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SOUTH AFRICA

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM092Aug22

In the matter between:

Clover S.A. Proprietary Limited	Primary Acquiring Firm
and	
The Milk Procurement Business of Dairy Farmers of South Africa Proprietary Limited	Primary Target Firm

Panel	:	Yasmin Carrim (Presiding Member)
	:	Andiswa Ndoni (Tribunal Member)
	:	Fiona Tregenna (Tribunal Member)
Heard on	:	01 December 2022
Order issued on	:	01 December 2022
Reasons issued on	:	19 December 2022

REASONS FOR DECISION

Approval

[1] On 1 December 2022, the Competition Tribunal conditionally approved the large merger in which Clover S.A. Proprietary Limited ("Clover S.A"), acquired the business and assets used or owned by Dairy Farmers of South Africa (Pty) Ltd ("DFSA") in relation to the procurement and supply of regular raw milk to Clover ("Milk Procurement Business").

[2] The reasons for the conditional approval follow.

Parties to the transaction and their activities

Primary acquiring firm

[3] Clover S.A. Proprietary Limited ("Clover S.A”) is directly controlled by Clover Proprietary Limited (“Clover”), which is ultimately controlled by Central Bottling Company Limited.

[4] Clover S.A is a branded consumer goods company in the food and beverage industry, with subsidiaries in South Africa, Botswana, Namibia, and eSwatini. Its focus is on the manufacturing and supply of dairy products, soy products, olive oil, peanut butter and mayonnaise and the production of non-alcoholic beverages as well as sales, merchandising and distribution of consumer goods.

[5] Clover S.A also procures raw Ayrshire milk and organic milk as an input for certain of its products. The merging parties confirmed that Clover SA does not currently engage with farmers directly regarding the procurement of regular raw milk. This is because 100% of its raw milk procurement is supplied by the Milk Procurement Business (the Target Firm in this instance).

Primary target firm

[6] The business and assets used and owned by Dairy Farmers of South Africa (Pty) Ltd (“DFSA”) in relation to the procurement and supply of regular raw milk to Clover S.A (“the Milk Procurement Business”). The Milk Procurement Business does not control any firms.

[7] The Milk Procurement Business provides procurement of raw regular milk to Clover S.A in South Africa (including in relation to concentrated regular raw milk and pasteurised, thermised and standardised milk), and the subsequent supply of such products as inputs to Clover. The Milk Procurement Business provides these services only to Clover S.A.

[8] The Milk Procurement Business procures regular raw milk from milk producers (predominantly located in KwaZulu Natal, Eastern Cape, and the Highveld) which involves transport and logistical services; raw milk quality and field services; and certain administrative, financial and contract management services, relating to the collection and supply of regular raw milk procured from producers.

Proposed transaction and rationale

[9] In terms of the proposed transaction Clover S.A is acquiring the Milk Procurement Business. Post-merger, Clover S.A will have sole control over the Milk Procurement Business.

[10] [redacted]

[11] [redacted]

Relevant market and impact on competition

[12] The Commission found that Clover Group is the only customer of the Milk Procurement Business and Clover Group procures 100% of its regular raw milk from the Milk Procurement Business. Hence the Commission is of the view that the proposed merger is unlikely to raise any foreclosure concerns as the Milk Procurement Business does not have any other customers.

[13] The Commission is also of the view that the merger is unlikely to alter the structure of the market as the merger will result in Clover Group replacing DFSA as the owner of the Milk Procurement Business because the Clover Group will take over all the supply agreements concluded between the Milk Procurement Business and the farmers.

[14] The Commission also enquired about Clover S.A.'s plans post-merger, especially with regards to the milk producers (farmers). The merging parties submitted that Clover Group will continue to procure from milk farmers who are currently supplying the Milk Procurement Business. Essentially, what this means is that Clover will procure its own regular raw milk, through the milk contracts and/or delivery agreements which will be ceded by DFSA to Clover.

[15] In light of the above, we are of the view that the proposed transaction is unlikely to substantially prevent or lessen competition in any market.

Public interest

[16] The merging parties submitted that DFSA commenced a section 189A process on 25 April 2022, prior to the commencement of negotiations with Clover regarding the proposed transaction on 23 May 2022, and it was unrelated to the proposed transaction.

[17] The merging parties further submitted that 52 employees at the Target Firm were retrenched in the past 12 months and that these retrenchments were unrelated to the proposed transaction.

[18] The Commission engaged with an employee representative of the merging parties during the site visit who confirmed that [redacted]

[19] The Commission found that the pre-merger retrenchments at DFSA were contemplated before the discussions about the present transaction for operational reasons and were unlikely to be merger specific.

[20] FAWU, AMITU and Inqubelaphambili Trade Union ("ITU") and the DTIC raised concerns regarding pre-merger retrenchments and employment.

[21] To remedy these concerns the Unions and the DTIC proposed that the merging parties provide retrenched employees an opportunity to apply for vacancies that may become available for a period of 3 (three) years from the implementation date using the contact details provided by each of the retrenched employees to the merged entity. The merging parties accepted the condition.

