

**COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA**

Case no: 48/LM/May05

In the Large Merger Between:

A P Moller-Maersk

Acquiring Firm

And

Royal P & O Nedlloyd N.V.

Target Firm

Reasons for Decision

Approval

1. On 1 November 2005, the Competition Tribunal approved the proposed merger between AP Moller-Maersk ("Maersk") and Royal P&O Nedlloyd N.V. ("PONL") in terms of section 16(2)(b) of the Competition Act.

Background

2. This is a proposed merger in respect of which the Commission submitted its recommended conditions on 5 September 2005. A pre-hearing was held in order to address certain preliminary issues, amongst others, the differences between the merging parties and the Commission relating to the Commission's recommended conditions of the merger. Subsequent to the pre-hearing, we held the hearing on 26 October 2005 which resulted in the Tribunal requesting the merging parties and the Commission to furnish the Tribunal with additional information regarding other aspects relevant to the Tribunal's adjudicative purposes. As explained above, we subsequently made an order on 1 November 2005.

3. The proposed transaction is basically a global merger transaction (in the liner shipping industry) whereby Maersk acquired the entire business of PONL. The transaction was also notified to various competition authorities in a number of other jurisdictions, viz.: the EU, the US, Australia, Brazil, Bulgaria, Israel, New Zealand, Romania, South Korea, and Turkey. The EU conditionally cleared the proposed merger. However, the US approved the proposed merger unconditionally.

4. The Commission told us that it has had constant contact with the European Commission during its investigation and there was information exchange between the two authorities. Subsequently, the Commission adopted the European Commission conditions as the Commission felt that those European Commission conditions addressed the competition concerns the Commission had relating to the South Africa / Europe and South Africa / North America trade routes. After intensive correspondence and negotiations with the merging parties, the Commission subsequently withdrew some of its recommended conditions.¹ At

¹ See page 2 of the transcript of 26 October 2005. The conditions subsequently withdrawn by the Commission essentially related to the divestiture of PONL's "rights, assets and obligations relating to its liner activities" with respect to South Africa/North America trades.

some stage the South African Association of Freight Forwarders ("SAAFF") which represents just under 200 freight forwarders in South Africa (and whose members are major customers of the merging parties) wrote to the Commission indicating their intention to object to the proposed merger.² Their view was that the proposed transaction would result in a substantial prevention and/or lessening of competition in South Africa in the market for container shipping services on a variety of routes to and from South Africa. It was their further view that the proposed transaction would potentially lead to foreclosure in the freight forwarding market and other levels of logistics supply chain. SAAFF subsequently dropped its intention to object to the proposed merger because they were satisfied that the Commission's adoption of the EU conditions would remedy their concerns.

The transaction

5. The parties to this merger are Maersk and PONL. Maersk is a Denmark based firm of the AP Moller-Maersk Group. The AP Moller-Maersk Group controls a number of subsidiaries.³ Of these subsidiaries, Safmarine (Pty) Ltd controls a number of South Africa based companies.⁴ PONL is a Netherlands based company.⁵

6. Maersk and PONL entered into a merger protocol in terms of which Maersk will acquire the entire ordinary share capital of PONL. Post-merger, Maersk will exercise sole control over PONL.⁶

Rationale for the transaction

7. According to the parties, the proposed transaction was prompted by the need to consolidate the so-called fragmented (liner) shipping industry. The parties asserted that the consolidation would be necessary to achieve increased economies of scale, improved quality of services to end customers and generate sufficient returns to maintain high investment levels benefiting global trade. The parties would also like the merged entity to deliver sufficient service and have enhanced global reach.⁷

The Relevant Market

8. Maersk is involved in container shipping, bulk carriers, tankers, supply vessels, drilling rigs and oil & gas exploration and production. Maersk's South Africa business involves containerised shipping, long-haul international containerised shipping and the operation of a regional feeder service.⁸

² See the letter from Webber Wentzel Bowens (representing SAAFF) dated 27 July 2005, page 941 of the merger record.

³ These include Maersk Sealand, Maersk Tankers, Maersk Gas Carriers, Car Carriers, Maersk Maersk Supply Service, Maersk Brokers, Maersk Logistics, APM Terminals, Safmarine (Pty) Ltd, Norfolkline and SvitzerWijismuller.

