



COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM234Mar17

In the matter between:

Maersk A/S
and

Primary Acquiring Firm

**Hamburg Südamerikanische Dampfschiffahrts-
Gesellschaft KG**

Primary Target Firm

Panel	:	Enver Daniels (Presiding Member)
	:	Medi Mokuena (Tribunal Member)
	:	Fiona Tregenna (Tribunal Member)
Heard on	:	4 October 2017
Order Issued on	:	5 October 2017
Reasons Issued on	:	27 October 2017

Reasons for Decision

Approval

[1] On 5 October 2017, the Competition Tribunal ("Tribunal") conditionally approved the large merger between Maersk A/S ("Maersk") and Hamburg Südamerikanische Dampfschiffahrts-Gesellschaft KG ("Hamburg").

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

Parties to transaction

Primary acquiring firm

[3] Maersk is a wholly-owned subsidiary of A.P. Møller – Maersk A/S (APMM). APMM is a publicly traded company listed on the Copenhagen Stock

Exchange. APM and its subsidiaries will hereinafter be referred to as the "Maersk Group". The Maersk Group is an integrated transport and logistics company headquartered in Copenhagen, Denmark. It is involved in the deep-sea container shipping market and is the world's largest container shipping company. Maersk serves customers through 317 offices in over 120 countries. It is active in various shipping-related upstream and downstream services, such as container liner shipping, tramp services, short-sea container shipping, container terminal services, towage, inland transportation, container manufacturing and freight forwarding. Of relevance to the South African market, is the Group's activities in the market for the provision of container liner shipping across various South African trade routes; freight forwarding services to South African customers; depot and off-dock container storage, maintenance and repair services in Port Elizabeth, Cape Town and Durban; as well as short distance haulage services.

Primary target firm

- [4] Hamburg is a limited partnership in accordance with the laws of Germany. Hamburg is a wholly-owned subsidiary of Dr. August Oetker KG ("Dr. Oetker"). Dr. Oetker and its subsidiaries will hereinafter be referred to as "Dr. Oetker Group". Hamburg is the seventh largest container shipping line in the world. The Dr. Oetker Group is involved in various sectors such as food and beverage production, banking and shipping. Hamburg is also active in the provision of tramp services. Hamburg has no subsidiaries in South Africa and is only represented through branch offices in Johannesburg, Durban and third party agents in Port Elizabeth and Cape Town. The only subsidiary of the Dr. Oetker Group in South Africa is involved in the production and distribution of pizzas and other frozen convenience foods.

Proposed transaction and rationale

- [5] This transaction is an international transaction. Through a Sale and Purchase Agreement, Maersk will acquire the entire issued share capital of Hamburg, such that post-merger Maersk will own and control Hamburg and its

subsidiaries. This means that post-merger, Hamburg will become a business unit within Maersk, operated under the existing Hamburg brand.

- [6] For Maersk this transaction will provide it with an opportunity to combine two container liner shipping businesses with complementary offerings in relation to geographic focus and customer perception. Hamburg on the other hand submits that the transaction will provide the owners of the Dr. Oetker Group with an opportunity to dispose of Hamburg to new owners.

Impact on competition

- [7] The proposed transaction gives rise to a horizontal and vertical overlap.
- [8] The Commission identified the relevant product market as the market for the provision of deep-sea container liner shipping services in South Africa. The Commission assessed the market based on the trade routes. Of concern and relevant to the proposed transaction, was the South Africa/East Coast South America and the South Africa/North America trade routes. The container liner shipping market works in such a way that firms either provide their services individually or through cooperation agreements with other shipping companies. The cooperation agreements can be in the form of a Slot Charter Agreements ("SCA") which involve a shipping company renting a pre-determined number of container slots of another firm's vessel in exchange for cash or slots on its own vessel. The Vessel Sharing Agreements ("VSAs") which involve firms providing a joint service and thus jointly agree on the capacity that will be offered by the service on its schedule and ports of call. The firms then contribute their vessels into the joint arrangement and allocate capacities in exchange for space on their vessels. The merging parties submitted that this is how the industry operates as it is more cost efficient than if a firm attempts to provide services without such arrangements.

Unilateral effects

- South Africa/East Coast South America

[9] On this route the Commission found that the merged entity will have a market share of less than 42%, making it the largest carrier. However the merged entity will still face competition from other carriers such as Hapag-Lloyd, MSC, CMA CGM and Nile Dutch Africa. Further, the merging parties both have cooperation agreements on this trade route which will account for approximately 74.9% market share, with the remainder of the 25.1% being relatively small carriers.

- South Africa/North America

[10] On this route the Commission found that the merged entity will have a market share of less than 40%, making it the largest carrier. However the merged entity will still face competition from other carriers such as Hapag-Lloyd, MSC, CMA CGM and Nile Dutch Africa. Further, the Commission found that because Hamburg does not have any cooperation agreement on this route, no structural linkages will be created as a result of the merger.

