



COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.: LM132Dec21

In the matter between:

Ardagh Group S.A

Primary Acquiring Firm

And

Consol Holdings (Pty) Ltd

Primary Target Firm

Panel: Y Carrim (Presiding Member)
AW Wessels (Tribunal Panel Member)
S Goga (Tribunal Panel Member)

Heard on: 28 April 2022
Decided on: 29 April 2022

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

Signed by: Yasmin Tayob Carrim
Signed at: 2022-04-29 10:42:10 +02:00
Reason: Witnessing Yasmin Tayob Carrim

Yasmin Tayob Carrim

**Presiding Member
Ms Yasmin Carrim**

29 April 2022

Date

Concurring: Mr Andreas Wessels and Ms Sha'ista Goga



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
fax: 27 12 394 0169
e-mail: ctsa@comptrib.co.za

Merger Clearance Certificate

Date : 29 April 2022

To : Bowmans Attorneys

Case Number: LM132Dec21

Ardagh Group S.A And Consol Holdings (Pty) Ltd

You applied to the Competition Commission on **29 November 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.

The Registrar, Competition Tribunal

Tebogo Mphahlele

CONFIDENTIAL
ANNEXURE A

IN THE LARGE MERGER INVOLVING:

ARDAGH GROUP S.A.
AND
CONSOL HOLDINGS PROPRIETARY LIMITED

CASE NUMBER: LM132DEC21

1. DEFINITIONS

In this document, the expressions used above will have the appropriate meanings assigned to them and the following and related expressions will bear the following meanings:

- 1.1 **"Approval Date"** means the date on which the Merger is approved in terms of the Competition Act;
- 1.2 **"Ardagh"** means Ardagh Group S.A.;
- 1.3 **"B-BBEE"** means broad-based black economic empowerment as defined in the B-BBEE Act;
- 1.4 **"B-BBEE Act"** means the Broad-Based Black Economic Empowerment Act, No. 53 of 2003;
- 1.5 **"Commission"** means the Competition Commission of South Africa, a statutory body established in terms of section 19 of the Competition Act;
- 1.6 **"Commission Rules"** mean the Rules for the Conduct of Proceedings in the Commission;
- 1.7 **"Competition Act"** means the Competition Act, No. 89 of 1998, as amended;

- 1.8 **“Conditions”** mean the Merger conditions set out in this Annexure A;
- 1.9 **“Consol”** means Consol Holdings Proprietary Limited;
- 1.10 **“Cullet Owner Driver Scheme”** means the current supplier development programme of Consol to provide assistance (including funding or security to assist independent owner drivers to purchase vehicles, upskilling and education, and assistance with management, payment and accounting systems) to independent HDP / SMME collectors and suppliers of cullet to Consol;
- 1.11 **“Days”** mean any calendar day that is not a Saturday, Sunday or public holiday in South Africa;
- 1.12 **“Dining Glassware”** means glass tumblers manufactured using the press and blow process and an individual section (IS) forming machine;
- 1.13 **“Employee”** means any permanent employee (as contemplated under the Labour Relations Act) of Consol in South Africa;
- 1.14 **“Existing ESOP”** means the Consol Holdings Staff Trust, through which HDP Workers have an interest of 4.45% in Consol on a flow-through basis;
- 1.15 **“HDP”** means a historically disadvantaged person as defined in section 3(2) of the Competition Act;
- 1.16 **“Food Jars”** mean wide-mouthed glass jars used for food packaging;
- 1.17 **“Implementation Date”** means the date, occurring after the last condition precedent to the transaction is fulfilled or waived, as the case may be, when the Merger is implemented in accordance with its terms;
- 1.18 **“Labour Relations Act”** means the Labour Relations Act, No. 66 of 1995;
- 1.19 **“Merged Firm”** means Consol in South Africa subject to control of Ardagh following the implementation of the Merger;