⁴ Maersk South Africa (Pty) Ltd, Maersk Logistics South Africa (Pty) Ltd, Southern Africa Transport Investments (Pty) Ltd and Umkhumbi Marine (Pty) Ltd (51%).

⁵ In South Africa PONL controls Cross Country Containers Africa (Pty) Ltd, P&O Nedlloyd (SA) Ltd and P&O Nedlloyd Ltd.

⁶ Pages 185-186 of the record.

⁷ Pages 186-187 of the record.

⁸ See page 46 of the record.

9. Globally, PONL is involved in containerised shipping, the provision of maritime transport services, warehousing and distribution services, freight forwarding, logistics services and truck transportation. It also owns harbour terminals throughout the world except in this country. The merging parties told us that PONL operates containerised shipping services only in this country.

Product overlap

10. What one sees from the above is that the only overlap between the merging parties relates to the containerised shipping services. According to the Commission world shipping industry can be divided into two broad categories, viz., bulk⁹ and container shipping.¹⁰

Geographic market

11. The merging parties operate in a variety of trade routes as listed below. The parties contended that the geographic range of container shipping is worldwide due to the scope for supply-side substitution between various trade routes. The Commission contended that container liner shipping services specified trade routes. Further to this there are certain ships, which have been purposely built for the South African ports and which, cannot be utilised anywhere in the world. According to the Commission moving vessels from one trade to the other would be subject to long term planning and high switching costs.

12. Pursuant to the above the Commission defined the geographic market as constituting each separate route, viz.: South Africa / Europe; South Africa / North America; South Africa / Middle East; South Africa / Far East; and South Africa / Intra-Africa.

Competition analysis

13. The Commission's investigation revealed the following combined market shares of the merging parties post-acquisition in containerised shipping relating to the above trade routes:

- South Africa / Europe : 43%
- South Africa / North America : 61%
- South Africa / Middle East : 53%
- South Africa / Far East : 33%
- South Africa / Intra-Africa : 34%

14. The Commission's investigation as confirmed by a number of customers, shippers and carriers revealed that there are barriers to entry in the market caused partly by agreements on trading conditions in the industry and cost involved in entering the market. The Commission further submitted that there have been no entrants in the SA/Europe trade route due to port constraints as SA ports are relatively small and cannot accommodate

⁹ Bulk shipping handles large cargo parcels on pallets in holds especially designed for this purpose. Bulk vessels tend to carry cargo of a low value / high volume and homogenous products such as unpacked dry commodities ("dry cargo") e.g., iron ore, coal, grain, timber, etc and liquid commodities ("liquid cargo") such as crude oil, chemicals, liquefied gas, etc. The shipping of bulk cargo is done through either specialised bulk vessels or multi-purpose vessels.

¹⁰ Container shipping services involve the carriage of goods by modular container, i.e., industrial sized "boxes" of a certain standard size on specially equipped ships which provide a fixed service between specified ports. These products are usually of high value / low volume heterogeneous nature.

certain types of large vessels. Although there might have been genuine competition concerns regarding other routes, the Commission's investigation nevertheless reveals a much more positive results relating to other routes. For instance, the Commission found that there have been several new entrants in the SA/Middle East and SA/Far East trade routes in the past three years. We have also been told that freight rates are negotiable. In addition, the Commission noted that in the SA/North America trade slots are easily available and the discontinuation of the USEADA Discussion Agreement has enhanced competition. The Commission also discovered that there is competition in the Intra-Africa trade route as there are large numbers of existing carriers.¹¹ Insofar as the South Africa/North America trade route is concerned, the merging parties advised us that PONL does not operate a service or deploy capacity on the South Africa/North America trade independently of its South Africa/Europe service. Interestingly, PONL currently offers an indirect service to North America via Europe, i.e., cargo travels from South Africa to Europe and then it is shipped to North America and *vice versa*. The European leg of PONL's service is supplied *via* the SAECS consortium, of which the merging parties are currently members.

