

## COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.: LM122Oct19

In the matter between:

Marinvest S.r.l.

Primary Acquiring Firm

And

Ignazio Messina & C.S.p.A and RORO Italia S.r.l.

Primary Target Firm(s)

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Panel : Y Carrim (Presiding Member)  
: AW Wessels (Tribunal Panel Member)  
: F Tregenna (Tribunal Panel Member)  
Heard on : 19 February 2020  
Decided on : 16 March 2020

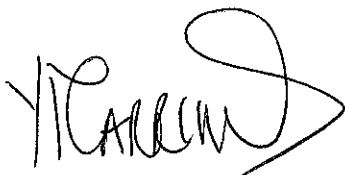
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### ORDER

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Further to the recommendation of the Competition Commission in terms of section 14A(1)(b) of the Competition Act, 1998 ("the Act") the Competition Tribunal orders that-

1. the merger between the abovementioned parties be approved in terms of section 16(2)(b) of the Act subject to the conditions attached hereto marked as **Annexure A**; and
2. a Merger Clearance Certificate be issued in terms of Competition Tribunal rule 35(5)(a).



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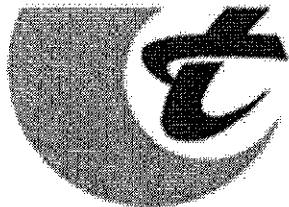
Presiding Member  
Ms Yasmin Carrim

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16 March 2020

Date

Concurring: Mr Andreas Wessels and Prof. Fiona Tregenna



# 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  
e-mail: ctsa@comptrib.co.za

## Merger Clearance Certificate

**Date:** 16 March 2020

**To:** Edward Nathan Sonnenberg Attorneys

(Name and file number of merger:)

Marinvest S.r.l And Ignazio Messina & C.S.p.A and RORO Italia S.r.l  
Case No.: LM122Oct19

You applied to the Competition Commission on 10 October 2019 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

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

**The registrar, Competition Tribunal:**

## **Annexure A**

### **Conditions**

#### **1. Definitions**

- 1.1. **"Approval Date"** means the date referred to on the Tribunal's Merger Clearance Certificate (Form CT10).
- 1.2. **"Closing Date"** is the date of effectiveness of the share capital increase of IM reserved to Marinvest Srl (**"Marinvest"**), a subsidiary of MSC.
- 1.3. **"Conditions"** means these conditions.
- 1.4. **"Commission"** means the Competition Commission of South Africa, a statutory body established in terms of section 19 of the Competition Act.
- 1.5. **"Competition Act"** means Competition Act No 89 of 1998, (as amended).
- 1.6. **"Competitively Sensitive Non-Public Information"** means pricing information, rebates, discounts provided to customers, any planned price increase or price reduction, information on tendering, margin information, customer-specific information (including but not limited to sales volumes and sales value), and commercial, advertising, marketing or promotional strategies as they relate to IM's South African Operations.
- 1.7. **"East Africa"** means Kenya and Tanzania.
- 1.8. **"Global Suppliers"** means suppliers located outside of South Africa.
- 1.9. **"IM South Africa Business"** means any South African Operations and related container-liner shipping services offered by IM.
- 1.10. **"IM South Africa"** means Ignazio Messina & C. Proprietary Limited.
- 1.11. **"IM"** means Ignazio Messina & C. S.p.A.
- 1.12. **"MSC South Africa Business"** means any South African Operations and related container-liner shipping services offered by MSC.
- 1.13. **"MSC South Africa"** means Mediterranean Shipping Company Proprietary Limited.

- 1.14. **“MSC”** means MSC Mediterranean Shipping Company SA.
- 1.15. **“Ordinary Course of Business”** means the routine day-to-day operations of the IM South Africa Business, undertaken in the ordinary and proper course of its normal day-to-day operations and which is not inconsistent with its general past practices.
- 1.16. **“South African Operations”** means any container-liner shipping services on routes from any port or destination in South Africa and destined for any port in East Africa (and *vice versa*).
- 1.17. **“South African Small and Medium Sized Suppliers”** means small and medium businesses as defined in the Competition Act and which are located in South Africa.
- 1.18. **“Tribunal”** means the Competition Tribunal of South Africa, a statutory body established in terms of section 26 of the Competition Act.

