COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM073Aug23

In the matter between:

Airports Company South Africa SOC Ltd	Acquiring Firm
And	
The Aviation Fuel Supply Assets of BP Southern Africa (Pty) Ltd Located at George and King Phalo Airports	Target Firm

Panel:	Liberty Mncube (Presiding Member) Shaista Goga (Tribunal Panel Member) Andiswa Ndoni (Tribunal Panel Member)
Heard on:	20 October 2023
Order issued on:	23 October 2023
Reasons issued on:	01 November 2023

REASONS FOR DECISION

Approval

[1] On 23 October 2023, the Competition Tribunal ("Tribunal") unconditionally approved the large merger in terms of which Airports Company South Africa SOC Limited ("ACSA") intends to acquire the aviation fuel supply assets of BP Southern Africa (Pty) Ltd ("bpSA"), located at the George and King Phalo airports ("the Target Assets"). Upon implementation of the proposed transaction, ACSA will own the Target Assets.

Parties to the transaction and their activities

Primary acquiring firm

[2] The primary Acquiring Firm is ACSA. ACSA is largely controlled by the South African Government (74.6%), through the Department of Transport ("the DoT") and the DR International Airports SA (Pty) Ltd (20%). The DR International Airports SA (Pty) Ltd is a wholly-owned subsidiary of the Public Investment Corporation ("PIC"). Accordingly, the South African Governments owns ACSA as to 94.6% and the remaining shares are held by various entities.

[3] ACSA controls a number of entities including ACSA Global Ltd, Airports Consultancy and Advisory Services SOC Ltd, JIA Piazza Park (Pty) Ltd, Precinct 2a SOC Ltd, Lexshell 342 Investment Holdings (Pty) Ltd, Airport Management Share Incentive Scheme (Pty) Ltd, Sakhisizwe Community Programme and Airport Logistics Property Holdings (Pty) Ltd.

[4] ACSA owns and operates the 9 (nine) principal airports (including George and King Phalo airports) in South Africa. Its mandate is to undertake the acquisition, establishment, maintenance, operation and control of any airport, or part of any airport. ACSA also participates in equity investments on an international scale and provides technical advisory and consultancy services to airports.

[5] ACSA generates revenue from government regulated tariffs paid by airlines. Such tariffs include fees for aircraft landing, aircraft parking and passenger service charges. In addition, ACSA derives a non-aeronautical income from retail sales, concession fees, property leases, parking fees, hotel operations and advertising. Lastly, ACSA generates non-core revenue from its offshore equity investments, technical advisory forums and consultancy services to airports.

Primary target firm

[6] The primary Target Firm is bpSA in respect of all immovables, movables, vehicles and equipment belonging to and used by bpSA in its aviation fuel supply operations at the George and King Phalo airports located in East London ("the Target Assets").

[7] The Target Assets include: (i) tanks, pipework, pumps, instrumentation, bunded areas, a gantry for loading refuellers and off-loading road bridgers; (ii) trucks; and (iii) buildings i.e., an administration building and a storage facility. BpSA leased the relevant premises at these two airports from ACSA, where it installed all immovable assets and purchased the movable assets required to operate the sites – which now comprise the Target Assets. The Target Assets are used to

receive, store and dispatch aviation fuel for planes (i.e., tank-farm fuel management operations) at the George and King Phalo airports.

Proposed transaction and rationale

Transaction

[8] In terms of the proposed transaction, ACSA intends to acquire the Target Assets from bpSA. Post-implementation of the proposed transaction, the Target Assets will be owned by ACSA.

Rationale

[9] In light of recent challenges facing the supply of aviation fuel and associated operations at airports in South Africa, including as a result of COVID-19, ACSA has developed a strategy that entails, among other things, having a deeper participation in the functioning of the aviation fuel infrastructure at airports. Pursuant to its new strategy, ACSA intends to take ownership and have greater oversight over the management of such assets at the George and King Phalo airports. As a result, when bpSA expressed an intention not to renew the lease agreements at the George and King Phalo airports, ACSA decided to exercise its rights of first refusal in order to acquire the Target Assets in line with its strategy outlined above.

Relationship between the parties

[10] Having considered the business activities of the merging parties, we find that the Proposed Transaction gives rise to a horizontal overlap as ACSA also owns assets similar to the Target Assets at Upington airport, OR Tambo International Airport, Cape Town International Airport, King Shaka International Airport and Port Elizabeth International Airport (Chief Dawid Stuurman International Airport). Furthermore, we find that the Proposed Transaction gives rise to a vertical overlap given that ACSA owns airports, and the Target Assets are used to supply aviation fuel at airports.

Relevant markets

[11] International case precedent (i.e., ***BP p.l.c/Statoil Fuel & Retail Aviation)*** posits that into-plane supply consists of the supply of aviation fuel at individual airports under contracts between into-plane suppliers and airlines, with the fuel supplied pursuant to the arrangements with servicing companies that operates the airport fuelling infrastructure (storage, hydrant pipelines) and perform actual into-plane fuelling services with dispenser vehicles or fuelling trucks to the aircraft for a fee paid by the airlines. In light of the above, and without concluding

on the precise parameters of the relevant market, we assess the impact of the proposed transaction in the market for into-plane supply of aviation fuel.

