COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM127Sep20

In the large merger between:

AIR LIQUIDE LARGE INDUSTRIES SOUTH AFRICA PROPRIETARY LIMITED	Acquiring Firm
and	
THE BUSINESS OF OWNING AND OPERATING 16 AIR SEPARATION UNITS OF SASOL SOUTH AFRICA LIMITED	Target Firm

---

Panel:	Yasmin Carrim (Presiding Member) Andreas Wessels (Tribunal Member) Imraan I. Valodia (Tribunal Member)
Heard on:	08 June 2021
Date of last submission:	10 June 2021
Order issued on:	11 June 2021
Reasons issued on:	02 July 2021

REASONS FOR DECISION

Conditional Approval

[1] On 11 June 2021, the Competition Tribunal conditionally approved the acquisition (which constituted a merger) of the business of owning and operating 16 air separation units of Sasol South Africa Limited by Air Liquide Large Industries South Africa Proprietary Limited.

[2] The reasons for the approval subject to conditions follow.

Parties to the transaction and their activities

Primary acquiring firm

[3] The primary acquiring firm is Air Liquide Large Industries South Africa (Pty) Ltd ("ALLISA"), a company that is 100% owned and controlled by French company, Air Liquide Afrique ("ALA"). ALA holds share capital in three other South African companies: Air Liquide Large Industries (Pty) Ltd (ALLI);[1] Air Liquide Africa Services (Pty) Ltd (ALAS);[2] and Air Liquide Large (Pty) Ltd (AL).[3] ALA is ultimately controlled by Air Liquide Sociětẻ Anonyme ("Air Liquide S.A."), a company listed on the Euronext Paris Stock Exchange and not controlled by any firm/s.[4] In South Africa, Air Liquide S.A. controls Air Liquide Global E and C Solutions South Africa (Pty) Ltd (E&C SA). The ALLISA controllers and subsidiaries are collectively referred to as the "Air Liquide Group".

[4] ALLISA, is a newly incorporated company and formed for the purpose of the proposed transaction. ALLISA will be registered as a ring-fenced entity, dedicated almost entirely to the supply of gases to Sasol.

[5] The Air Liquide Group has been operating in South Africa for over 60 years supplying various customers utilising different supply channels. In South Africa the Air Liquide Group supplies industrial and specialty gases to the steel, automotive and fabrication, food and beverage, mining, petrochemical, pharmaceutical and glass industries. Further, it also supplies medical grade gases through a network of many state and private hospitals as well as solutions and services to home-based patients.

---

[1] As to ██%.
[2] As to ██%.
[3] As to ███%. AL controls, as to ██% Air Liquide Healthcare (Pty) Ltd (ALH); as to ██% in Continuous Oxygen Suppliers (Pty) Ltd t/a VitalAire (VitalAire); and as to ██% Air Liquide Hospital Installations Services (Pty) Ltd (ALHIS).
[4] Its largest shareholder with a shareholding of 4.94% is Blackrock.

Primary target firm

[6] The primary target firm comprises 16 air separation units ("ASUs") comprising of Trains 1 – 16 located on the Secunda Synfuels site ("Target Assets"). The Target Assets are owned and controlled by Sasol South Africa Ltd ("Sasol"). Sasol is listed on the New York Stock Exchange and the Johannesburg Stock Exchange and is not controlled by a single shareholder.

[7] An ASU plant typically separates atmospheric air into its primary components – mainly nitrogen and oxygen. Atmospheric gases are extracted from the air by using large air compressors and the air is separated using cryogenic air separation technology.

[8] The Target Assets are used to produce both industrial and speciality gases mainly for internal use by Sasol as follows:

8.1. Industrial gases i.e., gaseous oxygen, gaseous nitrogen, and compressed air which are used as inputs for Sasol's coal-to-liquids ("CTL") process, through which liquid fuels are produced, as well as various chemicals processes.[5]

8.2. A small percentage[6] of liquid oxygen and liquid nitrogen. These products are used in Sasol's operation of the Target Assets and are also inputs into Sasol's various production processes.

8.3. A small percentage of speciality gases such as krypton / xenon mixture and liquid argon – these are co-products of the main operation.[7] The krypton / xenon mixture is sold by Sasol to Air Liquide France Industries SA, an entity based in France. The liquid argon produced is purchased by ALLI and then on-sold to customers via AL.

[5] Making up more than [redacted]% of the Target Assets output.
[6] Together constituting less than [redacted]% of the Assets' total production capacity by volume.
[7] Together constituting around [redacted]% of the Assets' total production capacity by volume.