## **2. Application**

- 2.1. Except where otherwise apparent from the context, the conditions will relate only to the South African Operations of MSC and IM.

## **3. Employment Condition**

- 3.1. There will be no merger specific retrenchments at IM South Africa for a period of three years post-transaction.
- 3.2. For the sake of clarity, retrenchments do not include (i) voluntary retrenchment and/or voluntary separations arrangements; (ii) voluntary early retirement packages; (iii) unreasonable refusals to be redeployed in accordance with the provisions of the Labour Relations Act of 1995 (as amended); (iv) resignations or retirements in the ordinary course of business; (v) retrenchments lawfully effected for operational requirements unrelated to the transaction; and (vi) terminations in the ordinary course of business, including but not limited to, dismissals as a result of misconduct or poor performance.

#### **4. *Supplier Condition***

- 4.1. For a period of three years post-transaction IM and IM South Africa will continue to use the services of their existing South African Small and Medium Sized Suppliers on the same terms and conditions that existed pre-transaction. In this context “existing” means having a valid agreement with IM or IM South Africa as at the date of approval by the Competition Tribunal.
- 4.2. For the avoidance of doubt, nothing in this condition will prevent IM or IM South Africa from terminating such supply agreements in terms of the existing breach clauses in such agreements.

#### **5. *Ring-fencing Condition***

- 5.1. The IM South Africa Business will be kept separate from the MSC South Africa Business and no steps will be taken to integrate or otherwise align the activities or conduct of IM and MSC’s respective South African Operations.
- 5.2. The day-to-day affairs and business of IM’s South African Operations shall be managed by IM, in accordance with its business trading policies and practices as at the Closing Date, except as may be necessary to comply with any changes in applicable law or good industry practice.
- 5.3. The IM South Africa Business shall exercise, in its sole discretion, final and determinative power regarding the strategic marketing and/or pricing policies of IM’s South African Operations and will operate the South African Operations in the Ordinary Course of Business independently of MSC. In particular, MSC and IM will not co-ordinate or otherwise jointly determine selling prices or discounts offered to customers in relation to their respective South African Operations, nor will they co-ordinate or otherwise jointly determine vessel capacity or frequency of vessel departures from or to South Africa for their respective South African Operations.
- 5.4. MSC and IM shall ensure that none of the MSC representatives (or representatives of MSC affiliate companies) appointed to the board of directors of IM shall be engaged in the direct day-to-day management of the IM South Africa Business.

- 5.5. MSC and IM shall ensure that no Competitively Sensitive Non-Public Information of the IM South Africa Business are discussed at IM board meetings unless the MSC board representatives (or representatives of MSC affiliate companies) first recuse themselves from such discussion.
- 5.6. MSC and IM shall establish "information barriers" between the operations of the IM South Africa Business on the one hand, and MSC, on the other hand, to ensure that:
- 5.6.1. Information barriers exist in relation to Competitively Sensitive Non-Public Information of the IM South Africa Business (as determined by IM, acting reasonably in its discretion) and that of MSC (i.e. in order to prevent any flow of such information between IM and MSC). These barriers may consist of both physical and procedural measures, as determined by IM, acting reasonably in its discretion; and
- 5.6.2. All members of the board of IM who obtain lawful access to the IM South Africa Business' Competitively Sensitive Non-Public Information shall retain same in secret and confidentially other than for use as permitted in terms of the Shareholders Agreement.
- 5.7. IM, acting reasonably in its discretion, can establish any other practical and/or operational measures necessary so as to maintain the segregation of the IM South Africa Business' Competitively Sensitive Non-Public Information from that of MSC, as well as the independent operation of IM's South African Operations. These measures shall not impede MSC (or MSC affiliate companies): (i) to comply with its reporting and/or disclosure obligations under any applicable law; and/or (ii) to obtain legal or other professional advice; and/or (iii) to legitimately protect its rights as a shareholder in IM.
- 5.8. IM and MSC shall procure that the members of the IM board, as well as all employees of IM and MSC responsible for strategic marketing and/or pricing decisions of their respective South African Operations, will undergo annual competition law compliance training and/or awareness sessions in relation to South African competition law generally, and in terms of their obligations in terms of the Conditions, so as to ensure that (i) the employees of IM and MSC and the board of directors of IM maintain a current awareness of the requirements of the Competition Act; and (ii) they adhere to and comply with

their obligations as set out in these Conditions as well as in terms of the provisions of the Competition Act.

