COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM047JUL23

In the matter between:

Kuehne and Nagel (Pty) Ltd	Primary Acquiring Firm
and	
Morgan Cargo (Pty) Ltd **Morgan Cargo (KZN) (Pty) Ltd** **Morgan Cargo Express (Pty) Ltd**	Primary Target Firms

Panel	:	L Mncube (Presiding Member)
	:	G Budlender (Tribunal Member)
	:	I Valodia (Tribunal Member)
Heard on	:	27 September 2023
Order issued on	:	27 September 2023
Reasons issued on	:	13 October 2023

REASONS FOR DECISION

Approval

[1] On 27 September 2023, the Competition Tribunal ("Tribunal") conditionally approved the large merger in which Kuehne and Nagel (Pty) Ltd ("Kuehne and Nagel SA") acquired sole control of Morgan Cargo (Pty) Ltd ("Morgan Cargo"), Morgan Cargo (KZN) (Pty) Ltd ("Morgan Cargo (KZN)") and Morgan Cargo Express (Pty) Ltd ("Morgan Cargo Express").

[2] The reasons for the conditional approval follow.

Parties to the transaction and their activities

Primary acquiring firms

[3] The primary acquiring firm is Kuehne and Nagel SA, a private company incorporated in accordance with the laws of the Republic of South Africa. It is majority owned by Kuehne + Nagel International AG ("Kuehne + Nagel International"), a company incorporated in terms of the laws of Switzerland, which holds [redacted] of the entire issued share capital of Kuehne and Nagel SA. The remaining shareholding is held by Kuehne and Nagel Inzuzo Trust ("Inzuzo Trust") which is a B-BBEE entity. Kuehne and Nagel SA does not control any firms in South Africa.

[4] Kuehne + Nagel International, Kuehne and Nagel SA, and all their respective subsidiaries are hereinafter referred to as the Acquiring Group.

[5] The Acquiring Group is a global logistics partner that offers highly specialized logistics solutions for major industries worldwide. The Acquiring Group's activities includes air logistics, sea logistics, road logistics and warehousing and distribution.

Primary target firms

[6] The primary target firms are:

6.1. Morgan Cargo which is wholly controlled by Morgan Cargo Holdings (Pty) Ltd ("Morgan Cargo Holdings");

6.2. Morgan Cargo (KZN) Proprietary Limited ("Morgan Cargo KZN"), which is controlled as to [redacted] by Morgan Cargo. The balance of the shares in Morgan Cargo (KZN) is held by Leigh Investment Trust.

6.3. Morgan Cargo Express Proprietary Limited ("Morgan Cargo Express"), which is controlled as to [redacted] by Morgan Cargo Investments (Pty) Ltd. The balance of shares in Morgan Cargo Express is held by Morgan Cargo.

[7] All the primary target firms are private companies incorporated in terms of the laws of South Africa.

[8] All the primary target firms collectively are referred to as the Morgan Cargo Group.

[9] The Morgan Cargo Group is a South African freight forwarding service provider. The Morgan Cargo Group provides these services in respect of both imported and exported goods via air and sea.

Indivisibility

[10] In determining whether the proposed transaction constitutes a single indivisible transaction, the Commission considered whether the proposed transaction comprises of various transaction steps and contemplates the acquisition of three Target firms.

[11] The merger parties submitted that proposed transaction constitutes a single-multi-step transaction in terms of which the (i) Pre-Transaction Restructure and (ii) the steps in terms of the Framework Agreement will result in Kuehne and Nagel SA acquiring sole control of HoldCo, and HoldCo will subsequently wholly control the Target Firms. The Pre-Transaction Restructure and the steps in terms of the Framework Agreement are considered a series of conditional transactions.

[12] The Commission's investigation found the following:

12.1. Pre-transaction, the Target Firms have a common shareholder in Morgan Cargo Holdings. This is due to the fact that Morgan Cargo Holdings wholly owns Morgan Cargo, and Morgan Cargo has interest in Morgan Cargo (KZN) as to [redacted] and an interest in Morgan Cargo Express as to [redacted]

12.2. Kuehne and Nagel SA's acquisitions of the Target Firms is made up of a series of steps (in terms of the Pre-Transaction Restructure and the steps in the Framework Agreement) which are all conditional on each other; and

12.3. All 3 of the Target Firms are involved in the same or interrelated lines of business. The Target Firms are part of the wider Morgan Cargo Group, a South Africa-based freight forwarding service provider, with its activities covering the full range of sea, air and road (as a limited complementary service to sea and air) freight forwarding.

[13] Based on the above, the proposed transaction constitutes a single indivisible transaction.

