

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.: LM140Oct20

In the matter between:

Trade Retail Holdco
AgriFin HoldCo

Primary Acquiring Firms

And

The Trade retail, fuel and financial services business
of BKB and VKB

Primary Target Firms

Panel : AW Wessels (Presiding Member)
: Y Carrim (Tribunal Panel Member)
: E Daniels (Tribunal Panel Member)
Heard on : 17 May 2021
Decided on : 21 May 2021

ORDER

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; and
2. a Merger Clearance Certificate be issued in terms of Competition Tribunal rule 35(5)(a).

Presiding Member
Mr Andreas Wessels

21 May 2021

Date

Concurring: Ms Yasmin Carrim and Mr Enver Daniels



competitiontribunal
SOUTH AFRICA

Merger Clearance Certificate

Date : 21 May 2021

To : Cliffe Dekker Attorneys

Case Number: LM140Oct20

Trade Retail HoldCo and AgriFin HoldCo And The Trade retail, fuel and financial services business of BKB and VKB

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.

You applied to the Competition Commission on **01 October 2020** 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.

Contacting the Tribunal

The Competition Tribunal
Private Bag X24
Sunnyside
Pretoria 0132
Republic of South Africa
tel: 27 12 394 3300
fax: 27 12 394 0169
e-mail: ctsa@comptrib.co.za

The Registrar, Competition Tribunal

THE COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.: LM140Oct20

In the *large merger* between:

Trade Retail HoldCo
AgriFin HoldCo

Acquiring Firms

And

**The Trade retail, fuel and financial services
business of BKB and VKB**

Target Firms

ANNEXURE "A" - CONDITIONS

1. Definitions

The following expressions shall bear the meanings assigned to them below and cognate expressions bear corresponding meanings –

- 1.1. **"Acquiring Firms"** mean "Trade Retail HoldCo" and "AgriFin HoldCo";
- 1.2. **"Approval Date"** means the date the Tribunal issues a Clearance Certificate (Notice CT10) in terms of the Competition Act;
- 1.3. **"BKB"** means BKB Limited;
- 1.4. **"BKB Trade Retail SubCo"** means a private company to be incorporated by BKB which will acquire the BKB Trade Retail business and all the shares held by BKB in BKB Fuel Retail SubCo from BKB prior to the implementation of the Trade and Fuel Retail Transaction.
- 1.5. **"Commission"** means the Competition Commission of South Africa;
- 1.6. **"Competition Act"** means the Competition Act 89 of 1998, as amended;

- 1.7. **“Competitively Sensitive Information”** includes, but is not limited to, any and all such information relating to:
- 1.7.1. pricing – including but not limited to pricing of specific products, prices/discounts offered to specific customers and planned price reductions or increases in Grain and Oilseed Storage And Trading Activities;
 - 1.7.2. margin information by product or customers in Grain and Oilseed Storage And Trading Activities;
 - 1.7.3. cost information particular products offered in Grain and Oilseed Storage and Trading Activities;
 - 1.7.4. information on specific customers and customer strategy, including information with respect to the grain volumes of customers, areas of operations of customers for Grain and Oilseed Storage and Trading Activities; and
 - 1.7.5. business plans, advertising strategies and marketing strategies on Grain and Oilseed Storage and Trading Activities.
- 1.8. **“Conditions”** mean these conditions contained in this Annexure A;
- 1.9. **“Charter”** means the Charter for the South African Petroleum and Liquid Fuels Industry: Empowering Historically Disadvantaged South Africans;
- 1.10. **“Days”** mean business days, being any day other than a Saturday, Sunday or official public holiday in the Republic of South Africa;
- 1.11. **“Grain and Oilseed Storage and Trading Activities”** mean the solicitation, financing, procurement, trading, marketing, handling and storage of grain and oilseed;
- 1.12. **“HDIs”** means historically disadvantaged individuals, as defined in section 3(2) of the Act;
- 1.13. **“Implementation Date”** means the date, occurring after the Approval Date, on which the Merger is implemented by the Merging Parties, and all conditions precedent to the implementation of the Merger are fulfilled;

- 1.14. **“Merger”** means the acquisition of the trade retail, fuel and financial services business of BKB and VKB;
- 1.15. **“Merging Parties”** mean the Acquiring Firms, VKB and BKB, in respect of the Target Businesses;
- 1.16. **“PPA”** means the Petroleum Products Act, No. 120 of 1977;
- 1.17. **“The Target Businesses”** mean the trade retail, fuel and financial services business of BKB and VKB to be acquired by the Acquiring Firms;
- 1.18. **“Transformation Initiative”** means BKB’s commitment to, within 24 months of the Implementation Date, restructure BKB Fuel Retail SubCo so that no less than 25% of the shares in BKB Fuel Retail SubCo is held, directly or indirectly, by one or more HDI shareholders as set out more fully in these Conditions;
- 1.19. **“Tribunal”** means the Competition Tribunal of South Africa;
- 1.20. **“VKB”** means VKB Landbou Proprietary Limited; and
- 1.21. **“VKB Trade Retail SubCo”** means a private company to be incorporated by VKB Landbou which will acquire the VKB Trade Retail business, and all the shares held by VKB Landbou in VKB Fuel Retail SubCo from VKB Landbou prior to the implementation of the Trade and Fuel Retail Transaction.

2. Conditions to the approval of the merger

2.1. Cross directorships

- 2.1.1. For as long as BKB and VKB can appoint or nominate individuals to the board of directors of the Acquiring Firms they shall ensure that their nominees:
 - 2.1.1.1. who are also employed by or serve on, or are nominated and/or appointed on any board or management committees of the holding companies and/or affiliate companies of BKB and VKB that are active in Grain and Oilseed Storage and Trading Activities are not directly involved in the day-to day management of the Grain and Oilseed Storage and Trading Activities.

