

**competitiontribunal**  
*south africa*

## Notice CT 10

### About this Notice

This notice is issued in terms of section 16 of the Competition Act.

You may appeal against this decision to the Competition Appeal Court within 20 business days.

### Contacting the Tribunal

The Competition Tribunal  
Private Bag X24  
Sunnyside  
Pretoria 0132  
Republic of South Africa  
tel: 27 12 394 3300  
fax: 27 12 394 0169  
e-mail: ctsa@comptrib.co.za

## Merger Clearance Certificate

Date: 16 January 2018

To: **Webber Wentzel**

Case Number: IM091Jul17

Joint Venture for The Container Liner Shipping Businesses of Nippon Yusen Kabushiki Kaisha, Mitsui O.S.K. Lines, Ltd. and Kawasaki Kisen Kaisha, Ltd And The Container Liner Shipping Businesses of Nippon Yusen Kabushiki Kaisha and Mitsui O.S.K. Lines, Ltd. and Kawasaki Kisen Kaisha, Ltd

You applied to the Competition Commission on **14 March 2017** for merger approval in accordance with Chapter 3 of the Competition Act.

Your merger was referred to the Competition Tribunal in terms of section 14A of the Act, or was the subject of a Request for consideration by the Tribunal in terms of section 16(1) of the Act.

After reviewing all relevant information, and the recommendation or decision of the Competition Commission, the Competition Tribunal approves the merger in terms of section 16(2) of the Act, for the reasons set out in the Reasons for Decision.

This approval is subject to:

- ☐ no conditions.
- ☒ the conditions listed on the attached sheet.

The Competition Tribunal has the authority in terms of section 16(3) of the Competition Act to revoke this approval if

- it was granted on the basis of incorrect information for which a party to the merger was responsible.
- the approval was obtained by deceit.
- a firm concerned has breached an obligation attached to this approval.

The registrar, Competition Tribunal:



## COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.: IM091Jul17

**In the matter between:**

Joint Venture for The Container Liner Shipping  
Businesses of Nippon Yusen Kabushiki Kaisha, Mitsui  
O.S.K. Lines, Ltd. and Kawasaki Kisen Kaisha, Ltd.

First Applicant

The Container Liner Shipping Businesses of Nippon  
Yusen Kabushiki Kaisha And Mitsui O.S.K. Lines, Ltd.  
And Kawasaki Kisen Kaisha, Ltd.

Second Applicant

And

The Competition Commission of South Africa

Respondent

**In re the Intermediate Merger between:**

Joint Venture for The Container Liner Shipping  
Businesses of Nippon Yusen Kabushiki Kaisha, Mitsui  
O.S.K. Lines, Ltd. and Kawasaki Kisen Kaisha, Ltd.

Primary Acquiring Firm

And

The Container Liner Shipping Businesses of Nippon  
Yusen Kabushiki Kaisha and Mitsui O.S.K. Lines, Ltd.  
and Kawasaki Kisen Kaisha, Ltd.

Primary Target Firms

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**Panel** : Y Carrim (Presiding Member)  
: A Ndoni (Tribunal Member)  
: M Mokuena (Tribunal Member)

**Heard on** : 16 January 2018

**Decided on:** : 16 January 2018

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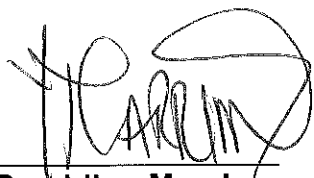
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**ORDER**

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Further to the merging parties consideration application in terms of section 16(1)(a) of the Competition Act 89 of 1998 ("the Act") the Competition Tribunal orders that –

1. the merger between the Joint Venture For The Container Liner Shipping Businesses Of Nippon Yusen Kabushiki Kaisha, Mitsui O.S.K. Lines, Ltd. and Kawasaki Kisen Kaisha, Ltd and The Container Liner Shipping Businesses of Nippon Yusen Kabushiki Kaisha and Mitsui O.S.K. Lines, Ltd. nd Kawasaki Kisen Kaisha, Ltd be approved in terms of section 16(2)(b) of the Act subject to the conditions in Annexure A; and
2. a Merger Clearance Certificate be issued in terms of Competition Tribunal Rule 35(5)(a).