Proposed transaction and rationale

[9] The Transaction is a sale of business, in terms of which the Target Assets will be purchased by ALLISA, the relevant employees will transfer to ALLISA under section 197 of the Labour Relations Act (the “LRA”); and the existing speciality gases supply agreements will be assigned to ALLISA.

[10] The Air Liquide Group is an international supplier of industrial gases. It has the technology and expertise to build and operate ASUs and, in fact, the Air Liquide Group designed and built the Target Assets for Sasol. The Air Liquide Group therefore sees the proposed transaction as an opportunity which is in line with its core business – the manufacture and supply of industrial gases. Furthermore, because it is familiar with the Target Assets it believes it will be able to profitably operate the ASUs to ensure efficient and continuous supply of industrial gases to Sasol.

[11] Sasol is embarking on a process of divesting some of its assets. Internal ownership and operation of the Target Assets is not considered as necessary.

Relevant market and impact on competition

Horizontal assessment

[12] Both the Air Liquide Group and the Target Assets are suppliers / producers of industrial and specialty gases. However, the Commission notes that the Target Assets are fully integrated into Sasol’s production facilities and are dedicated almost entirely to producing industrial gases for use as inputs for Sasol. Notwithstanding the above, the Commission considered the impact of the merger on the following markets:

12.1. The supply of industrial gases, which includes both gaseous and liquid gasses i.e. gaseous oxygen, gaseous nitrogen, compressed air, liquid oxygen, and liquid nitrogen; and

12.2. The supply of speciality gases in South Africa including narrow markets for the krypton and xenon mixture and liquid argon.

[13] At this juncture it is important to explain certain aspects of the routes to market, which differ depending on whether dealing with tonnage gases; bulk gasses; or packaged gasses.

13.1. Tonnage gases are generally supplied by pipeline to major consumers from an onsite or nearby plant. Tonnage / pipeline gas contracts are generally competitively bid at the outset, as they require the construction of high value dedicated plant and pipelines. These supply agreements are typically of 10-20 years duration, with gas pricing being linked to published indices. Subsequent supply agreements are typically negotiated on an open book basis with the incumbent supplier based on the capital re-investment required to refurbish / re-life the dedicated plant / pipelines. A majority of the Target Assets' gaseous products produced by are transported via tonnage / pipeline to Sasol.

13.2. Bulk (liquefied) gases are delivered by road tanker into bulk tanks on the customers' site. Bulk (liquefied) gas supply agreements require a lower value of dedicated capital investment and are typically of three-to-five (3-5) years' duration. Suppliers are relatively easily rotated based on pricing and service level considerations. The liquid oxygen and liquid nitrogen produced by the Target Assets, which is a minimal amount, is used in Sasol's operation as inputs into Sasol's various production processes.

13.3. Packaged gases are supplied in cylinders or small liquid tanks. Packaged gases are generally supplied on a short-term contract or even an uncontracted basis, although some corporate and SOE (state owned enterprises) customers prefer longer term agreements to avoid

unnecessary administrative work. Customer choice and mobility in this market are relatively high.

[14] In the broad market for the supply of industrial and speciality gases, the Commission found the following:

Players	Total Revenue		Estimated market share	
	Industrial Gases	Specialty Gases	Industrial Gases	Specialty Gases
Afrox				
Air Products				
Air Liquide				
Target Assets				
Total				

Source: Commission based on third party information

[15] The Commission understood that due to the integrated nature of the Target Assets with Sasol's fuel chemical business, it is not feasible for the gaseous oxygen from the Target Assets to be supplied to a third party. Therefore, the Commission did not consider this narrow market(s) any further. Products that can possibly be supplied from the Target Assets are liquid products (i.e., liquid oxygen, liquid nitrogen and liquid argon).

[16] The Commission estimated market share of the merging parties and their competitors in the market for the supply of liquid oxygen and liquid nitrogen (2019) and found the following:

Players	Production volume per day (tpd)		Estimated market share	
	Liquid Oxygen	Liquid Nitrogen	Liquid Oxygen	Liquid Nitrogen
Afrox				
Air Products				
Air Liquide				
Target Assets				
Total				

Source: Commission based on third party information

[17] The Commission also applied its mind to the narrow market for the provision of medical grade oxygen in South Africa (in light of recent reports about shortages of medical grade oxygen during the second wave of the COVID 19 pandemic). It was found that Afrox Limited ("Afrox") is the largest supplier of medical grade oxygen in South Africa, followed by Air Liquide and Air Products South Africa (Pty) Ltd ("Air Products"). [redacted] In light of the Target Assets' minimal production volume,[8] the Commission concluded it unlikely that the proposed transaction would substantially prevent or lessen competition in this market.

