

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case no.: IM091JUL17/ DSC174Sep17

In the application for further and better discovery between:

THE COMPETITION COMMISSION OF SOUTH AFRICA

First Applicant

and

**THE JOINT VENTURE FOR THE CONTAINER LINER
SHIPPING BUSINESS OF NIPPON YUSEN KABUSHIKI
KAISHA, MITSUI O.S.K LINES LTD AND KAWASAKI KISEN
KAISHA.**

First Respondent

NIPPON YUSEN KABUSHIKI KAISHA

Second Respondent

ITSUI O.S.K LINES LTD

Third Respondent

KAWASAKI KISEN KAISHA

Fourth Respondent

In re:

The request for consideration of the intermediate merger between:

**THE JOINT VENTURE FOR THE CONTAINER LINER
SHIPPING BUSINESS OF NIPPON YUSEN KABUSHIKI
KAISHA, MITSUI O.S.K LINES LTD AND KAWASAKI KISEN
KAISHA.**

Acquiring Firm

and

**THE CONTAINER SHIPPING BUSINESSES OF NIPPON
YUSEN KABUSHIKI KAISHA, MITSUI O.S.K LINES LTD
AND KAWASAKI KISEN KAISHA.**

Target Firms

Panel	: Enver Daniels (Presiding Member)
	: Anton Roskam (Tribunal Member)
	: Andiswa Ndoni (Tribunal Member)
Heard on	: 19 October 2017
Order Issued on	: 31 October 2017

ORDER

1. After having heard the parties in this application and with reference to the discovery schedule attached to this order as "ANNEXURE A", the Competition Tribunal ("Tribunal") orders as follows:

2. General Items:

2.1. The application in respect of general item 1 is upheld. The respondents are ordered to discover documentation for the period 2012-2017 where outstanding and applicable. For clarity this time period also applies to items 3; 40; 41; 43; 51; and 52.

2.2. The application in respect of general item 2 is denied. The respondents are ordered to discover any outstanding 'final' documentation only, unless otherwise tendered.

2.3. In respect of general item 3, the Tribunal orders the discovery of only those documents tendered by the merging parties. For clarity, this entails the respondents discovering documents, in addition to their own documents, for (i) the South African operating companies; and (ii) the operating companies that principally manage trade on the principal South African routes- being those routes between South Africa and Europe as well as between South Africa and East Asia, where applicable. Insofar as the items requested in general item 3 fall beyond the merging parties' tender, the application is denied.

2.4. In respect of general item 4, the Tribunal orders the discovery of only those four categories of documents in relation to the car carrier market and bulk shipping market tendered by the respondents under numbering 1 on page 45 of the attached schedule. Insofar as an item under general item 4 falls beyond the tender made by the respondents, the application for its discovery is denied.

2.5. In respect of general item 5, the respondents are required to submit a discovery affidavit under oath, as tendered, at the conclusion of the provision of documents in respect of this discovery order.

3. Specific items

3.1. The application for the discovery of items listed under items 1; 2; 3; 4; 5; 6; 7; 8; 9; 10; 11; 12; 13; 14; 15; 16; 19; 21; 22; 23; 24; 25; 26; 27; 28; 29; 30; 32; 33; 34; 36; 39; 44; 47; 50; 51; 52; 54; and 56 insofar as such are not contained in the respondents' tender, as expanded by 2.1 above is denied.

3.2. The application for the discovery of items listed under item 40, insofar as such is limited by 2.1-2.4 above is granted.

3.3. The application for the discovery of items listed under items 41 and 43 is denied.

4. Discovery is to be completed within 10 business days of this order.

5. No order is made regarding costs.



Mr. Enver Daniels

31 October 2017
Date

Ms. Andiswa Ndoni and Mr. Anton Roskam concurring

Tribunal Researcher: Alistair Dey-van Heerden

For the applicants: Mr R Maré of the Competition Commission

For the respondents: Adv. J Wilson SC
Instructed by: Webber Wentzel Attorneys

"ANNEXURE A"

Item	Request	Documents discovered?	Outstanding documents	Merger Parties' Response	Commission's Response
Gene ral 1	Period 2012 – 2017	Only 2014 - 2016	For all requests, 2012-2013 are outstanding	The request for documents for the period 2012 - 2017 is overly burdensome and unnecessary. Documents from 2014 to 2016 (and in some instances where they exist for 2017) were provided and are sufficient for purposes of this matter. The Commission has not justified why it requires documents for the period 2012 - 2013 as well.	The Commission persists with its request based on its oral argument and argument presented in the papers.
Gene ral 2	Definition of documents – "drafts"	Only final documents	For all requests (where only final documents were discovered).	The request is overly burdensome and the documents requested are irrelevant and/or unnecessary. The Merger Parties will confirm on affidavit that they have discovered all final versions of the documents that they have tendered to produce.	The Commission persists with its request based on its oral argument and argument presented in the papers. If the Commission request is not granted, the Commission requests the latest draft document is provided where no final document is available.

