



## COMPETITION TRIBUNAL OF SOUTH AFRICA

**Case no: LM151Dec23**

**Sea Harvest Pelagic Fishing (Pty) Ltd  
Sea Harvest Aquaculture (Pty) Ltd**

Primary Acquiring Firms

**And**

**Terrasan Beleggings (Pty) Ltd**

Primary Target Firm

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|-------------------|---|----------------------------------|
| Panel             | : | Liberty Mncube(Presiding Member) |
|                   | : | Imraan Valodia                   |
|                   | : | Geoff Budlender                  |
| Heard on          | : | 05 May 2024                      |
| Order issued on   | : | 05 May 2024                      |
| Reasons issued on | : | 07 June 2024                     |

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### REASONS FOR DECISION

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#### Introduction

- [1] On 05 May 2024, the Competition Tribunal (“Tribunal”) conditionally approved a large merger in terms of which Sea Harvest Aquaculture (Pty) Ltd (“Sea Harvest Aquaculture”) and Sea Harvest Pelagic Fishing (Pty) Ltd (“Sea Harvest Pelagic”), both ultimately controlled by Sea Harvest group Limited (“SHG”) intends to acquire 63.07% in Aquunion (Pty) Ltd (“Aquunion”), 100% in Saldanha Sales and Marketing (Pty) Ltd (“Saldanha Sales and Marketing”), 100% West

Point Fishing Corporation (Pty) Ltd (“West Point Fishing”) as well as the Terrasan Beleggings (Pty) Ltd (“Terrasan”) head office.

- [2] On completion of the proposed transaction, SHG will control Aquinion, Saldanha Sales and Marketing and West Point Fishing.

## **Parties and Activities**

### *Primary acquiring firms*

- [3] The primary acquiring firms are Sea Harvest Pelagic and Sea Harvest Aquaculture. Both the acquiring firms are private companies incorporated in terms of the laws of the Republic of South Africa (“South Africa”)
- [4] Sea Harvest Aquaculture is a wholly owned subsidiary of SHG. Sea Harvest Aquaculture controls Viking Aquaculture (Pty) Ltd (“Viking Aquaculture”) as to 87%. Relevant to this transaction, Viking Aquaculture controls Specialised Aquatic Feeds (Pty) Ltd (“SAF”) as to 30%.<sup>1</sup>
- [5] Sea Harvest Pelagic is a wholly owned subsidiary of Sea Harvest Corporation (Pty) Ltd (“Sea Harvest Corporation”), which is in turn wholly owned and controlled by SHG.
- [6] SHG is controlled by Newshelf 1411 (Pty) Ltd (“Newshelf 1411”) and Newshelf 1169 (Pty) Ltd (“Newshelf 1169”) as to 53.39%. Newshelf 1411 and Newshelf 1169 are both wholly owned and controlled by Brimstone Investment Corporation Limited (“Brimstone”). Relevant to this transaction, Brimstone controls Oceana Group Limited (“Oceana”) as to 25.1%
- [7] SHG and all the firms controlled by it are collectively referred to below as the “Acquiring Group”.

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<sup>1</sup> The other 70% is held by Abagold Limited (“Abagold”).

[8] The Acquiring Group is predominantly involved in the seafood and fishing industries. Specifically, and relevant to the competition assessment of this transaction, the Acquiring Group, catches (harvests), processes and supplies and market pelagic fish (anchovies and pilchards). The Acquiring Group is further involved in the abalone and aquaculture industries.

### *Primary target firms*

[9] The primary target firms are:

- 9.1. Aqunion;
- 9.2. Saldanha Sales and Marketing; and
- 9.3. West Point Fishing Corporation.

[10] The target firms are all private companies incorporated in accordance with the laws of South Africa.

[11] The Target Firms are all indirectly controlled by Terrasan.

[12] The Aqunion is wholly owned and controlled by Aqunion Group (Pty) Ltd (“Aqunion Group”), which is in turn wholly owned and controlled by Terrasan. Relevant to this transaction, Aqunion Group also controls Marifeed (Pty) Ltd (“Marifeed”) as to [REDACTED]<sup>2</sup> and Diamond Coast Abalone (Pty) Ltd (“DCA”) as to [REDACTED].

[13] Saldanha Sales and Marketing is wholly owned and controlled by Terrasan. Saldanha Sales and Marketing controls West Point Processing (Pty) Ltd (“West Point Processing”) as to [REDACTED].<sup>3</sup>

[14] West Point Fishing is wholly owned and controlled by Saldanha Foods (Pty) Ltd (“Saldanha Foods”), which is in turn controlled by Saldanha Protein (Pty) Ltd (“Saldanha Protein”) as to [REDACTED]. Saldanha Protein is wholly owned and controlled by Terrasan.