**Presiding Member**  
**Ms Y Carrim**

**16 January 2018**  
**Date**

**Concurring: Ms A Ndoni and Mrs M Mokuena**

**IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA  
(HELD IN PRETORIA)**

**CT CASE NUMBER: IM091Jul17**

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**CONDITIONS TO THE MERGER**

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**1. INTRODUCTION**

- 1.1 The Merging Parties filed an intermediate merger notification with the Commission on 14 March 2017.
- 1.2 The Merger is a global integration of the container liner shipping businesses and the container liner terminal services businesses (excluding the container terminal services in Japan) of three companies that are registered in Japan, namely NYK, MOL and KL and their respective subsidiaries.
- 1.3 NYK, MOL and KL are three companies involved in, amongst other things, the shipping industry. Activities of the firms include various types of shipping services (including container liner shipping, car carrier shipping, and bulk shipping), terminal services, logistics services and cruises. In terms of the proposed transaction, NYK, MOL and KL will effectively transfer certain assets including their container liner shipping assets into a joint venture. NYK, MOL and KL will share ownership in the joint venture known as Ocean Network Express.

- 1.4 The Commission noted that NYK, MOL and KL would still be operating independently of each other in respect of businesses which includes *inter alia* bulk shipping, car carrier, logistics and freight forwarding.
- 1.5 Subsequent to its investigation, on 19 June 2017, the Commission issued a certificate of Prohibition of the Merger arising from its findings that the merger would lead to co - ordinated effects in the container liner market as well as the adjacent markets for car carrier services and bulk shipping services. Accordingly, the Commission was of the view that the Merger would result in a likely prevention or lessening of competition in the relevant markets.
- 1.6 The Merging Parties filed an application with the Tribunal in terms of section 16(1)(a) of the Act, and Rule 32 of the Rules for the Conduct of Proceedings in the Tribunal, requesting the Tribunal to consider the prohibition of the proposed Merger, and to approve the proposed Merger unconditionally, alternatively to approve it subject to certain conditions which the Merging Parties tendered as part of the application.
- 1.7 In order to address the Commission's concerns regarding the Merger, the Merging Parties have agreed to conditions to the approval of the Merger, as set out below.

## **2. DEFINITIONS**

The following words shall, unless otherwise stated or inconsistent with the context in which they appear, bear the following meanings:

- 2.1 **Commencement Date** means the later date of (a) the conditional approval of the merger notification by the Tribunal, and (b) the date of implementation of the global merger of the container shipping liner businesses of the Parties;
- 2.2 **Commission** means the Competition Commission of South Africa;
- 2.3 **Confidential Information** means competitively sensitive information of a Party including but not limited to pricing, pricing policies, strategic plans, budgeting, product and service information, customer information and market know-how not generally available to or known by the public;
- 2.4 **Day-to-day Operations** means activities such as engaging with customers on a daily basis, including setting prices and sales to individual customers. Insofar as this definition applies to OpCo, all activities are classified as Day-to-day Operations.
- 2.5 **HoldCo** means Ocean Network Express Holdings, Ltd.;
- 2.6 **KL** means Kawasaki Kisen Kaisha, Ltd., a company incorporated in Japan;
- 2.7 **Merger** means the establishment of a global joint venture by the Parties for the conduct of the container liner shipping business (and where applicable in any relevant jurisdiction, the container terminal handling business) previously conducted independently by each of the Parties;
- 2.8 **MOL** means Mitsui O.S.K. Lines, Ltd., a company incorporated in Japan;

- 2.9 **NYK** means Nippon Yusen Kabushiki Kaisha, a company incorporated in Japan;
- 2.10 **ONE** means the joint venture between the Merging Parties known as Ocean Network Express Pte. Ltd and includes any holding companies and subsidiaries;
- 2.11 **OpCo** means Ocean Network Express Pte. Ltd.;
- 2.12 **Operations** mean Day-to-day Operations as well as management oversight of Day-to-day Operations.
- 2.13 **Party or Parties** means any or all of NYK, MOL and KL as the context may require, and includes, but is not limited to, NYK, MOL and KL's subsidiaries and holding companies.
- 2.14 **SA JV Co** means the joint venture company that has been established and registered in South Africa for the operation of the container liner shipping business currently operated by the Parties within South Africa and on trade routes to and from South Africa;
- 2.15 **the Act** means the Competition Act 89 of 1998, as amended; and
- 2.16 **Tribunal** means the Competition Tribunal of South Africa.