[11] Despite all of this, the customers¹ the Commission spoke to indicated that they have alternative carriers to those of the merging parties, thus no unilateral effects are likely to occur as a result of the merger.

Coordinated effects

[12] The Commission's assessment of the market revealed that it is conducive to coordination such as price signalling, market allocation and price fixing, based on previous collusive conduct in other parts of the world, as well as suspected collusion in the South African market.²

¹ See record pages 1903(Tongaat Hullet) 1901(Sappi), 1909(Damco) and 1928(Toll Group) amongst others.

² See pages 48-56 of Commission's report.

[13] The Commission's investigation revealed that the proposed transaction will create new structural linkages between Maersk and Hamburg through the cooperation agreements that they are both party to. Of main concern to the Commission, are the new structural links that will be created in the South/Far East Asia and South Africa/East Coast South America trade routes, as these will result in most of the carriers in those trade routes having contact through the cooperation agreements. The Commission found that these new structural linkages may allow competitors to coordinate capacity to deploy on the South Africa/East Coast South America trade route, which may affect the prices charged to customers.

Proposed Condition

[14] To address this coordination concern, the Commission recommended that the proposed transaction be approved with a condition requiring the merged entity to terminate the Hamburg cooperation agreement it has in the South Africa/East Coast South America trade route within a period of four months from the implementation date of the merger. This is in line with the termination clause already contained in the agreement. This remedy will also have an implication on an SCA Hamburg has with Hapag Lloyd, as Hamburg offers Hapag Lloyd slots through the SCA. The remedy will thus terminate the relationship that Hamburg has with Hapag-Lloyd. We agree with the Commission's findings.

[15] During the hearing, Mr Unterhalter on behalf of the merging parties submitted that although the conditions were unopposed, the merging parties had a different view on the aspects of the vessel sharing agreements and slot agreements. He submitted that this was based largely on how these agreements were viewed in other jurisdictions such as the European Union ("EU"), wherein these agreements have been found not to be promoting co-ordination as there is insufficient transparency.³ He further submitted that the merging parties also differed with the Commission's assessment of co-

³ See page 6-7 of transcript of hearing.

ordinated effects and how they have been assessed in other jurisdictions in the relevant product market. The merging parties submitted that in the EU it was found that there is no illegality in the market but simply price announcements. Nonetheless Mr Unterhalter submitted that these differences do not need to be resolved as they are simply differences of opinion.⁴ Mr Unterhalter confirmed that the merging parties accept the Commission's conditions.⁵

Vertical overlap

[16] The instant transaction results in a vertical overlap as the Maersk Group is active in the freight forwarding, short distance inland haulage, depot services and container manufacturing activities, which are inputs in the container liner shipping and tramp services market. However, the Commission submitted that no foreclosure concerns arise as the merged entity's market shares are very low in all the above mentioned markets. ⁶ We agree with the Commission on its findings.

Public interest

[17] The merging parties submitted that the proposed transaction will not result in any adverse impact on employment.⁷

[18] The proposed transaction further raises no other public interest concerns.

⁴ See pages 7-8 of the transcript of the hearing.

⁵ See page 6 of the transcript of the hearing.

⁶ See pages 26-29 of the Commission's report.

⁷ See transcript of hearing at page 8.

Conclusion

[19] In light of the above, we conclude that the proposed transaction is unlikely to substantially prevent or lessen competition in any relevant market. In addition, no public interest issues arise from the proposed transaction. Accordingly, we approved the proposed transaction subject to the conditions attached hereto as **Annexure A**.



Mr Enver Daniels

27 October 2017

DATE

Prof. Fiona Tregenna and Ms Medi Mokuena concurring

Tribunal Case Manager : Caroline Sserufusa
For the merging parties : D Unterhalter instructed by ENS
For the Commission : Amanda Mfuphi

ANNEXURE A

Maersk Line A/S

And

Hamburg Südamerikanische Dampfschiffahrts- Gesellschaft KG

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CONDITIONS

1. DEFINITIONS

The following expressions shall bear the meanings assigned to them below and cognate expressions bear corresponding meanings –

- 1.1. **"Approval Date"** means the date referred to in the Tribunal's Merger Clearance Certificate (Form CT10);
- 1.2. **"Business Day"** means any day other than a Saturday, Sunday or a day gazetted as a national public holiday in the Republic of South Africa;
- 1.3. **"CMA CGM"** means CMA CGM S.A;
- 1.4. **"Commission"** means the Competition Commission of South Africa;
- 1.5. **"Competition Act"** means the Competition Act 89 of 1998, as amended;
- 1.6. **"Competitively Sensitive Information"** means information relating to the rates, customers, type of cargo, capacities or volumes shipped of any party other than the Merging Parties;
- 1.7. **"Conditions"** mean these conditions;
- 1.8. **"ECSA"** means the East Coast of South America;
- 1.9. **"Effective SAAF Exit Date"** means the date on which HSDG's exit from the SAAF Agreement becomes effective;
- 1.10. **"HSDG"** means Hamburg Südamerikanische Dampfschiffahrts-Gesellschaft