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<sup>2</sup> The remaining interest is held by HIK Abalone ( Pty) Ltd (“HIK Abalone”) as to [REDACTED].

<sup>3</sup> The remaining interest is held by West Point Fishing as to [REDACTED] and La Vie Seafood Products (Pty) Ltd as to [REDACTED].

- [15] Terrasan is wholly owned and controlled by Terrasan Group Limited (“Terrasan Group”).
- [16] Terrasan including their subsidiaries and controllers will collectively be referred to as the “Target Firms”.
- [17] The Target Firms operate the pelagic fishing business and abalone business (referred to as the “Aqunion Abalone Business”).
- [18] The Saldanha Sales and Marketing and West Point Fishing operates the Terrasan’s pelagic fish business (referred to as the “Saldanha Fishing Business”). It comprises of fishing rights, fishing vessels, cold storage facilities, processing facilities and downstream operations relating to the sale of fishmeal and fish oil (for export) and canned sardines locally under the Saldanha brand.
- [19] Aqunion operates the Terrasan's abalone business, which includes abalone farming, ranching, processing and sales and marketing, as well as the manufacture and sale of aquafeed for use in abalone farming.
- [20] The Saldanha Fishing Business is predominantly involved in harvesting, processing pilchards into canned pilchards, anchovies into fishmeal, fish oil, supplying and marketing pelagic fish (anchovies and pilchards). The Saldanha Fishing Business produces canned fish products out of pilchards for the South African market and high-quality fishmeal and fish oil out of anchovies (and by-catch) for local and export markets.

### **Indivisibility**

- [21] In determining whether the proposed transaction constitutes a single indivisible transaction, the Competition Commission (“Commission”) considered whether the proposed transaction comprises of various transaction steps and contemplates the acquisition of three Target firms.

[22] The merger parties submitted that prior to the implementation of the proposed transaction, the Target Firms will undertake an internal restructuring process, in terms of which Terrasan will continue controlling the Target Firms' businesses until the sale agreement becomes unconditional.

[23] In its assessment, the Commission considered the Tribunal's decisions in the transactions between *Premier Fishing SA (Pty) Ltd and Talhado Fishing Enterprise (Pty) Ltd*,<sup>4</sup> *Khumonetix (Pty) Ltd* and *Auckland Investments 22 (Pty) Ltd*, *Blane & Company Sales (Pty) Ltd*, *Wideprops 97 (Pty) Ltd*, *Red Gold Investments (Pty) Ltd* and *Dreamfair Properties 11 (Pty) Ltd*<sup>5</sup>, were the Tribunal held that a transaction is indivisible in the following circumstances:

- 23.1. The target firms are subject to common ownership/shareholding;
- 23.2. The various transactions are conditional on each other and/or are concluded simultaneously; and
- 23.3. The target firms are involved in the same or interrelated lines of business.

[24] The Commission's investigation found that both the Acquiring Firms are subject to common shareholding and all three of the Target Firms are subject to common shareholding. The Commission further found that the proposed transaction has been negotiated between the Acquiring and Target Firms and will be implemented as a single indivisible transaction with a single purchase price based on a single set of suspensive conditions. Furthermore, the Commission found that all the Target Firms conduct business activities in the same line of business of seafood and fishing industry.

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

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<sup>4</sup> Case No LM299Mar18

<sup>5</sup> Case No. LM112Jul18

## Rationale

- [26] According to the Acquiring Group, the proposed transaction will enable it to expand its presence as a leading black-owned diversified food and seafood business. The proposed transaction significantly increases black ownership in the fishing and abalone industries due to the strong transformation credentials of the Acquiring group.
- [27] The Acquiring further submits that the proposed transaction will enable it to add value to its small pilchards and anchovy pelagic total allowable catch (“TAC”) through forward integration into pilchards canning and fishmeal and fish oil production. According to the Acquiring Group, increased beneficiation its catch opens opportunities for increased local employment in its facilities.
- [28] The Acquiring Group submits that the proposed transaction increases its appeal to investors on the Johannesburg Stock Exchange (“JSE”). The Acquiring Group further submits that the proposed transaction will also increase its export earnings as fishmeal and fish oil are exported.
- [29] According to the Acquiring Group, the integration with the Saldanha Fishing Business would allow the combined businesses the flexibility to land its pilchard catch on both the West and East Coasts of South Africa, thereby utilising its assets more efficiently. This effective use of assets contributes to the Acquiring Group's mission of providing sustainable employment and positively impacting the communities in which it operates, as it is expected to assist in preserving jobs, including in rural towns.
- [30] Regarding the acquisition of the Aquion Abalone Business, the Acquiring group views the acquisition as adding a mature, cash-generative abalone business with a diversified customer base and markets that the Acquiring group's existing abalone operations can utilise.
- [31] The Target Firms claims that the proposed transaction presents an opportunity for the Target Firms to realise its investment. The proposed transaction will also result in efficiencies including the better utilisation of the Acquiring Group's

anchovy and pilchard quotas, reducing the need for imports to produce canned pilchards.