[22] Furthermore, the Commission requested the merging parties to consider a moratorium on employment for a period of 5 (five) years. The merging parties submitted that they [redacted] were willing to undertake not to retrench any employees of the Milk Procurement Business as a result of the proposed transaction for a period of 3 (three) years and the Commission accepted this condition.

[23] The DTIC, had also requested the Commission to engage with the merger parties with a view to institute conditions requiring the acquiring firm to maintain existing milk

procurement contracts with both HDP and SME suppliers for a period of 5 (five) years from the merger approval date as well as making raw milk that is surplus to its own production requirements available to competitors.

[24] The merging parties indicated that they were amenable to the DTIC's proposed conditions, and the DTIC thus accepted the merger parties' conditions.

[25] The Commission accordingly recommended that the merger be approved on these two conditions.

[26] In the course of the Tribunal proceedings, the DTIC confirmed they had no further concerns and would not participate in our proceedings. We did receive written submissions from the unions, namely ITU, GIWUSA and FAWU. GIWUSA and FAWU were represented by Novus Risk. Only Novus Risk (on behalf of GIWUSA and FAWU) participated in the Tribunal proceedings.

FAWU's main concerns were:

26.1. The duration for the retrenchment moratorium should be extended to a period of 5 (five) years post-merger;

26.2. Harmonising wages and/or salaries, employment conditions, working conditions and benefits in the merged entity for all employees transferred to the Clover Group. Further to that, to establish and keep records of all employees who were retrenched before the commencement of the merger negotiations. This is inclusive and but not limited to employees retrenched for operational requirements. These employees should be given first preference for re-employment at the merged entity to apply for vacancies that may become available for a period of 3 (three) years from the date; and

26.3. Implementation of an Employees Share Ownership Scheme ("ESOP") of 10% in an unencumbered equity to be facilitated through a Trust for the benefit of all employees at the merged entity to the exclusion of certain employees at management level. The 10% equity shall be the total value of the merged entity and fully funded by the merging parties. An ESOP transaction shall be implemented within 24 months post-merger.

[27] At the hearing these concerns were ventilated, and the merging parties have since indicated that Clover is willing to extend the moratorium period from 3 (three) years to 5 (five) years.[1] The Commission and FAWU had no objection to this and the proposed condition was revised accordingly. These revised conditions are attached hereto as **Annexure "A"**.

[28] Further, with regard to harmonizing the working terms and/or giving first preference for re-employment at the merged entity to previously retrenched workers, we were of the view that this is a section 197 of the Labour Relations Act 1995 as amended, transfer of employees, thus the employment terms will remain the same. Further,, accepted that they would provide previously retrenched employees an opportunity to apply for vacancies that may become available, as a condition of the merger during its negotiations with the Commission.

[29] With regard to the potential ESOP, the merging parties submitted tha[redacted] As a result of this we agreed with the merging parties that there was no scope for a potential ESOP in this matter.

[30] FAWU indicated at the hearing that it had accepted the merging parties' submissions and would not persist with its suggestions.

Effect on greater spread of ownership

[31] The effective HDP in the Milk Procurement Business will be reduced by [redacted] from [redacted] to [redacted] following the implementation of the proposed transaction. Given the dilution, the Commission requested the parties to consider the certain remedies. However, in response to the Commission's request, the merging parties indicated that [redacted]. Moreover, the parties submitted that the proposed

[1] Page 6 of the transcript.

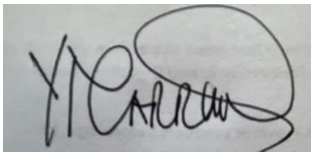
transaction therefore allows the HDP shareholders of the Milk Procurement Business to receive some value and that the merged entity will have an HDP shareholding of at least [redacted]

[32] The merging parties had further agreed to the condition that Clover S.A will invest [redacted] in skills development and [redacted] in enterprise development over a period of five years.

[33] In considering whether the conditions proposed by the merging parties outweigh the dilution and promote the greater spread of ownership as contemplated in section 12A(3)(e) of the Act, the Commission considered [redacted] The Commission then considered the quality of the HDP shareholdings in the Milk Procurement Business and found that [redacted] Lastly, the Commission considered the sustainability of the business model of the Milk Procurement Business; and the merging parties indicated that the Milk Procurement Business [redacted] The Commission found that competitors of Clover have their own in-house milk procurement business and rarely used independent intermediaries such as the Milk Procurement Business.

Conclusion

[34] In light of the above, we concluded that the proposed transaction is unlikely to substantially prevent or lessen competition in any relevant market. In addition, no public interest issues arise from the proposed transaction. Accordingly, we approved the proposed transaction on the conditions attached hereto as **Annexure "A"**.



19 December 2022

Ms Yasmin Carrim **Date**

Prof. Fiona Tregenna and Ms Andiswa Ndoni concurring.

Case Managers	:	Kameel Pancham and Theodora Michaletos
For the Merging Parties	:	Jean Meijer and Sandhya Foster of Herbert Smith Freehills South Africa LLP
For the Commission	:	Zintle Siyo and Themba Mahlangu