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14 September, 2017

**Tribunal sets aside Commission’s approval of Country Bird and Sovereign Food merger**

The Competition Tribunal has reviewed and set aside the Competition Commission’s decision to approve an intermediate merger between poultry producers Country Bird Holding (Pty) Ltd (“Country Bird”) and Sovereign Food Investments Ltd (“Sovereign”), referring such back to the Commission.

The Commission had conditionally approved the merger. The Tribunal ruled that the Commission’s decision was based on a material error of fact.

The matter stemmed from an offer made by Country Bird to acquire the entirety of Sovereign’s shares in July 2016. Country Bird’s initial offer to Sovereign was dependent on Country Bird obtaining 50% plus one shares in the target company before the offer’s termination date. When Country Bird noted that it would not reach the threshold required by its own offer in the designated time, it issued a circular amending its offer and waiving the acceptance condition.

In the Interim, the merging parties notified the merger with the Commission. The Commission, acting under the impression that the merger would only take place by Country Bird acquiring, at minimum, a 50% plus one share in Sovereign, approved the transaction and imposed employment conditions which would only be binding upon Country Bird if it were to come to control a 50% plus one share in Sovereign.

Sovereign thereafter approached the Tribunal, asking for a review of the Commission’s decision.

Sovereign, in its application, alluded to the fact that because the conditions only stipulate that employment conditions are activated with a 50% plus one shareholding, but the revised offer creates the opportunity for Country Bird to obtain control over the firm at a lower shareholding, it is possible that Country Bird could obtain *de facto* control over the firm and still not be subject to the employment conditions imposed by the Commission.

The Tribunal said it was not clear under what terms the Commission had approved the merger.

“Central to our finding in this matter is an inherent uncertainty as to what merger the Commission approved. Whether it is the acquisition of *de jure* control by Sovereign, i.e. an acquisition of 50% plus one shares or the acquisition of *de facto* control i.e. the ability to command a majority in a shareholding meeting.”

The Tribunal went on to find that the decision to approve the transaction subject to conditions which may not come into effect was based upon a material error of fact and should thus be set aside. It referred the decision back to the Commission for it to “reconsider its decision and to decide whether the merger should be approved, and if so, which appropriate conditions, if any, should attach to such approval”.

The Commission has 40 business days to come to a decision.

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