### 3. **CONDITIONS TO THE MERGER**

- 3.1 No Party shall disclose or exchange any of its Confidential Information regarding its car carrier and bulk shipping businesses to or with any other Party in contravention of the provisions of the Act.

3.2 Subject to what is stated below, the executive and non-executive directors, management, representatives and employees of ONE and SA JV Co (including those who are seconded from the Parties or who have left the employment of the Parties and will be employed as employees of ONE and/or SA JV Co) shall not receive any Confidential Information regarding the car carrier and bulk shipping businesses from any Party. The executive and non-executive directors of the Parties who are on the Board of Directors of ONE shall not be involved in the Day-to-day Operations of the car carrier and bulk shipping businesses. Notwithstanding the foregoing, some of the directors of HoldCo will also serve as directors and/or officers of the respective Parties, and accordingly these directors may come in contact with Confidential Information relating to that Party's car carrier and bulk shipping businesses at such occasions as the board of directors' meeting of that Party. However, such directors and or officers are required to strictly comply with the conditions set out in 3.1 above and 3.5.1 below.

3.3 **Management and employees of the container liner shipping businesses shall have no involvement in the car carrier and bulk shipping businesses:**

3.3.1 The executive and non-executive directors, management, representatives and employees of ONE and SA JV Co that are involved in ONE's and/or SA JV Co's Day-to-day Operations shall not be involved in the Operations of the Parties' respective car carrier and bulk shipping businesses, nor attend any operational



meetings of NYK, MOL and/or KL unless they are directly related to the container liner shipping business.

**3.4 Management and staff of the car carrier and bulk shipping businesses shall have no involvement in the container liner shipping business:**

3.4.1 The executive and non-executive directors, management, representatives and employees of NYK, MOL and/or KL who are involved in the respective Party's Day-to-day Operations of the car carrier and bulk shipping businesses shall not be involved in the Operations of the container liner shipping business conducted by ONE and SA JV Co.

3.4.2 The executive and non-executive directors, management, representatives and employees of NYK, MOL and KL who are involved in the respective Party's car carrier and bulk shipping businesses shall operate under strict confidentiality restrictions and no Confidential Information of NYK, MOL or KL, as the case may be, relating to the car carrier and bulk shipping businesses shall be made available to any of SA JV Co employees including any executive and non-executive directors and managers.

**3.5 Confidentiality Undertakings:**

3.5.1 All executive and non-executive directors, management, representatives and employees of NYK, MOL and KL who are involved in the respective Party's car carrier and bulk shipping

business shall owe a duty of confidentiality in favour of NYK, MOL and KL respectively in respect of which all executive and non-executive directors, management, representatives and employees commit not to disclose to SA JV Co any Confidential Information relating to the car carrier or bulk shipping business activities.

**3.6 The personnel of SA JV Co shall not report to any individual in the car carrier or bulk shipping businesses of the Parties:**

3.6.1 The executive and non-executive directors, management, representatives and employees of SA JV Co shall neither report to any representative, nor be involved in the Day-to-day Operations, of any of NYK, MOL and/or KL's car carrier or bulk shipping businesses.

**3.7 Separate IT systems between the businesses shall be maintained:**

3.7.1 The Day-to-day Operations of SA JV Co are to be kept separate from NYK, MOL and KL's Day-to-day Operations. This shall include the physical separation of SA JV Co's Day-to-day Operations and the separation of its information technology systems.

3.7.2 NYK, MOL and KL shall each ensure that all executive and non-executive directors, management, representatives and employees in the Day-to-day Operations of its car carrier or bulk shipping businesses do not have access to SA JV Co's information technology systems.

