

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.: LM010Apr21

In the matter between:

FFS Refiners (Pty) Ltd

Primary Acquiring Firm

And

OTGC Terminals (Pty) Ltd

Primary Target Firm

Panel: Y Carrim (Presiding Member)
AW Wessels (Tribunal Panel Member)
H Cheadle (Tribunal Panel Member)

Heard on: 23 June 2021
Decided on: 23 June 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).

Yasmin Tayob Carrim

**Presiding Member
Ms Yasmin Carrim**

23 June 2021

Date

Concurring: Mr Andreas Wessels and Prof. Halton Cheadle



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SOUTH AFRICA

Merger Clearance Certificate

Date : 23 June 2021

To : Shepstone and Wylie Attorneys

Case Number: LM010Apr21

FFS Refiners (Pty) Ltd And OTGC Terminals (Pty) Ltd

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 **06 April 2021** 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

FFS REFINERS (PTY) LTD

AND

OTGC TERMINALS (PTY) LTD

ANNEXURE A – MERGER CONDITIONS

1. DEFINITIONS

The following expressions shall bear the meaning assigned to them below and cognate expressions bear corresponding meaning:

- 1.1. **“Acquiring Firm”** means FFS Refiners (Pty) Ltd;
- 1.2. **“Approval Date”** means the date referred to in the Tribunal’s clearance certificate (Form CT 10);
- 1.3. **“Commission”** means the Competition Commission of South Africa;
- 1.4. **“Commission Rules”** mean Rules for the Conduct of Proceedings in the Commission;
- 1.5. **“Competition Act”** means the Competition Act, No. 89 of 1998, as amended;
- 1.6. **“Conditions”** mean the conditions set out herein;
- 1.7. **“Day”** means any calendar day which is not a Saturday, a Sunday or an official public holiday in South Africa;
- 1.8. **“Employee”** has the same meaning as in the LRA;
- 1.9. **“Implementation Date”** means the date, occurring after the Approval Date, on which the Merger is implemented by the Merging Parties;

- 1.10. **“LRA”** means the Labour Relations Act, No. 66 of 1995, as amended;
- 1.11. **“Merger”** means the Acquiring Firm’s proposal to acquire 100% of the shares in the Target Firm;
- 1.12. **“Merging Parties”** means the Acquiring Firm and the Target Firm;
- 1.13. **“Moratorium”** means the period of 2 (two) years from the Approval Date;
- 1.14. **“Retrenched Employees”** means employees retrenched by the Acquiring Firm in November 2020 and April 2021 who indicated, in writing, that they are interested in being called should a work opportunity arise and are on the Acquiring Firm’s database;
- 1.15. **“Target Firm”** means OTGC Terminals (Pty) Ltd;
- 1.16. **“Tribunal”** means the Competition Tribunal of South Africa; and
- 1.17. **“Tribunal Rules”** mean Rules for the Conduct of Proceedings in the Tribunal.

2. CONDITIONS

- 2.1. The Merging Parties shall not retrench any Employees because of the Merger for the duration of the Moratorium.
- 2.2. For the sake of clarity, retrenchments do not include (i) voluntary retrenchment and/or voluntary separation arrangements; (ii) voluntary early retirement packages; (iii) unreasonable refusals to be redeployed in accordance with the provisions of the LRA; (iv) resignations or retirements in the ordinary course of business; (v) retrenchments lawfully effected for operational requirements unrelated to the Merger; (vi) terminations in the ordinary course of business, including but not limited to, dismissals as a result of misconduct or poor performance; and (vii) any decision not to renew or extend a fixed term contract of a contract worker or Employee taken in the ordinary course of business.
- 2.3. Should any vacancy arise at either of the Merging Parties, the relevant Merging Party will use its reasonable endeavours to inform such employees thereof using the contact details provided by the Retrenched Employees. For the duration of the Moratorium, and where a Retrenched Employee applies for a vacant position and the relevant Merging Party is reasonably satisfied

that the Retrenched Employee is suitable for that position, the relevant Merging Party shall give preference to such Retrenched Employee in the recruitment process although the Retrenched Employee shall only be appointed if he/she is ultimately the best candidate for the job.

3. MONITORING OF COMPLIANCE WITH THE CONDITIONS

- 3.1. The Merging Parties shall circulate a copy of the Conditions to all Employees including their respective employee representatives and registered trade unions, within 5 (five) Business Days of the Approval Date.
- 3.2. As proof of compliance with 3.1, the Merging Parties shall within 5 (five) Business Days of circulating the Conditions, provide the Commission with an affidavit from a senior official, attesting to the circulation of the Conditions and attach a copy of the notice sent to the Employees and/or employee representatives and/or registered trade unions.
- 3.3. The Merging Parties shall inform the Commission in writing of the Implementation Date, within 7 (seven) Business Days of it becoming effective.
- 3.4. As proof of compliance with 2.1 above, on each anniversary of the Approval Date, the Acquiring Firm shall submit an affidavit from a senior official, attesting to compliance with the Conditions.
- 3.5. To monitor compliance with these Conditions, the Commission may require the Merging Parties, to provide any additional information.