Item	Request	Documents discovered?	Outstanding documents	Merger Parties' Response	Commission's Response
Gene ral 3	Inclusion of subsidiaries	Only for Merging Parties and subsidiaries which conduct business in SA routes	Documents from SA subsidiaries	The Merger Parties will, in addition to their own documents, discover documents for (i) the South African operating companies; and (ii) the operating companies that principally manage trade on the principal South African routes (i.e. Europe and Asia).	The Commission holds that all trade routes involving South Africa are relevant, not just the Europe and Asia routes, and thus does not accept this aspect of the merging parties' response. The Commission also does not accept the phrasing of the reference to routes in the merging parties' response. The Commission insists that the filter applied through paragraph 2.6 of its discovery request is sufficient. The Commission persists in its request that subsidiaries relevant to the filter be included.
Gene ral 4	Inclusion of car carrier and bulk shipping markets	Only for the container liner shipping market	All documents relating to the car carrier and bulk shipping markets	The request is overly burdensome and the documents requested are irrelevant and/or necessary. In respect of the car carrier and bulk shipping markets, the Merger Parties will provide the categories of documents set out in paragraph 1 below this table.	The Commission does not accept that the four categories of documents suggested are sufficient to assess its theory of harm.

Item	Request	Documents discovered?	Outstanding documents	Merger Parties' Response	Commission's Response
Gene ral 5	On oath	No documents were provided under oath by way of a discovery affidavit	Every response should be provided under oath by relevant official of each merging party	The Tribunal's directive did not require the Merger Parties to provide the discovered documents by way of a discovery affidavit. The Merger Parties are willing to provide such an affidavit if required.	The Commission holds that such an affidavit is indeed required and requests that any order of the Tribunal stipulate that all responses to items now and previously discovered be given under oath.

1	Provide all documents relating to the establishment of the subsidiary for the Joint Venture in South Africa.	Yes	Documents from 2012	The Merger Parties have tendered to discover the documents requested in terms of this item in relation to the South Africa - Europe and South Africa - East Asia trade routes (the "principal South African trade routes"), being the trade routes accounting for over 90% of the Merger Parties' volumes of container liner business on all South African trade routes, subject to the general limitations above.	The Commission does not accept the exclusion of other trade routes involving South Africa. These are relevant markets for the transaction. The Commission also does not accept the phrasing of the reference to routes in the merging parties' response. The Commission insists that the filter applied through paragraph 2.6 of its discovery request is sufficient. We note the merging parties attempt to introduce new facts – not under oath and not canvassed during oral argument by either of parties. The calculation of the alleged size of 90% is disputed. The Commission persists with its request as per the second column and the general filters indicated in the Commission's discovery request.
2	Provide all documents discussing or	Yes	Documents from 2012 as defined in the discovery	The Merger Parties have tendered to discover the documents requested in terms of this item in	The Commission does not accept the exclusion of other trade routes involving South Africa. These are

Item	Request	Documents discovered?	Outstanding documents	Merger Parties' Response	Commission's Response
	assessing any possible solutions for the alleged poor performance of the container liner businesses of the Merging Parties. Provide only documents exchanged, presented, or tabled at a management (or higher) level. Documents can exclude email exchanges where no such document is attached.		request	relation to the principal South African trade routes, subject to the general limitations above.	relevant markets for the transaction. The Commission also does not accept the phrasing of the reference to routes in the merging parties' response. The Commission insists that the filter applied through paragraph 2.6 of its discovery request is sufficient. The Commission persists with its request as per the second column and the general filters indicated in the Commission's discovery request.

Item	Request	Documents discovered?	Outstanding documents	Merger Parties' Response	Commission's Response
3	Provide all communication and documents for the period 2010 to date wherein the Merging Parties discuss and/or analyse routes, customers and tenders affecting the South African car carrier market with competitors or where communication with competitors is reported on for the period 2007 to 2017.	No	All documents falling within the description under this item	In respect of the car carrier and bulk shipping markets, the Merger Parties will provide the categories of documents set out in paragraph 1 below this table.	As above, the Commission does not accept that the four categories of documents suggested are sufficient to assess its theory of harm. The Commission also notes for clarity that in this request it requires documents from 2010.

Item	Request	Documents discovered?	Outstanding documents	Merger Parties' Response	Commission's Response
4	Provide all competitive reports of mergers filed in other jurisdictions involving container liner, car carrier and/or bulk shipping services as well as documents covering the authorities' concerns and findings.	Yes	Documents detailing the authorities' concerns and findings	The Merger Parties provided the merger reports filed in other jurisdictions. All other documents requested under this item are irrelevant and/or unnecessary.	The Commission persists only in its request for all decisions and/or reasons for decision whether publically available or not.