**3.8 Policy development:**

3.8.1 Within three months of the Commencement Date, ONE or SA JV Co shall develop, adopt and implement a policy ("the Policy") containing procedures for the implementation and on-going monitoring of these conditions.

3.8.2 The purpose of the Policy shall be to ensure, *inter alia*:

3.8.2.1 That no Party shall disclose or exchange any of its Confidential Information regarding its car carrier and bulk shipping businesses to any other Party in contravention of the provisions of the Act;

3.8.2.2 Subject to 3.2, that the executive and non-executive directors, management, representatives and employees of ONE and SA JV Co shall not receive any Confidential Information regarding the car carrier and bulk shipping businesses of any of the Parties from any such Party; and

3.8.2.3 The physical separation of operating offices (or other operating premises) between the management teams responsible for NYK, MOL and/or KL and SA JV Co.

3.9 **Commitment to competition law compliance:**

3.9.1 SA JV Co undertakes to comply with the provisions of the Act at all times.

- 3.9.2 SA JV Co shall, within three months of the Commencement Date, develop a competition law compliance policy, which shall be submitted to the Commission for approval before implementation.
- 3.9.3 All sales, marketing, management and executive employees and all directors of SA JV Co shall undergo competition law training at least once per year, beginning within one year from the Commencement Date.
- 3.9.4 All sales, marketing, management and executive employees and all directors of SA JV Co shall sign a code of conduct in relation to compliance with the compliance policy and code of conduct, at least once per year, beginning within one year from the Commencement Date.
- 3.9.5 The Managing Director of SA JV Co shall submit to the board of SA JV Co at least once per year a written signed statement confirming compliance with these conditions, and with South African competition law.
- 3.9.6 SA JV Co shall arrange an annual internal audit measuring compliance with the company's competition law compliance policy, with the outcomes reported to the Managing Director of SA JV Co.

3.10 **Reporting requirements**

- 3.10.1 The Parties shall, for a period of five years from the Commencement Date, inform the Commission of any transaction between the Parties that is defined as a small merger in terms of the Act and has an

effect in South Africa, within three months of implementation of such small merger. For the avoidance of doubt, this obligation will not in any way affect the notification requirements of the Act for transactions that meet the prescribed notification thresholds.

3.10.2 Each Party shall, on an annual basis, for a period of five years from the Commencement Date, prepare a competition law compliance report with respect to the tendering and/or bidding for services relating to its car carrier business where a South African route is involved. This report shall be tabled at a meeting of the compliance sub-committee of the board of directors of the Party concerned. Each Party shall notify the Commission that this report has been tabled as required.

3.10.3 The internal auditors of HoldCo, OpCo and SA JV Co shall for a period of five years from the Commencement Date prepare an annual report on whether HoldCo, the directors of OpCo and SA JV Co respectively are complying with these conditions. The Parties shall appoint an external trustee (independent law firm or auditor) to, using reasonable auditing methods, verify and endorse the report prepared by the internal auditors of HoldCo, OpCo and SA JV Co. HoldCo, OpCo and SA JV Co shall have an option to engage the external trustee to prepare the report *in lieu* of the internal auditors. In such case, HoldCo, OpCo and/or SA JV will not conduct the internal audit for this particular purpose as stipulated above.

- 3.10.4 The external trustee shall for a period of five years from the Commencement Date submit the verification and endorsement report referred to in 3.10.3 above to the Commission on an annual basis within 90 business days after each anniversary of the Commencement Date.

#### 4. GENERAL

- 4.1 Unless specifically provided otherwise, these conditions shall endure for as long as the container liner joint venture between the Parties remains in place.
- 4.2 All reporting documents referred to in these conditions shall be submitted to the following e-mail address: [mergerconditions@compcom.co.za](mailto:mergerconditions@compcom.co.za)
- 4.3 In the event that the Commission determines that there has been an apparent breach of the conditions by the Merging Parties, the breach shall be dealt with in terms of Rule 37 of the Rules for the Conduct of Proceedings in the Tribunal.
- 4.4 The Commission may request additional information for purposes of clarification of any aspect of the reports provided to the Commission in terms of these conditions.