- 1.20 “**Merger**” means the proposed transaction between the Merging Parties, and which constitutes a large merger;
- 1.21 “**Merging Parties**” mean Ardagh and Consol;
- 1.22 “**N2**” means the second furnace at Consol’s Nigel facility currently under construction and expected to be commissioned during May 2022. For avoidance of doubt, in this context, “commissioned” means to be brought online for production, in accordance with all statutory requirements and free of faults;
- 1.23 “**N3**” means a third furnace, production lines and warehousing that is being contemplated by Ardagh to be constructed and installed at Consol’s Nigel facility, as set out in more detail in Clause 4 of the Conditions;
- 1.24 “**New ESOP**” means an Employee share ownership plan, to be structured by way of a trust, to be implemented within the Planning Phase, as set out in more detail under Clause 2 of the Conditions;
- 1.25 “**NVF**” means notional vendor financing;
- 1.26 “**Participating Employees**” mean Employees from Grade 7 – 17 on the Peromnes grading system with the exclusion of top / senior management of the Merged Firm from Grades 1 – 6 of the Peromnes grading system;
- 1.27 “**Planning Phase**” means the 12-month period from the Implementation Date, during which the Merged Firm is required to make the necessary preparations to establish the New ESOP;
- 1.28 “**Prime Rate**” means the publicly quoted basic rate of interest, compounded monthly in arrears and calculated on a 365 (three hundred and sixty five) day year irrespective of whether or not the year is a leap year, from time to time published by The Standard Bank of South Africa Limited at the relevant point in time as being its prime overdraft rate, as certified by any representative of that bank whose appointment and designation it shall not be necessary to prove;

- 1.29 **"SMME"** means a small, medium or micro enterprise as contemplated in the National Small Enterprise Act, No. 102 of 1996;
- 1.30 **"South Africa"** means the Republic of South Africa;
- 1.31 **"Sphere"** means Sphere Investments Two (RF) Proprietary Limited;
- 1.32 **"Tribunal"** means the Competition Tribunal of South Africa, a statutory body established in terms of section 26 of the Competition Act;
- 1.33 **"Tribunal Rules"** mean the Rules for the Conduct of Proceedings in the Tribunal; and
- 1.34 **"Worker"** means an Employee and, in the context of ownership, refers to ownership by a broad-base of Employees of Consol in South Africa.

2. BROAD-BASED BLACK ECONOMIC EMPOWERMENT / WORKER OWNERSHIP

- 2.1 The Merging Parties shall prior to the end of the Planning Phase establish the New ESOP that will hold 7% of the issued shares of Consol.
- 2.2 The New ESOP shall:
- 2.2.1 not replace the Existing ESOP but rather be implemented in addition to the Existing ESOP;
- 2.2.2 be available for participation for all Participating Employees. For the avoidance of doubt, Participating Employees will not be required to pay anything to participate in the New ESOP, and maternity leave will have no adverse impact on the qualifying criteria;
- 2.2.3 be structured so that at least 85% of units allocated to Participating Employees pursuant to the New ESOP will be allocated to black employees (as defined in the B-BBEE Codes);
- 2.2.4 be structured so that the Participating Employees shall be entitled to appoint 50% of the trustees of the New ESOP trust and Consol shall be entitled to appoint the

remaining 50% of trustees. In the event of any deadlock between the trustees, the relevant resolution will fail as is the case for the Existing ESOP;

2.2.5 as is the case for the Existing ESOP, be funded by an NVF arrangement at the Prime Rate; and

2.2.6 provide for a trickle dividend of 30% of the actual dividend declared, with the remaining 70% to be allocated to repayment of the NVF.

2.3 For avoidance of doubt, to the extent any ordinary dividends are paid by Consol, the beneficiaries of each of the Existing ESOP and the New ESOP will receive trickle dividends in relation to the total outstanding shares covered by each.

2.4 Once every 4 (four) months during the Planning Phase, the Merged Firm will provide the Commission with a written report outlining the progress made in preparing for the implementation of this Clause 2. The report will allow for meaningful engagement between the Commission and the Merging Parties and in so doing ensure that the ESOP structure is established in accordance with objectives underlying the design principles referred to in Clause 2.2 above and Annexure B.

3. EMPLOYMENT

3.1 The Merged Firm shall not retrench any Employee as a result of the Merger for a period of 3 (three) years from the Implementation Date.