Item	Request	Documents discovered?	Outstanding documents	Merger Parties' Response	Commission's Response
5	Provide all documents analysing or discussing the horizontal overlap between the container liner shipping business, car carrier businesses and bulk carrier businesses of MOL, NYK and KL. Provide only documents exchanged or presented at a management (or higher) level. Documents can exclude email exchanges where no such document is attached.	No	All documents falling within the description under this item	The Merger Parties will provide all documents (as requested) analysing or discussing the horizontal overlap between each of the Merger Parties' container liner shipping businesses on the principal South African trade routes. In respect of the car carrier and bulk shipping markets, the Merger Parties will provide the categories of documents set out in paragraph 1 below this table.	The Commission does not accept the exclusion of other trade routes involving South Africa. These are relevant markets for the transaction. The Commission also does not accept the phrasing of the reference to routes in the merging parties' response. The Commission insists that the filter applied through paragraph 2.6 of its discovery request is sufficient. The Commission does not accept that the four categories of documents suggested are sufficient to assess its theory of harm. The Commission persists with its request as per the second column and the general filters indicated in the Commission's discovery request.

Item	Request	Documents discovered?	Outstanding documents	Merger Parties' Response	Commission's Response
6	Provide all documents relating to the state of competition in the container liner market, car carrier market and bulk carrier market.	Yes	- Documents from 2012 as defined in the discovery request - Bulk shipping market documents - Car carrier market documents	The Merger Parties have tendered to discover the documents requested in terms of this item in relation to the principal South African trade routes, subject to the general limitations above.	The Commission does not accept the exclusion of other trade routes involving South Africa. These are relevant markets for the transaction. The Commission also does not accept the phrasing of the reference to routes in the merging parties' response. The Commission insists that the filter applied through paragraph 2.6 of its discovery request is sufficient. The Commission persists with its request as per the second column and the general filters indicated in the Commission's discovery request.

Item	Request	Documents discovered?	Outstanding documents	Merger Parties' Response	Commission's Response
7	Provide all documents relating to barriers to entry in the market given the alleged low barriers to entry as stated at paragraphs 95-98 of the Competitive Report found at page 59 of the record and on page 7 of the Request for Consideration dated 19 June 2017 at paragraph 3.7.6.	Yes	Documents from 2012	The Merger Parties have tendered to discover the documents requested in terms of this item in relation to the principal South African trade routes, subject to the general limitations above.	The Commission does not accept the exclusion of other trade routes involving South Africa. These are relevant markets for the transaction. The Commission also does not accept the phrasing of the reference to routes in the merging parties' response. The Commission insists that the filter applied through paragraph 2.6 of its discovery request is sufficient. The Commission persists with its request as per the second column and the general filters indicated in the Commission's discovery request.

Item	Request	Documents discovered?	Outstanding documents	Merger Parties' Response	Commission's Response
8	Provide all letters and/or emails announcing rate increases to the Merging Parties' top 10 customers (by value) as well as related correspondence or minutes for each route involving South Africa and for each market (for each of the Joint Venture Partners) i.e. container liner shipping, car carrier and bulk shipping.	Yes	- Documents from 2012 as defined in the discovery request - NYK documents - KL Documents - Car carrier market documents - Bulk shipping market documents	The Merger Parties have tendered to discover the documents requested in terms of this item in relation to the principal South African trade routes, subject to the general limitations above.	The Commission does not accept the exclusion of other trade routes involving South Africa. These are relevant markets for the transaction. The Commission also does not accept the phrasing of the reference to routes in the merging parties' response. The Commission insists that the filter applied through paragraph 2.6 of its discovery request is sufficient. The Commission persists with its request as per the second column and the general filters indicated in the Commission's discovery request.

9	Provide all documents relating to tenders with the Merging Parties' top 5 (five) customers (by value of tender) for each route involving South Africa where one of the merging parties is present and for each market i.e. container liner, car carrier and bulk shipping as well as any internal memoranda or other documents related to these tenders (for each of the Joint Venture Partners). Documents can be limited to the tender document, the merging party's bid for the tender, the communication from the respective customer as well	No	All documents falling within the description under this item.	In relation to tenders with the Merging Parties' top 5 (five) customers (by value of tender) for each of the principal South African trade routes for the container liner market, the Merging Parties will provide the tender documents, the Merging Parties' bid for the tender, and documents in relation to further communications and negotiations insofar as they relate to material terms or pricing. In respect of the car carrier and bulk shipping markets, the Merging Parties will provide the categories of documents set out in paragraph 1 below this table.	The Commission does not accept the exclusion of other trade routes involving South Africa. These are relevant markets for the transaction. The Commission also does not accept the phrasing of the reference to routes in the merging parties' response. The Commission insists that the filter applied through paragraph 2.6 of its discovery request is sufficient. The Commission does not accept that the four categories of documents suggested are sufficient to assess its theory of harm. The Commission persists with its request as per the second column and the general filters indicated in the Commission's discovery request.
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Item	Request	Documents discovered?	Outstanding documents	Merger Parties' Response	Commission's Response
	as any further negotiation between the customer and merging parties,				

Item	Request	Documents discovered?	Outstanding documents	Merger Parties' Response	Commission's Response
10	Provide all commercially and competitively strategic documents, board minutes, board packs and business plans prepared for senior management and board members.	No	All documents falling within the description under this item	The Merger Parties will provide all commercially and competitively sensitive strategic documents, board minutes, board packs and business plans prepared for senior management and board members that discuss either (i) the transaction; or (ii) the principal South African trade routes in the container liner market.	The Commission rejects the Merging Parties' response, and insist on the narrowed description offered by the Commission. This version (the Merging Parties' response) was not tendered or argued by the Merging Parties at the hearing. As argued orally and on the papers, the filter defined by the Commission in its discovery request (paragraph 2.6) is more than sufficient. Limiting such documents to those that "discuss ... the transaction" is inadequate as it would exclude relevant documents (e.g. an overall strategic plan for a merging party). The Commission does not accept the exclusion of other trade routes involving South Africa. These are relevant markets for the transaction. The Commission also does not accept the phrasing of the reference to routes in the merging parties' response. The Commission insists that the filter applied through paragraph 2.6 of its discovery request is sufficient.