KG;

- 1.11. **"Implementation Date"** means the date, occurring following the Approval Date, on which the Proposed Transaction is implemented;
- 1.12. **"Merging Parties"** means Maersk Line and HSDG;
- 1.13. **"Maersk Line"** means Maersk Line A/S;
- 1.14. **"Nile Dutch"** means Nile Dutch Africa Line B.V.;
- 1.15. **"Proposed Transaction"** means the acquisition by Maersk Line of HSDG and the container shipping liner assets of HSDG as per the Sale and Purchase Agreement dated 14 March 2017;
- 1.16. **"SAAF Agreement"** means the VSA between HSDG, CMA CGM and Nile Dutch, dated 2 February 2016 and amended on 28 November 2016, covering the service on the ECSA-SAF and the SAF-WAF trades;
- 1.17. **"SAF"** means South Africa;
- 1.18. **"SCA"** means slot charter agreement;
- 1.19. **"SEA"** means slot exchange agreement;
- 1.20. **"Tribunal"** means the Competition Tribunal of South Africa;
- 1.21. **"Tribunal Rules"** means the rules for the conduct of proceedings in the Tribunal;
- 1.22. **"VSA"** means vessel sharing agreement; and
- 1.23. **"WAF"** means West Coast of Africa.

2. CONDITIONS TO THE APPROVAL OF THE MERGER

2.1. Termination of the SAAF Agreement

- 2.1.1. Maersk Line shall ensure that HSDG withdraws from the SAAF Agreement by serving a 4 (four) months' notice of withdrawal within 5 (five) Business Days of the Implementation Date to CMA CGM and Nile Dutch, in accordance with the SAAF Agreement. For the sake of clarity, the Effective

SAAF Exit Date is expected to be 4 (four) months and 49 (forty-nine) calendar days after the Implementation Date.

- 2.1.2. The Merging Parties will not within 3 (three) years from the Implementation Date, become members of any VSA on the ECSA-SAF trade to which CMA CGM and/or Nile Dutch are members without informing the Commission and motivating to it the commercial and efficiency / pro-competitive necessity of such potential agreement at least 1 (one) month before entering into such agreement.

2.2. Interim undertakings

- 2.2.1. From the Implementation Date until the Effective SAAF Exit Date, Maersk Line shall procure that, if and to the extent that HSDG receives any Competitively Sensitive Information of its partners to the SAAF Agreement, or any other information considered as commercially sensitive, such information will not be disclosed to Maersk Line.

- 2.2.2. Maersk Line also undertakes that to the extent that HSDG's partners in the SAAF Agreement, i.e. CMA CGM and Nile Dutch, elect to discuss or engage in contingency planning for this SAAF Agreement in the period following the serving of the withdrawal notice by HSDG, in line with the SAAF Agreement, HSDG shall be excluded from these discussions, and shall not receive any information regarding such planning except to the extent reasonably necessary to planning and completing HSDG's withdrawal from the SAAF Agreement.

- 2.2.3. Maersk Line commits that during the period between the Implementation Date and the Effective SAAF Exit Date, HSDG will not exercise any veto rights it may have with respect to decisions taken within the SAAF Agreement, except to the extent that any decision would adversely affect HSDG's allocation in this agreement.

3. MONITORING OF COMPLIANCE WITH THE CONDITIONS

- 3.1. Maersk Line shall within 5 (five) Business Days of the Implementation Date provide notice of such implementation to the Commission.
- 3.2. Maersk Line shall within 5 (five) Business Days of serving notice of withdrawal

in respect of the SAAF Agreement provide a copy of such notice of withdrawal to the Commission.

- 3.3. Maersk Line shall within 5 (five) Business Days of the Effective SAAF Exit Date, expected to take place four months and 49 calendar days after the Implementation Date, provide written proof of such exit to the Commission. In the event that the Effective SAAF Exit Date is to occur after four months and 49 days after the Implementation Date, Maersk Line shall inform the Commission of the likely delay within 5 (five) Business Days of becoming aware of the likely delay.

4. GENERAL

- 4.1. Maersk Line shall be entitled to apply to the Tribunal for a waiver, relaxation, modification and/or substitution of the Conditions, showing good cause.
- 4.2. The documents referred to in the paragraphs above must be submitted to the following e-mail address: 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 Tribunal Rules.