3.2 For the avoidance of doubt, retrenchments do not include (i) voluntary separation arrangements; (ii) voluntary early retirement packages; (iii) unreasonable refusals to be redeployed in accordance with the provisions of the Labour Relations Act; (iv) resignations or retirements in the normal course; and (v) terminations in the normal course of business, including but not limited to, dismissals as a result of misconduct or poor performance.

3.3 The Merged Firm shall, for a period of 3 (three) years from the Approval Date, and subject to: (i) any disposals of businesses which may be made in the ordinary course; (ii) unforeseen operational shutdowns; or (iii) any winding up of businesses, maintain at least the same number of Employees as are employed in the aggregate by Consol in South Africa as at the Approval Date.

- 3.4 The Merged Firm shall ensure that Employees of the Merged Firm will remain employed by Consol with all existing terms and conditions of employment (including benefits) remaining in place.
- 3.5 The Merging Parties shall ensure that any collective agreements in terms of the Labour Relations Act with respect to Consol in South Africa will be unaffected post-merger.

4. INVESTMENT IN CAPACITY

- 4.1 The Merged Firm undertakes to:
- 4.1.1 Incur all reasonable capital expenditure required to finalise the construction of N2 (at an anticipated total cost to Consol of approximately ZAR 1.5 billion); and
- 4.1.2 Commence the construction of N3 (which will involve similar expenditure to that associated with N2) within [REDACTED] of the finalisation of the construction of N2.
- 4.2 Ardagh shall provide technical and other forms of support to Consol, with the objective of ensuring Consol's operations are optimised in line with Ardagh's global best practices and procedures.

5. GLASS RECYCLING

- 5.1 The Merged Firm shall procure recycled glass or cullet for use in its operations in the ordinary course, and will favour HDPs in such procurement, provided that the cullet is able to be procured on commercially reasonable terms (particularly with respect to quality standards, availability and reasonably competitive commercial terms). In this regard, Consol has historically procured an average of 25% of its cullet from small / HDP vendors. For the avoidance of doubt, Consol shall increase its pre-merger procurement of cullet from small / HDP vendors to 50% by the end of its 2027 financial year.
- 5.2 Within 3 (three) years of the Implementation Date, the Merged Firm shall expand Consol's existing Cullet Owner Driver Scheme from 2 (two) owner drivers (currently) to 6 (six) owner drivers.

6. SMMEs

- 6.1. Ardagh shall ensure that Consol support SMME customers through a reduction of minimum order quantities (from currently a minimum three-day production run, to a minimum two-day production run).

7. PRODUCT RANGE

- 7.1. Once N2 is fully operational, and subject to customer demand, favourable macro-economic factors and no adverse change in the Merged Firm's financial performance, the Merged Firm will use reasonable endeavours to produce at least 5 (five) million units of Dining Glassware per annum for sale into the budget conscious market.

8. FOOD JARS

- 8.1. Provided it is commercially viable to do so, the Merged Firm commits to continue to manufacture Food Jars for a period of 7 (seven) years from the Implementation Date.

9. MONITORING

- 9.1 The Merged Firm shall circulate non-confidential versions of the Conditions to Employees and Employees' representative trade unions within 10 (ten) Days of the Approval Date.
- 9.2 As proof of compliance with paragraph 9.1, the Merged Firm shall within 5 (five) Days of circulating the Conditions, submit to the Commission an affidavit by a senior official attesting to the circulation of the Conditions and provide a copy of the non-confidential version of the notices that were circulated to the Employees and the Employees' representative trade unions.
- 9.3 Consol shall, within 10 (ten) Days of the Approval Date, provide the Commission with an affidavit which provides the total number of Employees that are employed by Consol in South Africa as at the Approval Date. The affidavit must be attested to by a senior official of Consol.
- 9.4 Within 5 (five) days after the Implementation Date, the Merged Firm shall notify the Commission in writing of the Implementation Date.