Item	Request	Documents discovered?	Outstanding documents	Merger Parties' Response	Commission's Response
11	Provide all documents that refer to "demand and supply conditions" as stated at paragraph 3.7.10 on page 8 of the Request for Consideration dated 19 June 2017.	Yes	- Documents from 2012 as defined in the discovery request - Car carrier market documents - Bulk shipping market documents	The Merger Parties have tendered to discover the documents requested in terms of this item in relation to the principal South African trade routes, subject to the general limitations above.	The Commission does not accept the exclusion of other trade routes involving South Africa. These are relevant markets for the transaction. The Commission also does not accept the phrasing of the reference to routes in the merging parties' response. The Commission insists that the filter applied through paragraph 2.6 of its discovery request is sufficient. The Commission persists with its request as per the second column and the general filters indicated in the Commission's discovery request.

Item	Request	Documents discovered?	Outstanding documents	Merger Parties' Response	Commission's Response
12	Provide all documents referring to the state of the market given the allegation of a highly volatile market as stated at paragraph 3.7.11 on page 8 of the Request for Consideration dated 19 June 2017.	Yes	Documents from 2012 as defined in the discovery request	The Merger Parties have tendered to discover the documents requested in terms of this item in relation to the principal South African trade routes, subject to the general limitations above.	The Commission does not accept the exclusion of other trade routes involving South Africa. These are relevant markets for the transaction. The Commission also does not accept the phrasing of the reference to routes in the merging parties' response. The Commission insists that the filter applied through paragraph 2.6 of its discovery request is sufficient. The Commission persists with its request as per the second column and the general filters indicated in the Commission's discovery request.

Item	Request	Documents discovered?	Outstanding documents	Merger Parties' Response	Commission's Response
13	Provide all documents relating to capacity and demand on the routes involving South Africa with respect to container liner shipping, car carrier shipping and bulk shipping given the statements regarding increased capacity and reduced demand in the market as stated at paragraph 3.8 on page 8 of the Request for Consideration dated 19 June 2017.	Yes	- Documents from 2012 as defined in the discovery request	The Merger Parties have tendered to discover the documents requested in terms of this item in relation to the principal South African trade routes, subject to the general limitations above.	The Commission does not accept the exclusion of other trade routes involving South Africa. These are relevant markets for the transaction. The Commission also does not accept the phrasing of the reference to routes in the merging parties' response. The Commission insists that the filter applied through paragraph 2.6 of its discovery request is sufficient.

14	Provide all documents relating to communication between the Merging Parties, and between the Merging Parties and any other competitor referring to cooperation agreements, including but not limited to slot chartering and vessel sharing agreements. Documents should include communication related only to the formation of each agreement and any amendments to the terms and key features of the agreements (such as vessels and capacity, ports of call, and schedules).	No	The merging parties have not responded to this item	The Merger Parties will provide copies of all existing cooperation agreements and other cooperation agreements on the principal South African trade routes in force since 2014, including any amendments thereto.	The Commission does not accept the merging parties' response but insists on the Commission's narrowed request which refers also to certain communication around the agreements and amendment thereto. The Commission does not accept the exclusion of other trade routes involving South Africa. These are relevant markets for the transaction. The Commission also does not accept the phrasing of the reference to routes in the merging parties' response. The Commission insists that the filter applied through paragraph 2.6 of its discovery request is sufficient. The Commission understands that the agreements tendered here would still be provided to the Commission in terms of the Merging Parties' response to item 16 below.
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Item	Request	Documents discovered?	Outstanding documents	Merger Parties' Response	Commission's Response
15	Provide all documents relating to price information regarding Peak Season Surcharge and Base Price letters and documents.	No	All documents falling within the description under this item.	The Merger Parties have tendered to discover the documents requested in terms of this item in relation to the principal South African trade routes, subject to the general limitations above.	The Commission does not accept the exclusion of other trade routes involving South Africa. These are relevant markets for the transaction. The Commission also does not accept the phrasing of the reference to routes in the merging parties' response. The Commission insists that the filter applied through paragraph 2.6 of its discovery request is sufficient. The Commission persists with its request as per the second column and the general filters indicated in the Commission's discovery request.