[12] As regards the geographic market, and in line with international case precent (i.e., ***BP p.l.c/Statoil Fuel & Retail Aviation),*** we find that the geographic scope of into-plane supply of aviation fuel is limited to each specific airport. This is because, airlines tend to select the supplier that submits the best bid, airport by airport, according to the relative advantages of the suppliers at that location. On the demand side, if the price of aviation fuel increases to an unsatisfactory level at one airport, an airline is unable to turn to another airport in order to obtain the same fuel at a lower price given the constraints connected with the availability of time slots.

[13] Perusal of the merger record reveals that the Target Assets and the aviation fuel supply assets owned by ACSA are not located in the same airport. The Target Assets are located at the George and King Phalo airports. The aviation fuel supply assets owned by ACSA are located at Upington Airport and the aviation fuel storage facilities are located at OR Tambo International Airport, Cape Town International Airport, King Shaka International Airport and Port Elizabeth International Airport (Chief Dawid Stuurman International Airport). In light of the above, we conclude that there is no geographic overlap between the activities of the merging parties.

Competition Assessment

[14] In line with the Competition Commission ("Commission")'s recommendation, we considered whether the vertical relationship between the merging parties would give rise to input and/or customer foreclosure concerns.

Vertical assessment

[15] With regard to input foreclosure, we find that the Target Assets located at each of the George and King Phalo airports serve each respective airport only and will continue to do so. Also, we find that the Target Assets are used to supply aviation fuel from tanks located at the relevant airport into aircrafts located at that airport. As such, we are of the view that it is not possible for the fixed assets located at one airport to be used to receive and store aviation fuel and supply fuel into aircrafts at any other airport.

[16] As regards customer foreclosure, the merging parties submitted that [redacted] did not have any [redacted] The merging parties submitted that ACSA does not trade in aviation fuel and is only purchasing the Target Assets.

[17] The Commission submitted that post-merger, ACSA will use the Target Assets to enable the supply of aviation fuels to airlines. The airlines that require aviation fuel will source this from suppliers ("through-putters") of their choice. The through-putter will use the Target Assets at the George and King Phalo airport to supply the aviation fuel to the airline. The cost of using the Target Assets will be the same for all users of the facility. This is achieved by a published tariff from the National Energy Regulator of South Africa ("NERSA") and ACSA will publish the costs of into-plane services.

[18] In light of the above, we find that the proposed transaction does not give rise to significant customer and/or input foreclosure concerns and is thus unlikely to result in a substantial prevention or lessening of competition in the affected markets.

Public interest assessment

Effect on employment

[19] The merger parties submitted that there will be no retrenchments or redundancies as a result of the proposed transaction. The Target Assets at the George and King Phalo airports have been operated by [redacted] and no permanent employees of bpSA were employed and dedicated to operating the facilities. [redacted] continue to provide these services while PetroSA has stepped in as interim operator. The merging parties submitted that once the proposed transaction has been implemented and a new operator is appointed by ACSA, that operator will be able to decide whether or not to continue using the services of [redacted] to operate the Target Assets on its behalf.

[20] The Commission engaged the employee representative of bpSA who confirmed that no concerns were raised by any employees. The Commission engaged the trade unions representing the employees within ACSA, namely the National Union of Metalworkers of South Africa ("NUMSA") and National Education, Health and Allied Workers' Union ("NEHAWU"). The Commission submitted, that after numerous attempts, they did not receive any feedback from NUMSA and NEHAWU.

[21] Considering the above, we conclude that it is unlikely that the proposed transaction will have adverse effects on employment in South Africa.

Effect on the spread of ownership

[22] The Commission submits that ACSA is a state-owned company that is majority owned and controlled by the South African Government as to 94.6%, held as to 1.2% by an employee share trust (majority of participants are HDPs), and the remaining non-HDP shareholders hold 4.2%. bpSA has an HDP shareholding of 25.11%.

[23] Given that the government is the ultimate shareholders and the dividends which accrue to it benefit all the people of South Africa, the Commission concluded that the proposed transaction does not negatively impact on the promotion of a greater spread of ownership. Further, the Commission noted that imposing HDP transactions/ESOP remedies in instances where the state is the acquiring firm would result in the privatization of parts of state-owned entities which falls within the purview of government policy and is beyond the scope of the Commission.

[24] Based on the above facts, we conclude that the proposed transaction does not raise any significant public interest concerns.

Conclusion

[25] For the reasons set out above, we conclude that the proposed transaction does not raise any significant competition or public interest concerns, and therefore approve the proposed transaction unconditionally.

Signed by:Liberty Mncube
Signed at:2023-11-01 09:40:57 +02:00
Reason:Witnessing Liberty Mncube

L-Mncube

01 November 2023

Professor Liberty Mncube **Date**

Concurring: Ms. Shaista Goga and Ms. Andiswa Ndoni

Tribunal case manager	:	Baneng Naape
For the merging parties	:	Jean Meijer and Sandhya Foster of Herbert Smith Freehills
For the Commission	:	Nomthandazo Mndaweni, Portia Bele and Grashum Mutizwa