Rationale

[redacted] The Acquiring Group submitted that the proposed transaction will lead to mutually beneficial synergies between the business of the Acquiring Group and the Target Firms, as well as the creation of exciting new combined business opportunities which are expected to contribute to the Target Firms' earnings. Accordingly, the Acquiring Group will share in a large proportion of the [redacted]

[15] The Target Firms submitted that, the proposed transaction will lead to mutually beneficial synergies, such as the combination of the Target Firms' existing

network of freight forwarding infrastructure and relationships with the Acquiring Group's facilities and business activities in South Africa. The Target Firms further submitted that the proposed transaction will ultimately provide clients with a better and more efficient service offering. The consolidated increased volumes, in respect of the sea and air freight forwarding sub-segments, will also allow for better capacity utilization when transporting goods via containers or pallets. The increased capital injection will also allow the merged firm to unlock exciting new, combined business opportunities, such as expanding and improving the Target Firms' facilities.

Competition assessment

Overlaps

[16] We considered the activities of the merger parties and found that the proposed transaction gives rise to a horizontal overlap. The horizontal overlap occurs in that the merger parties are both active in the provision of the provision of freight forwarding and clearing services (including advising on national customs and clearance, security, license requirements and regulations) in South Africa, and the narrow provision of (i) air freight forwarding and clearing services and (ii) sea freight forwarding and clearing services.

[17] There is no vertical relationship between the merger parties in South Africa because the merger parties do not supply any products or services to each other and also do not operate at different parts of the same value chain.

Relevant markets

[18] Given the horizontal overlap as set out above, we focused our assessment of the merger on:

18.1. The market for the provision of freight forwarding and clearing services in South Africa;

18.2. The narrow market for the provision of air freight forwarding and clearing services in South Africa;

18.3. The narrow market for the provision of sea freight forwarding and clearing services in South Africa.

[19] It is not necessary to conclude on the precise scope of the relevant markets in this case since the merger does not raise any competition concerns on either broad or narrow markets.

Competition assessment

[20] In the broad market for the provision of freight forwarding and clearing services, the Commission estimates that the merged entity has a combined market share range of about 10% – 20% with an accretion of 5% - 6%. The Commission also notes that these market shares are likely to be overstated, as they do not take into account all the market participants.

[21] In the narrow market for the provision of air freight forwarding and clearing services, the Commission estimates that the merged entity will have a combined market share range of about 30%- 35% with an accretion of 10% – 15%. The Commission also notes that these market shares are likely to be overstated, as they do not take into account of all the market participants.

[22] In the market for the provision of sea freight forwarding and clearing services, the merged entity will have a combined market share range of about 30% - 35% and an accretion of 10% – 15%. The Commission also notes that these market shares are likely to be overstated, as they do not take into account of all the market participants.

[23] We received no evidence suggesting that the Morgan Cargo Group provides a significant competitive constraint in any of the markets which would be removed by the merger.

[24] In light of the above, the proposed transaction is unlikely to substantially prevent or lessen competition in any market.

Effect on employment

Retrenchments

[25] The merger parties submitted that during the period of November 2022, January and March 2023, [redacted] employees were retrenched from Kuehne and Nagel SA in the last 12 months due to operational requirements,[1] in terms of Section 189 of the Labour Relations Act ("the Labour Relations Act").[2]

[26] The Commission contacted employee representatives of the Kuehne and Nagel SA, and obtained confirmation that no employment concerns were raised in relation to the proposed transaction. The employee representative also confirmed that the [redacted] employees were retrenched during the last 12 months due to operational requirements.

[27] The Commission considered all relevant documents pertaining to the retrenchments of the [redacted] employees and found that the retrenchments were due to an internal restructuring as a result of a general downturn in sea logistics particularly at the Johannesburg Sea Logistics Branch. Kuehne and Nagel SA [redacted] as a result of the general downturn [redacted] had to restructure some of its branches to reduce costs and maximise efficiencies. The restructuring resulted in the redundancies of the roles of the retrenched employees. The Commission's investigation further found that the [redacted] retrenched employees represented approximately [redacted] of Kuehne and Nagel SA's total staff complement and that the retrenchments are therefore not considered substantial.

[28] To protect the merger parties' employees and prevent merger-specific retrenchments, the Tribunal approved the proposed transaction subject to the following employment Conditions:

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[1] The affected employees are classified as skilled employees. The [redacted] retrenched employees have qualifications such as NQF 3 and NQF 4 in Freight Forwarding and Customs Compliance, Bachelor of Commerce degree, Diploma in Advanced Business Management, and additional further courses. These employees have years of service at Kuehne and Nagel ranging from 1 years to 9 years.

[2] 66 of 1995 (as amended).