Item	Request	Documents discovered?	Outstanding documents	Merger Parties' Response	Commission's Response
16	Provide all current and previous agreements between Merging Parties and their competitors specific to the routes involving South Africa for container, car carrier and bulk shipping markets including all alliances, Vessel Sharing Agreements, Slot Agreements, Slot Charter Agreements, Slot Exchange Agreements, Multi-Carrier Service Contract/s, and similar such agreements.	Yes	Documents from 2012 as defined in the discovery request.	The Merger Parties have tendered to discover the documents requested in terms of this item in relation to the principal South African trade routes, subject to the general limitations above.	The Commission does not accept the exclusion of other trade routes involving South Africa. These are relevant markets for the transaction. The Commission also does not accept the phrasing of the reference to routes in the merging parties' response. The Commission insists that the filter applied through paragraph 2.6 of its discovery request is sufficient. The Commission persists with its request as per the second column and the general filters indicated in the Commission's discovery request.

Item	Request	Documents discovered?	Outstanding documents	Merger Parties' Response	Commission's Response
19	Provide all documents discussing or referring to the decision to merge only the container liner business and/or any discussions, strategic or board level documents referring to the possible or potential merging of the car carrier and bulk businesses.	Yes	- Documents from 2012 as defined in the discovery request - Car carrier market - Bulk shipping market	The Merger Parties have tendered to discover the documents requested in terms of this item in relation to the principal South African trade routes, subject to the general limitations above.	The Commission rejects the Merging Parties' response and insists on the Commission's original request. The request is targeted at the decision to merge and by nature is not only relevant in so far as it relates to specific routes. Any reference to routes is unnecessary given the filter applied through paragraph 2.6 in the Commission's discovery request.

Item	Request	Documents discovered?	Outstanding documents	Merger Parties' Response	Commission's Response
20	Provide all documents of the Merging Parties at management level and above, including board packs and management discussions concerning the decision for NYK to exit the South African trade routes in the container liner business including communication between MOL and/or KL.	No	All documents falling within the description under this item	The Merger Parties will provide these documents.	The Commission accepts the Merging Parties' response.

Item	Request	Documents discovered?	Outstanding documents	Merger Parties' Response	Commission's Response
21	Provide all documents discussing the selection of or justification for the three Merging Parties for the JV transaction as against other shipping liners. Provide only documents exchanged, or presented, or tabled at a management (or higher) level. Documents can exclude email exchanges where no such document is attached.	Yes	Documents from 2012 as defined in the discovery request	The Merger Parties have tendered to discover the documents requested in terms of this item in relation to the principal South African trade routes, subject to the general limitations above.	The Commission rejects the Merging Parties' response and insists on the Commission's original request. The request is targeted at the decision to merge and by nature is not only relevant in so far as it relates to specific routes. Any reference to routes is unnecessary given the filter applied through paragraph 2.6 in the Commission's discovery request.

Item	Request	Documents discovered?	Outstanding documents	Merger Parties' Response	Commission's Response
22	Provide all e-mails and any communication between the Merging Parties concerning the formation of JV Co. Provide only documents exchanged, or presented, or tabled at a management (or higher) level. Documents can exclude email exchanges where no such document is attached.	No	All documents falling within the description under this item	The Merger Parties have tendered to discover the documents requested in terms of this item in relation to the principal South African trade routes, subject to the general limitations above.	The Commission does not accept the exclusion of other trade routes involving South Africa. These are relevant markets for the transaction. The Commission also does not accept the phrasing of the reference to routes in the merging parties' response. The Commission insists that the filter applied through paragraph 2.6 of its discovery request is sufficient. The Commission persists with its request as per the second column and the general filters indicated in the Commission's discovery request.

Item	Request	Documents discovered?	Outstanding documents	Merger Parties' Response	Commission's Response
23	Provide all documents covering the feasibility of the JV or any merger between the Merging Parties including studies, reports, presentations, minutes of meetings, and assessments.	Yes	- Documents from 2012 as defined in the discovery request - NYK documents - KL documents	The Merger Parties have tendered to discover the documents requested in terms of this item in relation to the principal South African trade routes, subject to the general limitations above.	The Commission does not accept the exclusion of other trade routes involving South Africa. These are relevant markets for the transaction. The Commission also does not accept the phrasing of the reference to routes in the merging parties' response. The Commission insists that the filter applied through paragraph 2.6 of its discovery request is sufficient. The Commission persists with its request as per the second column and the general filters indicated in the Commission's discovery request.
24	Provide the names and designations of all employees of the Merging Parties involved in previous cartel cases and investigations globally.	No	All the documents falling within the description under this item	This request amounts to an interrogatory which the Merger Parties are not obliged to answer. The documents requested are irrelevant and/or unnecessary.	The Commission is not persisting with this request.

Item	Request	Documents discovered?	Outstanding documents	Merger Parties' Response	Commission's Response
25	Provide all documents covering communications between the Merging Parties' management and directors/board members and their competitors. Documents should only include those related to capacity, pricing, tenders or any trading conditions on the routes involving South Africa.	No	All documents falling within the description under this item.	The Merger Parties tender to discover the documents requested in terms of this item in relation to the principal South African trade routes, subject to the general limitations above.	The Commission does not accept the exclusion of other trade routes involving South Africa. These are relevant markets for the transaction. The Commission also does not accept the phrasing of the reference to routes in the merging parties' response. The Commission insists that the filter applied through paragraph 2.6 of its discovery request is sufficient. The Commission persists with its request as per the second column and the general filters indicated in the Commission's discovery request.