2.2. Confidentiality of information

- 2.2.1. No Competitively Sensitive Information in relation to the Grain and Oilseed Storage and Trading Activities shall be discussed, disclosed nor shared in any form or means by the boards of directors of the Acquiring Firms.
- 2.2.2. The nominees of VKB shall not disclose to nominees of BKB contemplated in clause 2.1.1 and any employee of VKB's holding or affiliate companies who are seconded to the Acquiring Firms, any Competitively Sensitive Information. The nominees of BKB shall be bound to a similar undertaking *mutatis mutandis*, as contained in this clause.
- 2.2.3. The nominees of VKB and BKB contemplated in clause 2.1.1 shall be required to sign a Confidentiality Undertaking with the Acquiring Firms to ensure compliance with the abovementioned conditions.
- 2.2.4. Within 60 (sixty) Days of the Implementation Date, the Merging Parties shall put in place, for the Commission's approval, an appropriate confidential and information exchange policy to ensure compliance with clause 2 of the Conditions. Within 60 (sixty) Days of receiving the confidential and information exchange policy prepared by the Merging Parties, the Commission shall provide any comments that it has thereon to the Merging Parties and the Merging Parties shall within 30 (thirty) Days thereof seek to finalize the policy with the Commission.

2.3. Transformation Initiative

- 2.3.1. Within 24 (twenty-four) months of the Implementation Date, BKB will implement the Transformation Initiative. For the purposes of this Condition, BKB will, in its sole discretion, determine the identities of such HDIs as well as the proportion of shares that will be allotted to each such HDI shareholder.
- 2.3.2. Prior to the Implementation of the Transformation Initiative, BKB will provide the Commission with details of the Transformation Initiative in writing. These details shall include, but not be limited to, the transaction structure, identities of prospective HDIs, documentary evidence that prospective shareholders are HDIs, the proportion of shareholding in BKB Fuel Retail SubCo that each prospective HDI shareholder will receive, the number of board appointments each HDI shareholder is entitled to and

confirmation of whether the Transformation Initiative constitutes a merger for the purposes of the Act. The Commission will assess competition concerns that are likely to arise from the Transformation Initiative, which would include *inter alia* information exchange, HDI verification etc.

- 2.3.3. Within 60 (sixty) Days of receipt of the details of the Transformation Initiative, the Commission shall provide its written approval, or any comments or queries to the Transformation Initiative to BKB, in writing.
- 2.3.4. For the avoidance of doubt, the Transformation Initiative may not be implemented without the Commission's written approval, which approval will not be unreasonably withheld.
- 2.3.5. For the avoidance of further doubt, to the extent that the Transformation Initiative approved by the Commission in writing also constitutes a merger (whether or not the thresholds for mandatory notification are met), the Transformation Initiative can then only be implemented once same has been notified to the Commission as a merger and approved with or without conditions.

3. Monitoring of compliance with the Conditions

- 3.1. Within 20 (twenty) Days of the Implementation Date, the Merging Parties shall submit an affidavit listing the names of the persons nominated and/or appointed by BKB and VKB to the board of directors of the Acquiring Firms, their tenure and the nature of their directorships. This affidavit shall also confirm that the nominees to the Acquiring Firms' board meet the requirements set out in clause 2.1.1.
- 3.2. The Merging Parties shall inform the Commission of the Implementation Date within 5 (five) Days of its occurrence.
- 3.3. Within 20 (twenty) Days of the Implementation Date, the Merging Parties shall provide the Commission with a copy of the Confidential Undertaking(s) referred to clause 2.2.3 signed by each director of the Acquiring Firms and for subsequent Directors within 30 (thirty) Days of appointment. The Acquiring Firms shall ensure that the Confidentiality Undertaking shall form part of Directors' appointment letters and Employees' service agreements within 30 (thirty) Days after the appointment of the Director(s) and Employee(s).

- 3.4. For as long as these conditions remain in place, the Acquiring Firms shall annually, within 45 (forty-five) Days of each anniversary of the Implementation Date, submit to the Commission an affidavit from one of its directors confirming compliance with clause 2 of the Conditions, including compliance with the confidential and information exchange policy.
- 3.5. Should either BKB or VKB dispose of their shareholding in the Acquiring Firms, they shall inform the Commission of the sale within 30 (thirty) Days of concluding a sale agreement and submit a copy of the sale agreement irrespective of whether the transaction is notifiable in terms of the Act.
- 3.6. BKB shall, upon implementation of the Transformation Initiative contemplated on clause 2.3, submit an affidavit confirming compliance with the Conditions.
- 3.7. An apparent breach by the Merging Parties of any of the Conditions shall be dealt with in terms of Rule 39 of the Rules for the Conduct of Proceedings in the Commission read together with Rule 37 of the Rules for the Conduct of Proceedings in the Tribunal.
- 3.8. The affidavits/reports and or documents referred to in the Conditions shall be submitted to the following email address: mergerconditions@compcom.co.za and Ministry@thedtic.gov.za .

4. Duration

- 4.1. The cross ownership and confidential information conditions in clause 2.1. and 2.2 above shall apply for as long as the Acquiring Firms exist and/or as long as BKB and VKB can appoint directors to the boards of the Acquiring Firms.
- 4.2. The Transformation Condition in clause 2.3. above shall apply for a period of 24 (twenty-four) months following Implementation Date.

5. Variation

- 5.1. The Merging Parties and/or the Commission may at any time, on good cause shown, apply to the Tribunal for the Conditions to be waived, relaxed, modified and/or substituted.