



COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM263Mar19

In the matter between:

MILCO SA (PTY) LTD

Primary Acquiring Firm

and

CLOVER INDUSTRIES LIMITED

Primary Target Firm

Panel	:	AW Wessels (Presiding Member)
	:	Andiswa Ndoni (Tribunal Member)
	:	Thando Vilakazi (Tribunal Member)
Heard on	:	14 August 2019, 09 and 16 September 2019
Last submission received on	:	20 September 2019
Order Issued on	:	25 September 2019
Reasons Issued on	:	22 January 2020

Reasons for Decision

Approval

- [1] On 25 September 2019, the Competition Tribunal (“Tribunal”) conditionally approved the proposed transaction involving Milco SA (Pty) Ltd and Clover Industries Ltd. The imposed conditions related to post-merger information sharing between competitors, the continued procurement of juice concentrate locally by the merged entity after the proposed transaction, as well as the public interest issue of the negative employment effects of the proposed transaction.
- [2] The reasons for decision for the conditional approval follow, set out in two parts A and B relating to the competition and public interest issues, respectively.

Parties to the proposed transaction

Primary acquiring firms

- [3] The primary acquiring firm is Milco SA (Pty) Ltd (“Milco SA”), a newly formed entity established for the purpose of this transaction. Milco SA is controlled by Milco Mauritius International Ltd (“MMI”), a special purpose vehicle to be incorporated in Mauritius. The other non-controlling shareholders in Milco SA are Clover Management and a B-BBEE entity, Khulasande Partnership II (“Khulasande”). MMI is in turn controlled by International Beer Breweries Limited (“IBBL”), Ploughshare Investment Limited (“Ploughshare”) and Incubev Limited.
- [4] Ploughshare is [REDACTED]
[REDACTED]
[REDACTED]
- [5] IBBL is ultimately controlled by The Central Bottling Company Ltd (“CBC”), with a shareholding interest of [REDACTED]% while the remaining shareholding interest of [REDACTED]% is held by current and former managers of CBC. Of relevance to the assessment of the effects of the proposed transaction on competition is also the [REDACTED] shareholding of CBC in Gat Givat Haim cooperative (“GAT Foods”).
- [6] Milco SA, MMI and all the firms directly and indirectly controlling the said entities will be referred to as the “Acquiring Group”.
- [7] The Acquiring Group, through CBC, is an Israeli based manufacturer and distributor of soft drinks, dairy products and alcoholic beverages. In Israel, CBC manufactures and distributes The Coca-Cola Company (“Coca-Cola”) products and distributes major beer brands. Furthermore, the Acquiring Group, through GAT Foods, is active in the production of juice concentrate, used as an input in downstream production processes.

Primary target firm

- [8] The primary target firm is Clover Industries Ltd (“Clover”), a firm incorporated in South Africa. Clover is listed on the Johannesburg Stock Exchange (“JSE”) and is not controlled by any single shareholder. The following shareholders hold more than 5% of the shares in Clover: Clover Milk Producers Trust (12.42%), Allan Gray (7.87%), Government Employees Pension Fund (6.04%), and Lekto Brosseau (5.79%). Clover has several subsidiaries in South Africa, as well as subsidiaries, in Botswana, Namibia and Swaziland.
- [9] Clover through its various subsidiaries, is involved in the production and supply of dairy products, soy products, non-alcoholic beverages including fresh fruit juices, dairy based fruit juices, carbonated soft drinks, water and ice tea, the sale of oil and olives, sale of mayonnaise, sale and merchandising services provided in respect of its own product and certain products on behalf of third party principals.²

Proposed transaction and rationale

- [10] In terms of the proposed transaction, the Acquiring Group intends to acquire 100% of the issued shareholding in Clover. Post-merger, Milco SA will exercise sole control over Clover.
- [11] The Acquiring Group submitted that it: brings extensive knowledge of the dairy, juice and non-alcoholic beverages industries; has the technical and research ability to bring healthier food to consumers; has access to international brands; has connections and operating experience in Sub-Saharan businesses, in addition to proven commercial trade abilities. The Acquiring Group intends to combine these capabilities with those of Clover to unlock value through key strategic initiatives, primarily aimed at accelerating sales, distribution and efficiency opportunities within Clover’s product portfolio in South Africa, with an expansion into select sub-Saharan Africa territories.