Item	Request	Documents discovered?	Outstanding documents	Merger Parties' Response	Commission's Response
26	Provide all financial statements and management accounts for all business units (container liner, car carrier and bulk shipping) for each <u>of the relevant trade routes.</u>	Yes	- Documents from 2012 as defined in the discovery request - Car carrier market documents - Bulk shipping market	The Merger Parties have tendered to discover the documents requested in terms of this item in relation to the principal South African trade routes, subject to the general limitations above.	The Commission does not accept the exclusion of other trade routes involving South Africa. These are relevant markets for the transaction. The Commission does not accept the merging parties' tender and persists with its request as per the second column.

Item	Request	Documents discovered?	Outstanding documents	Merger Parties' Response	Commission's Response
27	Provide all financial statements and management accounts that pertain to the global business operations of the Merging Parties as a whole as well as specific markets – container liner, car carrier and bulk shipping.	Yes	- Documents from 2012 as defined in the discovery request - Car carrier market documents - Bulk shipping market	The Merger Parties will provide the monthly profit and loss statements for the Merger Parties' container liner services on the principal South African trade routes.	The Commission does not accept the exclusion of other trade routes involving South Africa. These are relevant markets for the transaction. The Commission does not accept the merging parties' tender and persists with its request as per the second column

Item	Request	Documents discovered?	Outstanding documents	Merger Parties' Response	Commission's Response
28	Beyond the above, provide all financial and/or performance assessments and analyses of all the relevant trade routes including any assessment of performance with respect to individuals ports, customers, directions or port-pairs where the Merging Parties operate.	No	All documents falling within the description under this item.	The Merger Parties will provide the monthly profit and loss statements for the Merger Parties' container liner services on the principal South African trade routes.	The Commission does not accept the exclusion of other trade routes involving South Africa. These are relevant markets for the transaction. The Commission does not accept the merging parties' tender and persists with its request as per the second column.

Item	Request	Documents discovered?	Outstanding documents	Merger Parties' Response	Commission's Response
29	Provide all sales data with information on the value and volume of every transaction in the container liner, car carrier and bulk shipping markets (separated by spot and contract) for the Merging Parties.	Yes	- Documents from 2012 as defined in the discovery request - Car carrier market data - Bulk shipping data - NYK data	The Merger Parties have tendered to discover the documents requested in terms of this item in relation to the principal South African trade routes, subject to the general limitations above.	The Commission does not accept the exclusion of other trade routes involving South Africa. These are relevant markets for the transaction. The Commission also does not accept the phrasing of the reference to routes in the merging parties' response. The Commission insists that the filter applied through paragraph 2.6 of its discovery request is sufficient. The Commission persists with its request as per the second column and the general filters indicated in the Commission's discovery request.

Item	Request	Documents discovered?	Outstanding documents	Merger Parties' Response	Commission's Response
30	Provide all documents stating General Rate Increases (GRIs) for the global operations of the Merging Parties. Documents provided should include only those referring to or affecting the South African routes.	No	All documents falling within the description under this item.	The Merger Parties will provide all documents reflecting General Rate Increases (GRIs) on the principal South African trade routes in the container liner market, subject to the general limitations above.	The Commission does not accept the exclusion of other trade routes involving South Africa. These are relevant markets for the transaction. The Commission also does not accept the phrasing of the reference to routes in the merging parties' response. The Commission insists that the filter applied through paragraph 2.6 of its discovery request is sufficient. The Commission persists with its request as per the second column and the general filters indicated in the Commission's discovery request.

Item	Request	Documents discovered?	Outstanding documents	Merger Parties' Response	Commission's Response
32	Provide all documents reflecting the decision making process and/or rationale for pricing decisions in the container liner, car carrier and bulk shipping markets. That includes discussions or models for rate increases where spot prices are concerned and bid prices in the case of tenders/negotiations.	Yes	- Documents from 2012 as defined in the discovery request - Car carrier market documents - Bulk shipping market documents - NYK documents	The Merger Parties have tendered to discover the documents requested in terms of this item in relation to the principal South African trade routes, subject to the general limitations above.	The Commission does not accept the exclusion of other trade routes involving South Africa. These are relevant markets for the transaction. The Commission also does not accept the phrasing of the reference to routes in the merging parties' response. The Commission insists that the filter applied through paragraph 2.6 of its discovery request is sufficient. The Commission persists with its request as per the second column and the general filters indicated in the Commission's discovery request.

Item	Request	Documents discovered?	Outstanding documents	Merger Parties' Response	Commission's Response
33	Provide all market studies and any other documents detailing the competitive dynamics and performance of the container, car carrier and bulk businesses in each of the ports affected by the merger. Documents should be limited only to ports on the routes involving South Africa.	Yes	- Documents from 2012 as defined in the discovery request - Car carrier market documents - Bulk shipping market documents - NYK documents	The Merger Parties have tendered to discover the documents requested in terms of this item in relation to the principal South African trade routes, subject to the general limitations above.	The Commission does not accept the exclusion of other trade routes involving South Africa. These are relevant markets for the transaction. The Commission also does not accept the phrasing of the reference to routes in the merging parties' response. The Commission insists that the filter applied through paragraph 2.6 of its discovery request is sufficient. The Commission persists with its request as per the second column and the general filters indicated in the Commission's discovery request.

