depressed South African growth rates are all relevant factors in the conclusion of the proposed transaction.

[10] Grindrod submits that the proposed transaction is an attempt to "*curtail the on-going operating losses of Atlas*" through "*an orderly unwind.*" Notwithstanding its intention to unwind, it remains obligated in terms of numerous forward contracts to supply customers with soybean meal and it has identified the proposed transaction as the most appropriate way to balance its intention to unwind with upholding its contractual obligations.

[11] Seaboard submits that the volumes shipped individually by Atlas and Seaboard pre-merger are often insufficient to warrant full container loads. Post-merger, however, when shipping together, their volumes will warrant regular, full container load volumes and thus lead to cost-saving. Seaboard also views the relationships Atlas has with its customers and suppliers as particularly attractive.

Relevant Market

[12] While the merging parties submit that there exists no need to conclude on the relevant market definitively, they propose that the effects of the merger be assessed on "*the market for the origination and trading of oilseeds in South Africa*".

[13] The Commission however, having conducted a detailed market definition exercise, considered the market to be considerably narrower than that suggested by the merging parties and proposed the transaction be assessed on the following markets:

1. The market for the trade of soybean meal; and
2. The market for the trade of sunflower pellets.

[14] Soybean meal and sunflower pellets are used primarily as sources of protein in animal feeds.

[15] The Commission did not conclude definitively on the appropriate geographic market but proposed that the effect of the transaction be assessed on "*the national market with imports*".

[16] We consider the Commission's market definition to be correct and henceforth analyse the proposed transaction on the narrower market as opposed to the broad market definition proposed by the merging parties.

Competition Analysis

[17] In the market for the trade of sunflower pellets, the merged entity will have a market share of between 10% and 22% with the transaction accounting for accretion of between 2.9% and 6%. The Commission considered this market share relatively low and found that the merged entity will remain constrained by numerous capable competitors including the Willowton Group and Wilmar Continental Edible Oils and Fats (Pty) Ltd. Customers of the merging parties confirmed the existence of alternatives and expressed no concern regarding the effects of the proposed merger on the sunflower pellets market.

[18] In light of the above, the Commission concluded that the proposed transaction was unlikely to result in a substantial lessening of competition in the market for the trade of sunflower pellets, a finding with which we wholly concur.

[19] In the soybean meal market, the merged entity would enjoy market shares of between 44% and 67%. The Commission, considering these to be high market share figures, conducted an extensive investigation into, *inter alia*:

- Whether pre-merger the merging parties are close competitors;
- Transparency of pricing;
- Barriers to entry;
- Countervailing power;
- Unilateral effects;

- Coordinated effects;
- The restraint of trade imposed on Atlas; and
- Public interest.

We consider each of these factors in detail hereunder.

A. Are the merging parties close competitors:

[20] In assessing whether the merging parties are in fact close competitors, it was revealed that they have 25 customers in common and they in fact supply one another with soybean meal. Notwithstanding these findings, both of which suggest closeness of competition, it was found that when market share has been lost by one of the merging parties, it is generally not acquired by the other but by Olam, a local producer.

[21] This finding suggests that while the merging parties certainly compete, they are in fact not one another's closest competitors. The merging parties' primary competitors appear to be local soybean meal producers and this constraint will remain unchanged by the merger.

B. Pricing transparency:

[22] Pricing is particularly transparent and generally follows import parity pricing (IPP). This high level of transparency is largely attributable to the fact that soybean prices are quoted on the Chicago Board of Trade (CBOT); which importers merely convert to a Rand price, and add the costs associated with importing along with a small margin. Animal feed producers (the merging parties' primary customers), confirmed to the Commission that they are able to monitor soybean pricing closely using the method referred to above and are able to detect "*non-competitive prices*".[6]

[23] We are comforted by the high level of price transparency in this market and find that anti-competitive pricing would most likely be easily detected.

[6] Submission from Epol dated 10/07/2014, submission from Meadow Feeds dated 16/05/2014 and submission from Quantum Foods dated 21/05/2014.

[24] C. Barriers to and likelihood of entry:

The merging parties submit that it would take a new entrant less than a month to enter, would require no significant sunk costs, and would demand an initial investment in the region of R80 million.[7]

[25] The Commission found however that while initial investment might be costly and potential entrants might be deterred by the existence of a 6.6% import tariff, these barriers are certainly not insurmountable, particularly to existing global commodity traders. Further, the Commission was informed that if the merged entity prices anti-competitively, "*multinational companies will grab at the opportunity to take over the merging parties' market share.*"[8]

[26] Moreover, we find that there exist no long-term supply agreements between suppliers and animal feed producers, switching costs are minimal and in recent times, local capacity has increased considerably.