4. BREACH

- 4.1. If 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 the Merging Parties of these Conditions, the breach shall be dealt with in terms of Rule 39 of the Commission Rules read together with Rule 37 of the Tribunal Rules.

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.

6. GENERAL

- 6.1. All correspondence in relation to the Conditions must be submitted to the following email address: mergerconditions@compcom.co.za and ministry@thedtic.gov.za.



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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.: LM010Apr21

FFS Refiners (Pty) Ltd

(Acquiring Firm)

and

OTGC Terminals (Pty) Ltd

(Target Firm)

REASONS FOR DECISION

- [1] On 23 June 2021, the Competition Tribunal conditionally approved a large merger whereby FFS Refiners (Pty) Ltd (“FFS”) would acquire the entire issued share capital in OTGC Terminals (Pty) Ltd (“OTGC”) from OTGC Holdings (Pty) Ltd (“OTGC Holdings”)
- [2] FFS, is ultimately controlled by Calulo Petrochemicals (Pty) Ltd and Bud Chemicals and Minerals (Pty) Ltd. The three companies together are referred to as the “acquiring group”. The acquiring group is a supplier of industrial heating fuels in South Africa. It markets, supplies and stores bulk liquids; and offers ancillary packages related to these activities. Of relevance to this merger assessment are the acquiring group’s bulk liquid storage tanks at Cape Town port and Durban at Prospecton and Teakwood Road (which is not situated within the Durban terminal). The acquiring group’s rationale for the proposed transaction is to diversify the business including making bulk liquid storage space available to third-party customers.
- [3] OTGC Holdings wholly controls OTGC (the “target firm”) and is selling its entire interest at the behest of OTGC’s largest shareholder, Oiltanking GmbH.¹ OTGC is active as an independent bulk liquid storage provider for non-hazardous products. It has liquid bulk terminals within Durban and Cape Town.
- [4] Both the acquiring and target firms possess bulk liquid storage facilities in Durban and Cape Town. The acquiring group’s bulk liquid storage facilities predominately store hazardous high flash products, whilst the target firm only stores non-hazardous high flash products; the Tribunal’s prior treatment of these markets was to treat them as non-substitutable.² The Commission’s consultations with the Transnet National Ports Authority (TNPA) and customers confirmed this view. As a result of this and further investigation, the Commission concluded that the merger does not result in any horizontal or vertical overlaps.
- [5] Third parties were contacted by the Commission and certain customers raised concerns that OTGC would switch its storage facilities to start storing hazardous high flash products. The Commission investigated these concerns and found, based on

¹ Oiltanking wishes to divest itself of its operations in South Africa because it has identified them as non-core to its global corporate strategy. As a result of Oiltanking decision, the remainder of OTGC Holding’s shareholders also wish to divest.

² *Bidvest Group Ltd and Island View Storage Ltd*, case no 17LMDec99.

FFS' internal documentation, the incentives for such a move to be lacking. Furthermore, the role that the TNPA plays in regulating and licensing the provision of certain types of liquid bulk means that switching from provision of non-hazardous to hazardous bulk storage (or vice versa) is not simple. These concerns were ameliorated by the merging parties' undertaking to honour OTGC's existing contracts with customers.

- [6] The Commission also investigated the submission by the Chemical, Energy, Paper, Printing, Wood and Allied Workers' Union (CEPPWAWU) that two sets of proximally related retrenchments may have been occasioned by the merger; however, the Commission's investigation revealed that retrenchments were occasioned by the deleterious economic effects of the Covid-19 pandemic.
- [7] The Commission could not definitively discount the fact that duplications may arise because of the merger.³ To mitigate against the prospect of any rationalisation arising from such duplications post-merger, the Commission recommended that the merger be approved subject to a 2-year moratorium on merger-specific job losses.
- [8] In considering the merit of the proposed conditions, the Tribunal sought submission from both the merging parties and the Commission on the imposition of an additional employment-related condition that preference will be given when vacancies arise in the merged entity to any employees that may have been retrenched for operational reasons. The merging parties were amenable to this.
- [9] In relation to the spread of ownership the merging parties submitted that:
- a. OTGC's existing Black ownership is 30%. FFS is majority Black owned as to 51.39%. This merger will therefore give rise to an increase in Black ownership of the terminal operators in relation to OTGC Durban and OTGC Cape Town.
 - b. The merger will increase Black female ownership from 16.52% in OTGC to 31.7% Black female ownership.
- [10] Based on the above, we concluded that the proposed transaction is unlikely to substantially prevent or lessen competition in any relevant market; and as a result of the conditions undertaken by the merging parties attached hereto marked Annexure "A" ameliorate any potential public interest concerns.

23 June 2021

Ms Yasmin Carrim
Mr Andreas Wessels and Prof Halton Cheadle concurring

Date

Tribunal Case Manager: Mpumelelo Tshabalala
For the Merging Parties: Louise Cleland and Jenny Finnigan
For the Commission: Wiri Gumbie and Tumiso Loate

³ As there may be similarities in the functions of employees operating hazardous and non-hazardous bulk storage tanks from the same premises