- 9.5 Within 30 (thirty) Days of each anniversary of the Implementation Date up until the 5th (fifth) anniversary of the Implementation Date, the Merged Firm shall provide a suitable and appropriately detailed annual report regarding the Merged Firm's compliance with the Conditions. In respect of Clause 8 only, suitable and appropriately detailed annual reports will be provided within 30 (thirty) Days of each anniversary of the Implementation Date for an additional 2 (two) years i.e. up until the 7th (seventh) anniversary of the Implementation Date.
- 9.6 The reports referred to in Clause 9.5 above shall be accompanied by an affidavit attested to by the Chief Executive Officer of Consol confirming the accuracy of the annual report and full compliance with these Conditions in the 12 months to which the report relates.
- 9.7 For the purposes of Clause 3.3, within 10 days of any binding agreement being entered into in respect of any disposal or decision taken in relation to winding up, the Merged Firm shall report to the Commission including the number of Employees associated with each such occurrence. Within 10 days after the implementation of any such disposals, or winding ups, the Merged Firm shall provide the Commission with the aggregate number of Employees within Consol as a result of the disposal.
- 9.8 The Commission may at any time request additional information from the Merging Parties, which the Commission may reasonably deem necessary for the purposes of monitoring the extent of Compliance with these Conditions.
- 9.9 Any person who believes that the Merging Parties have failed to comply with these Conditions may approach the Commission with their complaint. If the Commission determines that there has been an apparent breach by the Merging Parties of these Conditions, the matter shall be dealt with in terms of Clause 11 below.

10. VARIATION OF CONDITIONS

The Merged Firm and/or the Commission may at any time, and on good cause shown, apply to the Tribunal for any of the Conditions to be waived or relaxed, including any resultant modification or substitution thereof.

11. APPARENT BREACH

If the Merging Parties appear to have breached the Conditions or if the Commission determines that there has been an apparent breach by the Merging Parties of any of the Conditions, this shall be dealt with in terms of Rule 39 of the Commission Rules read together with Rule 37 of the Tribunal Rules.

12. GENERAL

All correspondence concerning these Conditions must be submitted to the following email address: mergerconditions@compcom.co.za and ministry@thedtic.gov.za.

ANNEXURE B: Indicative Design Principles for ESOPs

Design Principle	Applicable Criteria
<i>Structure</i>	<ul style="list-style-type: none"> ➤ In previous transactions, unitised employee share ownership trust established for allocated shares ➤ Merged entity can also consider apportioning part of profit after tax for purchase of shares at market value and for these to be maintained in share registry by company secretary. ➤ The Merging Parties shall establish the New ESOP that will hold 7% of the issued shares of Consol. ➤ 85% of units allocated to Participating Employees pursuant to the New ESOP will be allocated to black employees (as defined in the B-BBEE Codes)
<i>Cost to Workers</i>	<ul style="list-style-type: none"> ➤ Notional vendor financing. Participating Employees will not be required to pay anything to participate in the New ESOP, and maternity leave will have no adverse impact on the qualifying criteria.
<i>Governance</i>	<ul style="list-style-type: none"> ➤ The Participating Employees shall be entitled to appoint 50% of the trustees of the New ESOP trust and Consol shall be entitled to appoint the remaining 50% of trustees. In the event of any deadlock between the trustees, the relevant resolution will fail as is the case for the Existing ESOP.
<i>Duration</i>	<ul style="list-style-type: none"> ➤ Perpetual/evergreen to cater for changing workforce
<i>Participants</i>	<ul style="list-style-type: none"> ➤ All current and future workers. ➤ Employees from Grade 7 – 17 on the Peromnes grading system with the exclusion of top / senior management of the Merged Firm from Grades 1 – 6 of the Peromnes grading system.
<i>Participation Benefits</i>	<ul style="list-style-type: none"> ➤ Beneficiaries will be entitled to: (a) dividends and (b) capital growth/upside based on their participation rights calculated with reference to units allocated to beneficiaries. ➤ Beneficiaries will cease to participate for bad leaver events: resignations and dismissals. ➤ Death, retirement, and retrenchment will not affect participation. ➤ To the extent any ordinary dividends are paid by Consol, the beneficiaries of each of the Existing ESOP and the New ESOP will receive trickle dividends in relation to the total outstanding shares covered by each.
<i>Value & Funding</i>	<ul style="list-style-type: none"> ➤ To be funded by a notional vendor financing (NVF) arrangement at the Prime Rate ➤ Provides for a trickle dividend of 30% of the actual dividend declared, with the remaining 70% to be allocated to repayment of the NVF.