² Including the production and packaging of Woolworths and Pick n Pay own name brands.

merged entity. In terms of the conditions the merged entity undertook to take certain measures to limit the flow of Competitively Sensitive Information³ arising from cross-shareholding and cross-directorships post-merger, including:

“3.1.1 For as long as any shareholder may nominate a person for election as a director or alternate director of MMI, Milco or Clover, the merged entity and the CSI Shareholders shall ensure that the nominated person is not simultaneously a director or an alternate director or a manager of a Competing Business⁴ in South Africa, or is otherwise involved in determining strategy at a Competing Business.

3.1.2. To the extent that a CSI Shareholder receives, as part of the information that it is entitled to as a shareholder, Competitively Sensitive Information of Milco and/or its subsidiaries that relates to an activity in which the shareholder has a Competing Business, the shareholder shall ensure that the Competitively Sensitive Information will not be made available to any director or manager of, or person at a Competing Business.”⁵

[16] Compliance with this condition includes a number of aspects as set out in the attached Annexure A.

[17] We are satisfied that the above conditions adequately remedy the concerns relating to post-merger information exchange between competitors.

Vertical assessment (input and customer foreclosure)

Input foreclosure

[18] The Acquiring Group, through GAT Foods operates in the upstream market for the production and supply of juice concentrate. As such the Commission assessed the likelihood of input foreclosure in the downstream market. The

³ See paragraph 1.7 of Annexure A for the definition of “Competitively Sensitive Information”.

⁴ “Competing Business” means any entity that competes against Clover in respect of non-alcoholic beverages in South Africa and in which a CSI Shareholder of Milco directly and indirectly holds shareholding interest that enables that shareholder to appoint or nominate a director/s to the board of those entities.

⁵ Merger Conditions, page (“pg.”) 4.

Commission however found that GAT Foods supplies only one firm in South Africa, namely [REDACTED]. Furthermore, rivals of Clover in South Africa indicated that they did not currently procure juice concentrate from GAT Foods. Thus, the Commission concluded that the proposed transaction will not result in input foreclosure.

Customer foreclosure

- [19] The Commission found that in the downstream market for the production and supply of fruit juice, Clover has a national market share of approximately 6% based on volumes produced and supplied. The Commission also found that there are a number of alternative customers that local juice concentrate suppliers can target such as Pioneer Foods, Coca-Cola and the Rhodes Food Group.
- [20] However, two of Clover's current juice concentrate suppliers, Southern Canned Products (Pty) Ltd ("SCP") and Granor Passi (Pty) Ltd ("Granor Passi"), raised concerns around the proposed transaction. SCP and Granor Passi were concerned that their businesses would be negatively affected if they lost Clover as a customer post-merger. SCP submitted that it would take a period of 5 to 10 years to find a new customer, and, in the meantime, it would have to downscale production and retrench at least 25 employees. Granor Passi on the other hand, submitted that it would take a period of 3 to 5 years to establish a new supply option, and that it would need 12 months' notice before termination. The Department of Agriculture, Forestry and Fisheries ("DAFF") was also concerned that the proposed transaction may result in local suppliers of juice concentrate losing business to GAT Foods.
- [21] To remedy the concerns raised by the current juice concentrate suppliers, the Commission recommended a condition that the merged entity continue purchasing juice concentrate from local suppliers on substantially the same terms and conditions currently in place for a period of 3 years. The Commission argued that this 3-year commitment would provide local juice concentrate suppliers with adequate time to source alternative customers other than Clover. It further said that this condition was likely to address DAFF's concerns since

DAFF submitted that continued sourcing from local fruit processors for a certain period will allow for adjustments.