15. We note too that although a large number of customers and carriers initially raised concerns about the proposed merger they were satisfied that the adoption by us of the EU conditions would remove the objectionable features of the merger.

16. We are satisfied that the conditions do address the competition concerns initially raised by the merger. Since they do so, it is not necessary for us to analyse those concerns to see if they are valid. It suffices to say that if they are valid, the proposed conditions will remedy them. In brief the proposed conditions provide for the following: the divestiture by AP Moller of the business of PONL on the trade between Europe and South Africa; and the withdrawal by PONL from the IOS liner shipping consortium as well as the notification by AP Moller to the Competition Commission of the transfer of the divestment business as a merger regardless of whether the transaction falls with the thresholds for notification as a merger.¹²

Public Interest

17. The Commission was also concerned that the merger might lead to significant employment loss. Maersk had indicated to the Commission that it anticipated that the proposed merger might result in a reduction of approximately 5% or 1 500 jobs worldwide across the combined entity over a period of 5 years.¹³ Although the merging parties had indicated that retrenchments in South Africa were unlikely as natural attrition over time might obviate the need for retrenchments the Commission remained concerned. The parties tendered a condition in respect of employment loss that met with the Commission's approval. We consider that in this case in view of the high levels of employment loss that might eventualise particularly in relation to unskilled workers that the condition is appropriate. The condition we have imposed at the parties' suggestion obliges the merged entity not to retrench any unskilled employees of the merged firm due to the merger for a period of twelve months from the date of this Order.

¹¹ In fact, one Mr Peter Newton, a representative company executive of one of the major customers to the merging parties testified that "...on the South America, South Africa, Far East we made it very clear we had no objection because there is plenty of competition on that route..." **See the transcript, page 11.**

¹² See the Tribunal's non-confidential order attached hereto and marked "Annexure A".

¹³ See page 24 of the Commission's Recommendations.

Conclusion

18. We are of the view that the imposed conditions will ameliorate any concerns that might result from the proposed merger hence the conditional approval.



N Manojm

12 May 2006

Date

Concurring: **D Lewis, and Y Carrim**
Tribunal Researcher: T Masithulela

For the Merging Parties: Adv. D Unterhalter SC instructed by Bowman Gilfillan Inc.
For the Commission: M Langa (Legal Services) and L Khumalo (Mergers and Acquisitions)

COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

Case No.: 48/LM/May05

In the large merger between:

AP Moller-Maersk

And

Royal P & O Nedlloyd N.V.

NON-CONFIDENTIAL ORDER

Further to the recommendation of the Competition in terms of section 14A(1)(b), the Competition Tribunal orders that the merger between AP Moller-Maersk and Royal P & O Nedlloyd N.V. be approved in terms of section 16(2)(b), subject to the following conditions:

Section A. Definitions

1. For the purposes of the Commitment, the following terms shall have the meaning defined below:

Closing: the transfer of the legal title of the Divestment Business to the Purchaser(s).

Divestment Business: the business of P&O Nedlloyd on the Identified trade as defined in paragraph 7 of this Commitment that the Parties have undertaken to divest pursuant to a commitment offered to and accepted by the European Commission pursuant to Article 6(2) of Council Regulation (EEC) No. 139/2004.

Effective Date: the date of this order by the South African Competition Tribunal.

Identified Trade: the trade between Europe and South Africa.

IOS: Indian Ocean Vessel Sharing Agreement Slot Rationalisation and Scheduling Agreement, which is a consortium agreement on the South Africa/Middle East trade. The following carriers are members of IOS: P&O Nedlloyd, Laurel Navigations (Mauritius) Limited, Pacific International Lines.

Purchaser: the acquirer of the Divestment Business.

Relevant Trade: for IOS this is the trade to and from South Africa/Middle East.

SAECS: consortium operating on the Northern Europe/Southern Africa trade. The following carriers are members of the SAECS consortium: Deutsche Afrika-Linien, Safmarine, Maersk Sealand and P&O Nedlloyd.

Sale and Purchase Agreement: the binding agreement(s) entered into between the Parties and the Purchaser (including all ancillary agreements relating thereto) concerning the transfer of the Divestment Business to the Purchaser.