- 5.9. For the avoidance of doubt, nothing in the Conditions will prevent or otherwise limit the ability of IM and MSC to integrate their operations outside of South Africa. This includes any initiatives to engage in joint purchasing or other input procurement initiatives from Global Suppliers, even if such initiatives have an impact on the procurement activities of IM's South African Operations.
- 5.10. In addition, nothing in the above Conditions will prevent or otherwise limit the ability of IM and MSC to enter into consortia agreements,<sup>1</sup> or to enter into arm's length agreements for the provision of inland operational services (including but not limited to cargo handling and warehousing, cargo inland transportation or containers logistics (i.e. storage, repairs or positioning)).

## **6. Duration**

- 6.1. The Employment Condition and the Supplier Condition will apply for a period of three years from the Closing Date.
- 6.2. The Ring-fencing Condition will apply for as long as MSC has shareholding in IM.

## **7. Monitoring of compliance with the conditions**

- 7.1. A director of each of MSC and IM shall produce an annual affidavit which confirms their compliance with the conditions contemplated in paragraphs 3, 4 and 5 above. Such affidavits will be submitted to the Commission within one month of each anniversary of the Approval Date.
- 7.2. Each of the affidavits as described in 7.1 above shall include a list of additional employees of IM and MSC who are responsible for strategic marketing and/or pricing decisions of their respective South African Operations (**Additional Employees**). Each Additional Employee shall produce an annual affidavit which confirms their individual compliance with the conditions contemplated

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<sup>1</sup> Consortia agreements being agreements between shipping companies relating to the joint operation of liner shipping services which are pro-competitive and widely accepted as such by competition authorities around the world.

in paragraphs 3, 4 and 5 above. Such affidavits will be submitted to the Commission within one month of each anniversary of the Approval Date.

- 7.3. The affidavits described in paragraphs 7.1 and 7.2 above must include at least a confirmation that MSC and IM (or the individual employee as applicable) did not co-ordinate or otherwise jointly determine selling prices or discounts offered to customers, or co-ordinate or otherwise jointly determine vessel capacity or frequency of vessel departures from or to South Africa, in relation to their respective South African Operations.
- 7.4. The affidavits deposed to by the directors of IM and MSC must include a further confirmation that all employees of IM and MSC responsible for strategic marketing and/or pricing decisions of their respective South African Operations have (i) deposed to an affidavit of their own; and (ii) undergone the required training and/or awareness sessions as described in paragraph 5.8 above.
- 7.5. Within 20 (twenty) Days of the Closing Date, MSC and IM shall publish a link to the Conditions on their respective websites in order to promote awareness of the Conditions. The link to the Conditions shall remain available on their respective websites for a period of 12 months from the date the link is first published.
- 7.6. The Commission may reasonably request any additional information from IM or MSC which the Commission from time to time deems necessary for the monitoring of compliance with these Conditions and their effectiveness.

## **8. Variation**

- 8.1. The Commission, IM or MSC (or MSC affiliate companies) may at any time, on good cause shown, apply to the Tribunal for the Conditions to be lifted, revised or amended.

## **9. General**



- 9.1. In the event that the Commission receives any complaint in relation to non-compliance with the above Conditions, or otherwise determines that there has been an apparent breach by either IM or MSC of any of these Conditions, this shall be dealt with in terms of Rule 39 of the Rules for the Conduct of Proceedings in the Commission and Rule 37 of the Rules for the Conduct of Proceedings in the Tribunal.
- 9.2. All correspondence in relation to these Conditions shall be submitted to the following email address: [mergerconditions@compcom.co.za](mailto:mergerconditions@compcom.co.za).