[22] However, the Tribunal raised concerns regarding the formulation of the initial local procurement remedy as tendered by the merging parties and recommended by the Commission. The initial formulation limited or restricted the local procurement by the merged entity of fruit juice concentrate in a number of respects, which in the Tribunal's view would have made the proposed remedy ineffective since the intended commitment to buy locally could potentially be circumvented by the merged entity. However, following concerns raised by the Tribunal regarding the formulation of the tendered remedy, the merging parties redrafted the condition and that cured the Tribunal's concerns.

[23] The Tribunal ultimately imposed the condition that the merged entity must for a period of three years from the implementation date of the proposed transaction, continue to procure its required volumes of bulk juice concentrate from local suppliers of bulk juice concentrate on substantially the same terms and conditions as are currently in place with Clover's local suppliers (allowing for reasonable variations in price and commercial terms in response to market conditions unrelated to the proposed merger) subject to the following:

- “3.2.1. the bulk juice concentrate from local suppliers is at least of the same quality as is currently procured by Clover;*
- 3.2.2. the price at which local suppliers offer to supply the bulk juice concentrate to the merged entity is not higher than the price at which bulk juice concentrate is available in the South African market; and*
- 3.2.3. the bulk juice concentrate volumes required by the merged entity are readily available from the local suppliers.”⁶*

[24] We are satisfied that the above conditions adequately remedy the concerns relating to the procurement of fruit juice concentrate from local suppliers after the proposed transaction.

⁶ Merger Conditions pg. 5.

PART B: REASONS FOR CONCLUSION ON PUBLIC INTEREST

- [25] In the public interest section of the reasons we focus on the effect of the merger on employment since the Commission identified no other public interest concerns.
- [26] In their filing, the merging parties indicated that as a worst-case scenario, the net impact on employment of a project which was currently underway at Clover was 516 jobs that would be lost. This project was referred to as Project Sencillo, the rationale of which is to ensure a better utilization of Clover's assets (factories, production lines, warehouse and trucks). It was estimated that this project would take up to 5 years to complete, noting that Phase 1 was completed in 2017 and that Phase 2 was underway.
- [27] Briefly, Project Sencillo commenced in May 2016, with the aim of deriving efficiencies in Clover's operations primarily through the creation of "super facilities" at Queensburgh, Port Elizabeth and Clayville. In order to achieve this, a number of facilities have been, or are still to be, closed or sold. The production at these facilities is to be moved to other facilities with the view of maximising capacity and the utilization of those remaining facilities. According to the merging parties, the rationale for Project Sencillo is the reorganisation of Clover's production platforms in order to increase efficiency and the consolidation of its distribution operations in order to improve the utilisation and efficiencies of Clover's assets, including its factories, manufacturing lines, warehouses and transportation.
- [28] The reorganization of plant facilities has implications for employment. The Commission raised concerns regarding the planned retrenchments and concluded that the contemplated 516 job losses as a result of Project Sencillo were substantial and merger specific. It found that the initial Project Sencillo approved in May 2016 as well as the interactions that took place between the Acquiring Group and Clover from July 2016 to May 2017, resulted in Project Sencillo moving from the consolidation of certain factory lines to the closure of 8 out of 15 factories. In addition, the number of factory closures then increased

to 11 out of 15 factories as of the date of submission of the proposed merger. The Commission concluded that given the short period in which the changes took place as well as the fact that the changes took place after engagements with the Acquiring Group, it could be reasonably inferred that the final Project Sencillo planned retrenchments were merger specific. In addition, the Commission noted that the majority of the affected employees are semi-skilled and unskilled. The Commission further raised the concern that the planned closure of certain Clover facilities would have significant economic consequences for the regions where those facilities are located since Clover is a substantial employer within certain of those regions.