Vertical assessment

[18] The Commission also found the proposed transaction unlikely to result in any foreclosure concerns; on account of the fact that it is not feasible to provide gaseous products to an external market because of the integrated nature of the Target Assets to the Sasol site. The gaseous oxygen, nitrogen and other air products are delivered directly to the site via integrated pipelines, and the Target Assets were designed specifically for this purpose in the original construction.

Continued supply

[19] In terms of a Gas Supply Agreement signed on 9 September 2020 by Sasol and ALLISA ("GSA"); ALLISA will take over the business of supplying gaseous and liquid oxygen, gaseous and liquid nitrogen and compressed air to Sasol. ALLISA will also take over the business of supply of [redacted] In terms of the GSA, Sasol has contracted to obtain [redacted] pd[9] quantity of gaseous oxygen a period of [redacted] years,

[8] of [redacted] tpd.
[9] Tons per day.

[redacted] This is in line with the practical capacity of the Target Assets of under [redacted] pd.[10]

Views of third parties

[20] A small competitor raised the argument that the proposed transaction scores negatively on : (i) the ease of entry into the market; and (ii) the level and trends of concentration, and history of collusion, in the market.[11]

[21] They assert that in South Africa, this market is highly concentrated as it comprises just three players, namely Air Liquide, Afrox and Air Products, all of which are foreign owned and/or controlled. In this competitor's view, it is not inconceivable that Sasol constituted a restraining influence on the three players in the market as a potential competitor. A direct consequence of the increase in concentration is to raise barriers to entry in a manner that will make it "highly impossible" for small entities to achieve meaningful entry into this market.

[22] They submitted that Sasol, as one of the largest, if not *the* largest consumer of industrial gases in South Africa, has always seen by the competitor as a potential customer, in the event that it required additional product. This transaction takes that opportunity away because Sasol will only have to inform ALLISA to increase capacity in order to meet any additional requirements it may have. This competitor says that this closes the door for third parties to supply Sasol almost permanently. A concern related to ease of entry (also as raised as a public interest argument) was a complaint by this competitor that the Target Assets ought to have been put out on tender and Sasol should not have been allowed to negotiate the transaction with ALLISA.

[10] Capacity utilisation of the Target Assets is at the total installed capacity in the theoretical situation where all of the target ASUs are functioning optimally and simultaneously is around 42 000tpd of oxygen. However, in reality around [redacted] tpd of oxygen is produced from the trains in operation.

[11] Record p1083-4.

[23] When this argument was put to the merging parties they submitted that none of these concerns are merger specific. The transaction does not change competitive dynamics in South Africa, the Target Assets will continue to be dedicated to supplying Sasol post-merger, just as they do today - with no impact on barriers to entry. The trivial amount of liquid oxygen and liquid nitrogen produced currently by the Target Assets, which could theoretically be sold on the open market, is utilised as back-up for internal usage and consumed entirely by Sasol's Secunda operations.

[24] Further it is not within the Commission's or the Tribunal's discretion to determine whether a third-party could be considered a more suitable purchaser of the Target Assets, either from a competition or public interest perspective. It is in Sasol's interests to sell the Target Assets to a company who has the capability of operating the Target Assets in order to supply Sasol with important inputs at competitive prices.

[25] With respect to the removal of a potential competitor theory, the Commission found it not feasible for the Target Assets to provide gaseous products to an external market given the integrated nature of the Target Assets to the Sasol site. On this basis it's not possible for Sasol to be viewed as a potential competitor. In so far as the transaction could be thought to increase barriers to entry or expansion, the Commission notes that the proposed transaction does not remove a player from the (contestable) market. Currently there are 3 players in the market and post-merger the same players remain. Hence, there is no increase in concentration.

History of Collusion

[26] On 6 March 2009, Sasol put in a marker application under the Corporate Leniency Programme (CLP), in terms of which Sasol indicated that it and Air Products, through a suite of agreements, agreed on prices and markets for sale of liquid nitrogen and liquid argon to third parties.