Item	Request	Documents discovered?	Outstanding documents	Merger Parties' Response	Commission's Response
34	Provide all marketing strategies for all markets (container, car carrier and bulk shipping) globally.	No	All documents falling within the description under this item.	The Merger Parties will provide any marketing strategy documents relating to their respective container liner businesses on the principal South African trade routes.	The Commission does not accept the exclusion of the other markets. These are relevant markets for the transaction. The Commission persists with its request as per the second column and the general filters indicated in the Commission's discovery request.
36	Provide all market studies or any other documents containing market shares in the container, car carrier and bulk shipping markets.	Yes	- Documents from 2012 as defined in the discovery request - Car carrier market documents - Bulk shipping market documents	The Merger Parties will provide any marketing strategy documents relating to their respective container liner businesses on the principal South African trade routes.	The Commission does not accept the exclusion of the other markets. These are relevant markets for the transaction. The Commission persists with its request as per the second column and the general filters indicated in the Commission's discovery request.

Item	Request	Documents discovered?	Outstanding documents	Merger Parties' Response	Commission's Response
37	Provide all reports and market information received from Hesen Shipping for any service (container, car carrier, bulk).	No	All documents falling within the description under this item.	The Merger Parties will provide these.	The Commission accepts the merging parties'
39	Provide all reports from Clarkson Factbook.	Yes	- Documents from 2012 as defined discovery request - MOL documents - KL Documents	The Merger Parties have tendered to discover the documents requested in terms of this item in relation to the principal South African trade routes, subject to the general limitations above. The Commission does not accept the exclusion of other trade routes involving South Africa. These are relevant markets for the transaction. The Commission also does not accept the phrasing of the reference to routes in the merging parties' response. The Commission insists that the filter applied through paragraph 2.6 of its discovery request is sufficient. The Commission persists with its request as per the second column and the general filters indicated in the Commission's discovery request.	

Item	Request	Documents discovered?	Outstanding documents	Merger Parties' Response	Commission's Response
40	Provide all competition law compliance manuals and training programmes of each of the merging parties from 2000 onwards.	No	All documents falling within the description under this item.	The Merger Parties will provide all current compliance manuals and training programmes applicable to staff involved in their respective container liner businesses on the principal South African routes.	The Commission persists with its request as per the second column and the general filters indicated in the Commission's discovery request.

Item	Request	Documents discovered?	Outstanding documents	Merger Parties' Response	Commission's Response
41	Provide all documents and minutes to meetings discussing changes to compliance manuals or assessing efficacy or relevance thereof from 2000 onwards. With the exception of minutes of meetings, provide only documents exchanged, presented, or tabled at a management (or higher) level. Documents can exclude email exchanges where no such document is attached.	No	All documents falling within the description under this item.	Save as set out in response to item 40 above, the documents requested are irrelevant and/or unnecessary.	The Commission persists with its request as per the second column and the general filters indicated in the Commission's discovery request.

Item	Request	Documents discovered?	Outstanding documents	Merger Parties' Response	Commission's Response
43	Provide all minutes of disciplinary hearings and documents indicating the action taken against employees (for example letters of dismissal, written warnings or the like) where contravention of competition law or compliance manuals was the reason for the particular action being taken.	No	All documents falling within the description under this item.	Save as set out in response to item 40 above, the documents requested are irrelevant and/or unnecessary.	The Commission persists with its request as per the second column and the general filters indicated in the Commission's discovery request.

Item	Request	Documents discovered?	Outstanding documents	Merger Parties' Response	Commission's Response
44	Provide all decisions and judgements from competition authorities and courts, both public decisions and the reasons for decision that were not made public.	No	All documents falling within the description under this item.	The Merger Parties will provide the judgments that are publically available.	The Commission persists with its request as per the second column.
47	Provide documents detailing and discussing the marketing teams for each product market (container liner, car carrier, and bulk shipping) before and after the merger.	Yes	- Documents from 2012 as defined in the discovery request - NYK documents - KL documents	The Merger Parties have tendered to discover the documents requested in terms of this item in relation to the principal South African trade routes, subject to the general limitations above. The Commission does not accept the exclusion of other trade routes involving South Africa. These are relevant markets for the transaction. The Commission also does not accept the phrasing of the reference to routes in the merging parties' response. The Commission insists that the filter applied through paragraph 2.6 of its discovery request is sufficient. The Commission persists with its request as per the second column and the general filters indicated in the Commission's discovery request.	

Item	Request	Documents discovered?	Outstanding documents	Merger Parties' Response	Commission's Response
49	Provide documents indicating competitors that have entered the market through slot charter agreements recently as stated in paragraph 3.7.6 of the request for consideration dated 19 June 2017.	No	All documents falling within the description under this item.	The Merger Parties will provide these.	The Commission accepts the merging parties' tender.