28.1. No merger specific retrenchments shall take place on the employees of the Target Firms for a period of 36 months, following the Approval Date[3].

28.2. Merger specific 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 Labour Relations Act; (iv) resignations or retirements in the ordinary course of business; (v)retrenchments lawfully effected for operational requirements unrelated to the Merger; and (vi) terminations in the ordinary course of business, including but not limited to, dismissals as a result of misconduct or poor performance.

NUMSA, NTM, and TTSW's concerns

[29] The Commission further contacted the trade unions National Union of Metalworkers South Africa ("NUMSA"), the National Transport Movement ("NTM") and the Tirisano Transport and Services Workers Unions ("TTSW") representing Morgan Cargo. NUMSA raised concerns relating to the provident funds of the employees, that they want their provident funds to be withdrawn and incorporated with the Kuehne and Nagel SA provident fund, as Morgan Cargo does not contribute to the provident funds of its employees. TTSW raised concerns on whether they would still be employed by Morgan Cargo and on what basis.

[30] In relation to the concerns raised by NUMSA, the merger parties submitted that the query related to provident funds is unrelated to the proposed transaction and that the Target Firms will continue to have separate provident funds to Kuehne and Nagel SA for their respective employees post-transaction. With regards to the concerns raised by TTSW, the merger parties submitted that all employees of Morgan Cargo were informed of the proposed transaction on 06 June 2023 and 13 June 2023 respectively.

[3] The date upon which the Tribunal issues a Clearance Certificate in terms of the Competition Act.

[31] The Commission also contacted employee representative of Morgan Cargo (KZN) and obtained confirmation that no employment concerns were raised in relation to the proposed transaction.

[32] The Commission further contacted employee representative of Morgan Cargo (Express). The employee representative raised job security concerns and whether the merging parties will occupy one office and concerns relating to whether the employees will be incorporated into the Kuehne and Nagel SA HR and payroll systems with additional benefits. In response to the concerns raised by Morgan Cargo (Express) employees, the merger parties submitted that there will be no job losses as a result of the proposed transaction.

[33] In light of the above, we are of the view that the proposed transaction is unlikely to have a negative impact on employment.

Effect on greater spread of ownership

[34] The merger parties submit that pre-transaction, Kuehne and Nagel SA has an HDP shareholding of [redacted] which is as a result of the Inzuzo Trust holding [redacted] of the shares in Kuehne and Nagel SA. The merger parties further submitted that the Target Firms have the following shareholding held by HDPs: Morgan Cargo [redacted] Morgan Cargo (KZN) [redacted] and Morgan Cargo Express [redacted]

[35] The Commission's investigation found that proposed transaction will result in an increase of [redacted] HDP shareholding in Morgan Cargo, an increase of [redacted] HDP shareholding in Morgan Cargo (KZN) and an increase of [redacted] HDP shareholding in Morgan Cargo Express.

[36] The Department of trade and Competition ("DTIC") sought to obtain the following commitments from the merger parties:

36.1. 36 months moratorium on retrenchments;

36.2. Specific initiatives to promote B-BBEE in its supply chain and support for historically disadvantaged operators, especially small and medium sized businesses owned by black women and other designated groups; and

36.3. Implementing an Employee Share Ownership Program ("ESOP") of at least 5% in the target firms or merged entity for the benefit of South African employees within 36 months.

[37] The merger parties agreed to the moratorium on retrenchments for a period of 3 years. The Commission notes that the proposed transaction increases the HDP shareholding of the Target Firms.

[38] Given the above, we are of the view that the proposed transaction is unlikely to have a negative impact on employment or the promotion of a greater spread of ownership.

Conclusion

[39] For reasons set out above, we are satisfied that the proposed transaction is unlikely to substantially prevent or lessen competition in any relevant market.

[40] Furthermore, the conditions relating to employment adequately address any public interest concerns.

[41] In order to give effect to the above, the Tribunal approved the proposed transaction on the above conditions which are attached hereto as **Annexure "A"**.

Signed by:Liberty Mncube
Signed at:2023-10-13 15:02:32 +02:00
Reason:Witnessing Liberty Mncube

L-Mncube

13 October 2023

Prof Liberty Mncube **Date**

Prof. Imraan Valodia and Adv Geoff Budlender concurring.

Case Managers	:	Nomkhosi Mthethwa-Motsa and Theodora Michaletos
For the Acquiring Firm	:	Xolani Nyali, Alexander Gloor , Sivuyise Lutshiti of Bowmans Inc
For the Target Firm		Roux van der Merwe, Tamarin Tosen, Ntobeko Rapuleng, Reece May and Albert Aukema of Cliffe Dekker Hofmeyr Inc.
For the Commission	:	Portia Bele and Tarryn Sampson