Same Partners(s): all partners to IOS except P&O Nedlloyd, namely, Laurel Navigation (Mauritius) Limited and Pacific International Lines Ltd.

TEU: Twenty-foot Equivalent Unit.

Section B. The Divestment Business

Commitment to Divest

2. AP Moller shall divest, or procure the divestiture of the Divestment Business, on the understanding that AP Moller shall use its best efforts to procure the transfer of the relevant personnel and contracts referred to below at paragraphs 7(d) - (h).
3. In order to maintain the structural effect of the Commitments, the Parties shall, for a period of [*Confidential*] after the Effective Date, not acquire direct or indirect influence over the whole or part of the Divestment Business, unless the South African Competition Commission has previously found that the structure of the market has changed to such an extent that the absence of influence over the Divestment Business is no longer necessary.

Divestment Period

4. AP Moller shall find one Purchaser for the Divestment Business and enter into a final binding Sale and Purchase Agreement with such Purchaser for the transfer of the Divestment Business within [*Confidential*] from the Effective Date.
5. Should AP Moller be unable to enter into binding agreements for the transfer of the Divestment Business within the [*Confidential*] period referred to in paragraph 4, the period shall be extended by another [*Confidential*] from the date of the expiry of the [*Confidential*] period following the Effective Date.

Closing

6. AP Moller shall be deemed to have complied with this undertaking if, within a period not exceeding [*Confidential*] from the Effective Date, it has entered into a binding Sale and Purchase Agreement for the transfer of the Divestment Business in accordance with paragraphs 4 and 5, above, provided that the Divestment Business is transferred to the Purchaser either upon Closing or within [*Confidential*] from Closing.

Divestment Business

7. The Divestment Business consists of those assets, rights and obligations which relate to P&O Nedlloyd's activities on the Identified Trade, namely:
 - (a) P&O Nedlloyd's rights, interests and obligations in two time-charters with Offen Reederei GmbH & CO, Hamburg:
 - (i) the PONL Heemskerck, under time-charter dated 26 March 2003 for a duration of [*Confidential*] from 15 February 2005, being the date of delivery, with P&O Nedlloyd's option of [*Confidential*] further one year periods;
 - (ii) the PONL Livingstone, under time-charter dated 26 March 2003 for a duration of [*Confidential*] from 28 February 2005, being the date of delivery, with P&O Nedlloyd's option of [*Confidential*] further one-year periods.

- (b) P&O Nedlloyd's rights, interests and obligations in a time-chartered vessel, the P&O Nedlloyd Portbury, chartered for [Confidential] with effect from 15 July 2004. This is a B170 vessel with a nominal capacity of 1,728 TEUs (allocated capacity of [Confidential]) having 200 reefer plugs.
- (c) P&O Nedlloyd's rights, interests and obligations whether as owner or lessee, of the following number of dry and reefer containers used by it on the Identified Trade: P&O Nedlloyd estimates that the number of containers required to service its volume on the Identified Trade would be approximately [Confidential] general purpose 20' containers (or equivalent mixture of 20' and 40') together with approximately [Confidential] 40' high cube integral (i.e. reefer) containers.
- (d) Relevant personnel employed by P&O Nedlloyd in South Africa in the management, operation and marketing of its liner shipping activities on the Identified Trade.
- (e) The contracts to which P&O Nedlloyd (whether individually or jointly with one or more other liner shipping companies) is party for the provision of liner shipping services on the Identified Trade.
- (f) The contracts to which P&O Nedlloyd (whether individually or jointly with one or more other liner shipping companies) is party for the provision of goods and services to P&O Nedlloyd in the operation of its liner shipping services on the Identified Trade.
- (g) The rights and obligations associated with P&O Nedlloyd's membership of the SAECS consortium, including P&O Nedlloyd's rights and obligations as a member of SAECS under special berthing arrangements negotiated with terminals in South Africa.
- (h) The rights and obligations associated with P&O Nedlloyd's membership of the Europe South Africa Conference.