Item	Request	Documents discovered?	Outstanding documents	Merger Parties' Response	Commission's Response
50	Provide a list of the Merging Parties' top 10 customers annually for each relevant trade for each service (containers, bulk and car carrying) including revenue per customer for each product market. Alternatively, provide all invoices and documents referring to sales on every route in all three products.	Yes	- MOL documents - NYK documents	The Merger Parties have tendered to discover the documents requested in terms of this item in relation to the principal South African trade routes, subject to the general limitations above.	The Commission does not accept the exclusion of other trade routes involving South Africa. These are relevant markets for the transaction. The Commission also does not accept the phrasing of the reference to routes in the merging parties' response. The Commission insists that the filter applied through paragraph 2.6 of its discovery request is sufficient. The Commission persists with its request as per the second column and the general filters indicated in the Commission's discovery request.

Item	Request	Documents discovered?	Outstanding documents	Merger Parties' Response	Commission's Response
51	Provide all documents, assessments, studies, external reports or statistics on the excess capacity in the industry for the period 2010 to 2017.	No		The Merger Parties have tendered to discover the documents requested in terms of this item in relation to the principal South African trade routes, subject to the general limitations above.	The Commission does not accept the exclusion of other trade routes involving South Africa. These are relevant markets for the transaction. The Commission also does not accept the phrasing of the reference to routes in the merging parties' response. The Commission insists that the filter applied through paragraph 2.6 of its discovery request is sufficient. The Commission persists with its request as per the second column, including the longer time period specific to this request, and the general filters indicated in the Commission's discovery request.

Item	Request	Documents discovered?	Outstanding documents	Merger Parties' Response	Commission's Response
52	Provide all documents assessing capacity utilisation rates over time per route, per vessel, per consortia, and/or per market for all business units for the period 2010 – 2017.	Yes	- Documents from 2010 as defined in the discovery request - NYK documents - KL documents	The Merger Parties have tendered to discover the documents requested in terms of this item in relation to the principal South African trade routes, subject to the general limitations above.	The Commission does not accept the exclusion of other trade routes involving South Africa. These are relevant markets for the transaction. The Commission also does not accept the phrasing of the reference to routes in the merging parties' response. The Commission insists that the filter applied through paragraph 2.6 of its discovery request is sufficient. The Commission persists with its request as per the second column, including the longer time period specific to this request, and the general filters indicated in the Commission's discovery request.

Item	Request	Documents discovered?	Outstanding documents	Merger Parties' Response	Commission's Response
54	Provide all documents (including minutes of meetings between shareholders, memoranda and/resolutions of the shareholders' meetings) relating to the implementation of the First Closing as contained in your email (from Stephan Langbridge) dated 27 June 2017.	No	All documents falling within the description under this item.	The Merger Parties will provide the documents sought by the Commission in so far as they relate to the implementation of the transaction in South Africa.	The Commission rejects the merging parties' tender in so far as it implies that only the implementation of the JV in South Africa is relevant. As per oral argument, the implementation of the joint beyond South Africa is also relevant. The Commission insists that the filter applied through paragraph 2.6 of its discovery request is sufficient to limit the request.

Item	Request	Documents discovered?	Outstanding documents	Merger Parties' Response	Commission's Response
56	Provide all correspondence between the shareholders of HoldCo and OpCo post the First Closing period concerning the implementation of the Joint Venture as well as all minutes and strategic documents of HoldCo and/or OpCo generated after the First Closing.	No	All documents falling within the description under this item.	The Merger Parties will provide the documents sought by the Commission in so far as they relate to the implementation of the transaction in South Africa.	The Commission rejects the merging parties' tender in so far as it implies that only the implementation of the JV in South Africa is relevant. As per oral argument, the implementation of the joint beyond South Africa is also relevant. The Commission insists that the filter applied through paragraph 2.6 of its discovery request is sufficient to limit the request.

1 The Merger Parties will provide the following categories of documents in response to the Commission's requests for documents in relation to the car carrier market and the bulk shipping market -

1.1 market research reports in respect of the car carrier market and the bulk shipping market;

1.2 total global revenues and profitability for the most recent financial year for the Merger Parties' car carrier and bulk shipping divisions;

- 1.3 the top ten global customers for each of the Merger Parties for car carrier and bulk shipping for their most recent financial year; and
- 1.4 documents reflecting the major cost items of the Merger Parties in relation to their respective car carrier and bulk shipping businesses for the most recent financial year.

Commission response to the above four categories:

The Commission does not accept the tender that these documents are the only documents that are relevant to the car carrier and bulk shipping markets. As such the Commission persists with its request that the merging parties provide the requested documents for the car carrier and bulk shipping markets as indicated in the second column above.

If the merging parties intend pursuing this line of argument in their expert report or elsewhere then the Commission would necessarily require the documents, through discovery, that pertains to the merging parties' argument. Such discovery does not replace the Commission's requests but would be in addition to the Commission's requests (seeing as the merging parties may intend relying on documents relevant to these four categories).