- [29] While the merging parties disputed the merger specificity of these planned retrenchments, they tendered certain conditions in order to address the concern.
- [30] The Commission and the merging parties agreed on a set of employment-related conditions which the Commission recommended. In relation to Project Sencillo, the Commission recommended the approval of the proposed transaction subject to the merged entity not retrenching any employees as a result of the completion of Project Sencillo for a period of two years from the implementation date. In the 3-year period thereafter, the merged entity would limit the net impact of the job losses as a result of the completion of Project Sencillo to 516 jobs.
- [31] The General Industries Workers Union of South Africa (“GIWUSA”) and Inqubelaphambili Trade Union (“ITU”) raised concerns regarding *inter alia* the effects of the proposed transaction on employment in South Africa, specifically in relation to but not limited to the large number of planned retrenchments as a result of Project Sencillo. The Tribunal allowed the unions to make written and oral submissions and to put questions to the merging parties’ factual witnesses. The Food and Allied Workers Union (“FAWU”) also made submissions to the Commission during its investigation.

- [32] At the hearing, the Tribunal and the unions raised concerns regarding the merging parties' tendered employment-related conditions, as set out further below.
- [33] The Tribunal required evidence to be led regarding the abovementioned 516 job losses as a result of Project Sencillo. It further required employment-related data from Clover, as well as further details in relation to the creation of new jobs through Project Masakhane. Project Masakhane is a Clover project to increase its distribution reach into previously under- and un-served areas including the increase of Clover's delivery points at the bottom-end of the market. These new positions would consist mostly of sales representatives, drivers and van assistants.⁷
- [34] During the hearing the Tribunal questioned the methodologies used by Clover to arrive at its worst-case scenario of 516 job losses. We were concerned that certain mitigating factors that would lower the ultimate number of required retrenchments, such as vacancies, natural attrition, potential relocation of employees, etc. were not considered in Clover's calculations. Clover's estimates of the number of retrenchments were thus inflated since it ignored a number of mitigating factors that would lower the ultimate number of required retrenchments. Put differently, Clover's initial retrenchment estimates were not determined through a rational process.
- [35] However, in the course of the hearing and following questions raised by both the unions and the Tribunal, the merging parties reviewed their initial estimations of potential retrenchments in light of the queries raised, and proposed a significantly lower net impact as a result of Project Sencillo from the original 516 job losses to a maximum of 277 jobs.
- [36] The Tribunal accepted these lower figures, but in its final imposed conditions increased the recommended moratorium on the retrenchments as a result of the completion of Project Sencillo from the tendered two-year period from the implementation date to a three-year period.

⁷ See letter to the Tribunal dated 15 August 2019.

[37] For the sake of completeness, we note that the condition ultimately imposed by the Tribunal in relation to Project Sencillo was that the merged entity shall not retrench any employees as a result of the completion of Project Sencillo for a period of three years from the implementation date. In the two-year period thereafter, the merged entity must limit the net impact of the job losses as a result of the completion of Project Sencillo to a maximum of 277 jobs. We note that the latter is a maximum number, which means that the actual number could be lower.

[38] The above three-year moratorium is consistent with the evidence led in the hearing regarding the time it would take Clover to initiate specific projects to restructure and consolidate its production operations as part of the Project Sencillo strategy, which predates the date of filing of the merger. In his oral evidence, Mr Anton Pretorius,⁸ stated that:⁹

“...So the important thing is, up till now we do not have a fixed timeline. We have an estimated timeline on the table as I require that to do proper resource planning from the engineering team. So at this stage the only timing that we have, is that it will take roughly between 3 and 5 years, depending on many things, depending on your approval and all the other things. We want to kick off as soon as possible and it is correct that even though we have some space available in Queensburgh, there is still quite a bit of civil work that must be done to expand that space.

So we ideally and I’m saying we, then I’m talking about the execution team that must make this happen, would want to kick off the contracting of that civil expansion, if possible still in this year. If it is then possible to do it in this year still, then the timeline of 3 to 5 years is applicable. If we delay it with another year, then okay we are just going to expand and increase the total timeline.”
(emphasis added).

[39] Furthermore, the Tribunal’s extension of the moratorium period to three-years would narrow the time gap between the net impact on employment of 277 job

⁸ Clover’s group manager for product technology and technical services and the project lead for Sencillo Phase 2.