[27] In a consent order of 20 March 2013 Air Products admitted that it entered into the suite of agreements with Sasol giving rise to price fixing and market allocation of industrial specialty gases namely, liquid nitrogen and liquid argon, in contravention of sections 4(1)(b)(i) and4(1)(b)(ii) of the Act. Air Products agreed to amend the suite of agreements within 10 days of the order. Air Products also agreed to pay an administrative penalty in the sum of R2 762 978.70.

[28] Based on the assessment canvassed above, we find that the proposed transaction is unlikely to substantially, lesson or prevent competition in the relevant markets. Despite the outcome of this test, the Act obliges the consideration of the effect of a merger on the public interest – to which we now turn.

Public interest

[29] The Department of Trade Industry and Competition (the "DTIC") and Chemical, Energy, Paper, Printing, Wood and Allied Workers' Union ("CEPPWAWU") participated in the Commission's investigation. The DTIC was represented and made submissions during the hearing on several aspects of the proposed conditions.

Employment

[30] At the start of the Commission's investigation, CEPPWAWU indicated that it was not supportive of the proposed transaction. Concerns were raised relating to job security, where it appeared uncertain whether there would be future retrenchment. Allegations were that Sasol had already started notifying employees that stay on Sasol properties to move out of these rented properties as they are no longer Sasol employees. Concerns were also raised regarding what would happen to workers after the proposed two-year moratorium on retrenchments; particularly where Air Liquide is understood to operate with fewer job levels than Sasol (Sasol has three to four level of artisans, Air Liquide only

one level). Workers wanted to know if NQF level (4) will still be relevant to the new employer. If not, what is the plan to develop those who may not have the needed qualification? Furthermore, they also wanted to know what will happen with their medical aid schemes because Sasol has two schemes, scheme B, according to which a person on retirement will keep his/her medical aid, and scheme C. Lastly, the workers also wanted to know why Sasol was selling the plant as the plant produces several products; and would like to understand the criteria used to select the Air Liquide Group.

[31] In response, the merging parties provided that there would be no retrenchments as a result of the transaction. With respect to employees who are staying on Sasol properties, there are no changes to any employees' conditions of employment, and no employee has been requested to move out of any Sasol property. With respect to whether NQF level (4) will still be relevant to the new employer, the merging parties confirmed that NQF level (4) will continue to be sufficient for purposes of employment with ALLISA. Similar learnership structures to those followed by Sasol will be followed by ALLISA post-merger.

[32] The merging parties submitted, which was confirmed by the Commission, that the proposed transaction will not have a negative effect on employment because the Target Assets will continue to operate as is post-merger. Certain other issues that CEPPWAWU raised are not all relevant to the Commission's assessment of whether the merger has an impact on employment. Instead, some the concerns are more relevant to the parties' obligations under the LRA. With respect to the concern regarding medical aid schemes, ALLISA undertook that it will maintain the same provisions in regard to payment of medical aid plans at retirement for employees transferring to ALLISA who are currently eligible for this benefit (this scheme is a closed scheme at Sasol, and only a few employees transferring to ALLISA are currently eligible to this benefit at retirement).

[33] The DTIC wanted Sasol to commit to re-employ any of their 250 former employees transferred to ALLISA that may become redundant as a consequence of plant upgrades. In response to this, the merger parties undertook that if, unrelated to the merger, the future operational requirements of

ALLISA's business that give rise to the possibility of employment reductions, ALLISA and Sasol committed to cooperate in order to identify available opportunities for those affected employees (including by Sasol assisting through rehiring those employees where practicable and providing them access to Sasol internal mobility opportunities).

[34] In light of the undertakings made by the merging parties after the negotiations with CEPPWAUW and the DTIC, the Commission was of the view that the proposed transaction is unlikely to have a negative effect on employment. In respect of some of CEPPWAWU's more extraneous concerns the Commission's view was that there was sufficient protection under section 197 of the LRA which requires a new employer to take over all the labour related obligations of the old employer.

[35] After negotiation the conditions proposed upon the recommendation of the merger in relation to employment were:

35.1. Merger Parties record that no retrenchments are contemplated as a result of the merger.

35.2. If future operational requirements of ALLISA's business give rise to possible employment reductions, the merger parties commit to cooperate to create alternate employment (through rehiring).

35.3. In order to reduce the likelihood of any future retrenchments for operational requirements unrelated to the merger, and to ensure that transferred employees are capable of operating in other areas of the industry i.e., hydrogen and energy transition industries, ALLISSA commits to spend R20 million (twenty million rand) in training and upskilling of these employees transferred to ALLISA from Sasol within 2 (two) years from the implementation date.