[27] In light of this, we find that barriers to entry are not particularly high and new entry could be likely, timely and sufficient were the merged entity to effect a significant price increase.

D. Countervailing power

[28] As a commodity, soybean meal is essentially subject to global pricing which is, as aforementioned, particularly transparent. Furthermore, customers of the merging entities indicated that they are unconcerned by the merger and stated that if the merged entity increased prices by 5%-10%, they would simply switch suppliers immediately.[9] This is indicative of considerable countervailing power that is likely to persist post-merger.

[7] This is in respect of an importer, not a local producer.
[8] This view was expressed by competitors and customers of the merging parties.
[9] See page 50 of the Recommendation.

E. Unilateral Effects

[29] Local demand exceeds local supply and the merged entity will thus have the ability to short the market. If the merged entity had no interest in locally produced soybean meal, it would lack any incentive to exert upward pressure on the local price. However, it is necessary here to note the aforementioned condition precedent regarding Seaboard acquiring a 30% holding in Russelstone, a local soybean meal producer.[10]

[30] Customers of the merged entity indicated that if the merged entity shorted the local market or increased its prices, multinational commodity trading companies would merely step in and begin supplying South Africa. This is in line with our earlier finding regarding possible new entry and our conclusion regarding entry being likely, timely and sufficient. We thus conclude that the merger is unlikely to result in unilateral effects.

F. Coordinated effects

[31] The product in question is homogenous and, as aforesaid, the market is subject to high levels of price transparency. In addition, the market is already quite concentrated pre-merger and the removal of a competitor merely amplifies this concentration.

[32] Notwithstanding these noteworthy concerns, our fears are allayed by the aforementioned factors regarding, *inter alia*, low barriers to entry, strong countervailing power, and the fact that the merging parties are not one another's closest competitors.

G. The Restraint

[33] The proposed transaction was initially subject to a 5 year restraint of trade in terms of which Atlas was essentially restrained from purchasing or selling oilseed products and on-selling into or in South Africa. The Commission considered the 5 year period to be excessive and requested that it be reduced

[10] Clause 5.1.6 of the Sale Agreement.

considerably. The merging parties ultimately agreed to a truncated period of 3 years and it is this shorter period which is now before us. The Commission proposes that the transaction be approved subject to the Restraint being limited to 3 years and this is a proposal with which we are agreeable.

Public Interest

[34] The proposed transaction raises just a single public interest concern, that being an employment concern. Seaboard intends to retain 4 of the 7 Atlas employees currently involved in the oilseed business and has concluded voluntary separation agreements with the other 3. These 3 employees are skilled and the Commission considers them likely to find alternative employment relatively quickly.

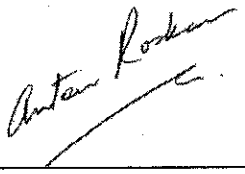
Conclusion

[35] We consider locally produced soybean meal to act as an increasingly relevant competitive constraint on the merged entity. Further, as aforesaid, barriers to entry are not insurmountable and we find no reason to doubt the submission regarding the fact that were the merged entity to increase price by say 5%-10%, global players would merely begin to supply South Africa. In response thereto and in an attempt to defend market share, we feel the merged entity's pricing would be pressured into returning to pre-merger levels.

[36] We were comforted by the submission regarding the merging parties' primary customers' ability to closely monitor prices. This factor is likely to be unaffected by the merger and pricing is likely to remain particularly transparent.

[37] In respect of the right of last refusal afforded IVS, our concerns were allayed by the fact that it is of limited duration and that the merged entity holds truly minimal market share in the dry bulk shipping market.

[38] We find that the proposed transaction is unlikely to result in a substantial prevention or lessening of competition and we do not consider the public interest concerns sufficient to warrant a departure from that finding. In light thereof, we approve the transaction unconditionally.



22 September 2014

DATE

ANTON ROSKAM

Ms Medi Mokuena and Prof Imraan Valodia concurring

Tribunal Researcher: Shannon Quinn

For the merging parties: Mark Garden and Rutendo Hlatshwayo of ENSafrica.

For the Commission: Seabelo Molefe and Werner Rysbergen