⁹ See Transcript, dated 16 September 2019 pages 311-312.

losses as a result of the completion of Project Sencillo and the creation of new jobs through Project Masakhane, which will be done over a 5-year time horizon (discussed in more detail below). This longer moratorium of three years would contribute to mitigating the negative effects of the planned retrenchments on the affected workers and the economies of the local towns / cities where the production facilities that are to be closed are located, and hopefully assist to reduce the maximum net impact on employment of 277 job losses as a result of Project Sencillo even further.

[40] In relation to the creation of new jobs, the merging parties tendered that the merged entity shall in the 5-year period following the implementation date, create 550 new permanent employment positions at Clover through the expansion of the ongoing Clover programme, Project Masakhane.

[41] With regards to the abovementioned 550 new Project Masakhane jobs, the trade unions raised concerns regarding potential differences in the employee benefits of the Project Masakhane positions when compared to other Clover positions. In light of the concerns raised by the trade unions, the merging parties agreed to a condition that the conditions of employment for employees in Project Masakhane will be substantially similar to all other Clover permanent employees, taking the job grade into consideration. These benefits are medical aid, retirement fund, group scheme, spouse and trauma insurance, housing allowance, meal allowance, 13th cheque, long service bonus, maternity leave, family responsibility leave, sick leave and annual leave.

[42] For the sake of completeness, we note that the condition ultimately imposed by the Tribunal in relation to Project Masakhane was that the merged entity shall, in the five-year period following the implementation date, create 550 new permanent employment positions at Clover through the expansion of Project Masakhane. It is recorded that Clover currently employs 332 permanent employees through Project Masakhane in South Africa.

[43] The other employment related conditions agreed to by the merging parties and imposed by the Tribunal include:

- [43.1] The merged entity shall not retrench any employee in South Africa as a result of the merger. This undertaking does not extend to *inter alia* voluntary separation arrangements, voluntary early retirement packages and the retrenchments arising from the completion of Project Sencillo, as discussed above.
- [43.2] The merged entity will contribute reasonable relocation and training costs for the affected employees that successfully apply for a vacant / new position in Project Masakhane. The merged entity will cover the cost of such training up to a total of R5 000 000 and the cost of relocation up to a total of R5 000 000.
- [43.3] Affected employees will be offered the opportunity to apply for and preference in relation to any new / vacant Clover position (including for any vacant / new position created by Project Masakhane).
- [43.4] If an affected employee elects not to apply for any Clover positions, the affected employee will receive a severance package of 2 weeks' remuneration per completed year of service, a pro-rata bonus (where applicable in terms of Clover's policy), a pro-rata long service bonus (where applicable in terms of Clover's policy), and pro-rata leave due (where applicable in terms of Clover's policy).
- [44] Given the 550 new permanent jobs to be created as a result of Project Masakhane over a 5-year period, the significant reduction in the number of Project Sencillo planned retrenchments, subject to a 3-year moratorium, read with all other merger-related imposed conditions, the Tribunal was satisfied that the proposed transaction will not have an overall adverse effect on employment in South Africa.

Other union concerns

- [45] GIWUSA and ITU alleged that The Central Bottling Company through its wholly owned Central Company for Sales and Distribution has violated international law by operating in illegally occupied Palestinian territories. However, these concerns relating to international law violations fall outside of the Tribunal's

jurisdiction and we therefore do not discuss these concerns any further in these reasons.

Conclusion

[46] In light of the above, we conclude that the imposed conditions adequately address both the competition and employment concerns resulting from the proposed transaction. The Tribunal's full set of imposed conditions are contained in **Annexure "A"** to these reasons.



Dr Thando Vilakazi

22 January 2020
DATE

Ms Andiswa Ndoni and Mr Andreas Wessels concurring

Tribunal Case Manager: Busisiwe Masina

Tribunal Economist: Karissa Moothoo-Padayachie

For the merging parties: Adv. Jerome Wilson, SC instructed by Ms Jean Meyer of HSF Inc. and Ms Jocelyn Katz of ENSAfrica Inc.

For the Commission: Mr Tumiso Loate, Mr Thabo Khumalo and Mr Thabelo Masithulela