Section C. Withdrawal

Withdrawal from consortia

- 8. AP Moller shall procure that P&O Nedlloyd will withdraw from the IOS liner shipping consortium. It shall do so by serving notice of termination of its membership within [Confidential] of the Effective Date in accordance with the terms of the relevant consortium agreement, such notice to take effect at the earliest date permitted by such agreement, namely, [Confidential] from the date on which notice is served.
- 9. In summary, within the above liner shipping consortium the members provide international liner services, chiefly by container, in respect of which they cooperate in the joint operation of a maritime transport service, including any one or more of the following: the coordination of sailing timetables, the exchange of vessel space or slots and the pooling of vessels. The members of consortia do not agree any common freight rates or charges.

Related Commitment

- 10. AP Moller shall not, for a period of [Confidential] following the Effective Date, become a member of the IOS consortium. AP Moller also shall not become a member of any consortium with substantially similar terms and with the Same Partners as the IOS consortium on the Relevant Trade.
- 11. The obligations set out in paragraph 10 shall lapse if the South African Competition Commission has previously found (as a matter of priority) that the structure of the

market has changed to such an extent that the withdrawal of the membership of or participation in the consortium is no longer necessary.

12. The obligations described above at paragraphs 10 do not preclude the Parties from joining other conferences, consortia or any other agreements between container shipping lines, nor do they preclude the Parties from entering into any *ad hoc* bilateral space or slot chartering arrangements with any carrier(s) on the Relevant Trade or any other trades in order to meet customer demands for capacity and/or frequency on such trades at any given time, provided the *ad hoc* bilateral space or slot chartering arrangements with any carrier(s) on the Relevant Trade are not in substantially similar terms to the agreement referred to at paragraph 8.

Section D. Reporting

Divestment Business

13. AP Moller shall submit a written report to the South African Competition Commission within [*Confidential*] after the end of each month following the Effective Date in relation to progress of the divestiture process. In addition, AP Moller shall ensure that appropriate waivers are in place in order that the South African Competition Commission can liaise and communicate with the European Commission and its Monitoring Trustee to monitor the divestiture of the Divestment Business in accordance with the procedures contemplated by the commitment offered to and accepted by the European Commission pursuant to Article 6(2) of Council Regulation (EEC) No. 139/2004.
14. AP Moller shall inform the South African Competition Commission on the preparation of any data room documentation, information memorandum and due diligence procedure arranged by AP Moller.

Further notification

15. AP Moller shall be required to notify the transfer of the divestment business as a merger to the Competition Commission, irrespective of whether the transaction falls within the thresholds for notification as a merger.

Withdrawal from consortia

16. No later than [*Confidential*] following the Effective Date, AP Moller shall confirm in writing to the South African Competition Commission that P&O Nedlloyd has given notice to terminate its membership of IOS. Upon completion of the withdrawal of P&O Nedlloyd from the IOS agreement, AP Moller shall inform the South African Competition Commission in writing of the withdrawal.

Section E. Review

17. The South Africa Competition Commission may, where appropriate, in response to a reasoned request from AP Moller showing good cause and, if requested by the Commission:
 - (i) grant an extension of the time periods foreseen in the Commitments, or

- (ii) waive, modify or substitute, in exceptional circumstances, one or more of the undertakings in these Commitments.

Where AP Moller seeks an extension of a time period, it shall submit a request to the South African Competition Commission no later than one month before the expiry of that period, showing good cause. Only in exceptional circumstances shall AP Moller be entitled to request an extension within the last month of any period.

18. In case of a material change of circumstances, AP Moller reserves its rights to request the Commission to review the whole or any specific undertakings relating to this Commitment as set out above.

Section F. Public Interest

19. AP Moller shall not retrench any unskilled employees of the merged firm (being employees who mainly perform manual or technical labour primarily outside an office environment) due to the merger for a period of twelve (12) months from the Effective Date. During the twelve (12) month period AP Moller must notify the Commission of the retrenchment of any unskilled employee within 14 business days of the date of the retrenchment taking effect. The notice must include the name of the employee, the date that the retrenchment becomes effective, and the reasons for the retrenchment.

Section G. A merger clearance certificate

20. A Merger Clearance Certificate be issued in terms of Competition Tribunal rule 35(5)(a).

2005

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Concurring: D. Lewis, Y. Carrim

01 November

Date