Spread of Ownership

[36] The Commission noted that Sasol is more empowered (B-BBEE) compared to the Air Liquide Group, as 18% of the shares in Sasol are owned by a B-BBEE shareholder and was concerned that the transaction would negatively impact on section 12A(3)(e) dealing with a greater spread of ownership. The DTIC suggested that ALLISA commit to achieving as a minimum Level 4 B-BBBEE status within two years of approval of the merger. The merging parties provided that the Air Liquide Group is committed to improve its B-BBBEE rating [redacted] [12] [redacted]

[37] The final proposed condition, proposed to cater for any negative impact on the spread of ownership was that: in addition to increasing the B-BBBEE levels, ALLISA commits to achieve a B-BBEE shareholding of [redacted] (the shares will translate into voting rights of [redacted] If necessary, to ensure that the B-BBEE transaction is achievable, [redacted]

Effect on small businesses/HDP firms, local procurement

[38] The DTIC, wanted ALLISA to use the services of South African technical personnel and input material to upgrade the Target Assets and commit to maintain and increase the proportion of services procured from small to medium

[12] [redacted]

enterprises (SMEs) and black-owned firms. In response to this the merging parties provided that when upgrading the Target Assets, ALLISA would commit to maximise where reasonable, practically and technically feasible (having regard to the nature of the products and services required), procurement of services and input material from SMEs and black-owned firms. ALLISA will liaise with the DTIC to assist and identify potential SMEs and black-owned suppliers who may have the necessary expertise and capabilities to provide the relevant products and services to ALLISA (which would be in addition to the pool of suppliers identified by ALLISA).

[39] The conditions that were proposed in this regard were:

39.1. ALLISA commits to procure services and input material from SMEs and black-owned firms.

39.2. ALLISA commits to establish a programme aimed at supporting and developing SMEs and firms controlled by HDPs in the Secunda area, and to spend at least R100 million (one hundred million rand) on these programmes within five years from implementation date.

39.3. In line with government's economic reconstruction and recovery plan, ALLISA commits to contribute (over a five-year period from the implementation date) R100 million (one hundred million rand) to localisation initiatives.

Effect on particular sector or region

[40] The DTIC requested ALLISA commit to the upgrade of the Target Assets in the amount of [redacted] to effectively reduce carbon emissions at Sasol's Secunda plant. The merging parties committed to target a reduction of carbon emissions associated with the Target Assets by 30% within 10 years from the implementation date.

[41] The conditions that were proposed provide that:

41.1. In pursuing this objective, ALLISA commits to invest in the Target Assets by spending at least [redacted] in sustaining and upgrading the performance and integrity of the Target Assets within 10 years from the implementation date (and commits to spend at least 50% of this amount during the first 5 years from the implementation date).

41.2. The merger parties commit to pursue a collaborative renewable energy process aimed at procuring an aggregate amount of up to 900MW[13] of renewable energy for the Secunda site.

[42] The DTIC requested that, ALLISA must commit to make available any liquid oxygen which is not procured by Sasol, to South African users, specifically in the healthcare sector. ALLISA has committed to supply liquid oxygen on fair and reasonable terms at market related prices; and also commits to prioritise supply to the public healthcare sector

[43] Taking the totality of the remedies proposed to ameliorate any negative effect that the proposed transaction may occasion to the public interest, we find that the transaction does not have a negative impact on the public interest.

[13] Megawatts.

Conclusion

[44] We concluded that the proposed transaction is unlikely to substantially prevent or lessen competition in any relevant market. In addition, the public interest issues that arose from the proposed transaction have been ameliorated by the provided public interest conditions. Accordingly, we approved the proposed transaction subject to the conditions attached to the order marked Annexure "A".

Signed by:Yasmin Tayob Carrim
Signed at:2021-07-02 14:58:17 +02:00
Reason:Witnessing Yasmin Tayob Carri

Yasmin Tayob Carrim

02 July 2021

Yasmin Carrim
(Presiding Member)

Date

Mr Andreas Wessels and Prof Imraan I. Valodia concurring.

Tribunal case manager:	Mpumelelo Tshabalala and Kgothatso Kgobe
For the merging parties:	Adv Michelle Le Roux instructed by Neil MacKenzie of Fasken attorneys on behalf of ALLISA and Adv Phumlani Ngcongo instructed by Wade Graaff of ENSAfrica attorneys on behalf of Sasol.
For the Commission:	Ratshidaho Maphwanya and Billy Mabatamela
For the DTIC:	Derek Lotter and Claire Reidy of Bowmans attorneys