## **Competition Assessment**

### *Overlap*

[32] The proposed transaction results in horizontal and vertical overlap between the activities of the merging parties.

[33] The horizontal overlap arises as the merging parties all provide the following business activities: (i) harvesting pelagic fish (anchovies and pilchards) and abalone, (ii) processing pelagic fish and abalone and (iii) supplying and marketing abalone.

[34] The vertical overlap arises as result of the following relationship:

34.1. The Acquiring Group catches pilchards, an input in the Target Firms Fishing Business (Saldanha Sales and Marketing & West Point Fishing) downstream canned fish business;

34.2. The Acquiring Group catches anchovies, an input in the Target Firms Fishing Business (Saldanha Sales and Marketing & West Point Fishing) downstream fishmeal and fish oil businesses; and

34.3. The Acquiring Group procures abalone feed for its abalone operations and the Target Firm supply abalone feed.

### *Relevant Product Market*

[35] In its assessment of product market, the Commission assessed the effects of the proposed merger in the following markets: (i) harvesting, processing and supply of pelagic fish and (ii) harvesting, processing and the supply of abalone.

- [36] In respect of the market for harvesting pelagic fish, the Commission in its investigation considered the Tribunal's finding in the transaction between *Oceana Group Ltd, and Foodcorp* ("Oceana merger")<sup>6</sup>, where the Tribunal held that there are separate markets for the catching of pelagic fish and the processing and supply of pelagic fish. Accordingly, the Commission concluded that the relevant upstream market is for the harvesting/catching of pelagic fish, specifically pilchards and anchovies.
- [37] In respect of the market for processing and supply of pelagic fish in relation to (i) canned pilchards and (ii) fishmeal and fish oil, the Commission considered its previous decision in the *Nomzamo Fishing merger*<sup>7</sup>, where it found that at the downstream level, firms operate processing plants for pelagic fish. At this level, pilchards are processed into canned pilchards and anchovies are processed into fishmeal and fish oil. The Commission's investigation further found that Saldanha Sales and Marketing and West Point Fishing operate Terrasans' pelagic fish business. It comprises fishing rights, fishing vessels, cold storage facilities, processing facilities and downstream operations relating to the sale of fishmeal and fish oil (for export) and canned sardines locally under the Saldanha Fishing Business. The Commission concluded that the relevant downstream market is that for the processing of pelagic fish, specifically pilchards and anchovy.
- [38] Regarding the market for harvesting, processing and supplying of abalone, the Commission relied on its final report in the exemption application in terms of section 10(1) of the Act for abalone producers to exchange competitively sensitive information ("Abalone Exemption Application"). The Commission's investigating team found that abalone is expensive when compared to other marine aquaculture products and the process of farming takes longer. Furthermore, the Commission found that there is no demand-side substitution between abalone and other types of marine aquaculture due to its distinct features, taste and price. The Commission submits that for the purpose of

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<sup>6</sup> *Oceana Group Ltd and Another v Competition Commission; In Re: Oceana Group Ltd v Foodcorp (Pty) Ltd*, Case No: 018101

<sup>7</sup> Commission Case Number 2018Aug0041.



assessing the proposed transaction, it is not necessary to definitively conclude on the relevant market.

[39] In respect of the market for production and supply abalone feed, the Commission submits that abalone feed is an input to abalone farming and is used to increase growth, and when kelp (an abalone's natural food) is difficult to source. In this regard, the Commission did not definitively conclude on the market for the production and supply of abalone feed.

[40] We did not receive evidence to suggest that we should depart from this way of framing the product markets. While we do not find it necessary to conclude on the precise scope of the relevant product markets since no competition concerns arise in the present case whichever approach is taken, we examine each of the above product markets in our analysis.

#### *Relevant Geographic Market*

[41] In its assessment of geographic market, the Commission considered the effects of the proposed transaction in the following markets relating to pelagic fishing and abalone industries:

- 41.1. The national market for the catching of pelagic fish (anchovies and pilchards);
- 41.2. The international market for the harvesting, processing and supply of abalone; and
- 41.3. The national market for the supply of abalone feed.

[42] In respect of the national market for the harvesting, processing and supply of pelagic fish, the Commission's investigation found that at the upstream level, fishing rights are awarded to firms to fish within the waters of South Africa where pelagic fish is found and fishing is permitted. The Commission investigation further found that the relevant geographic market in the market for harvesting pelagic fish is national in scope.

- [43] With regards to the international market for harvesting, processing and supplying & marketing abalone, the Commission submits that in the Abalone Exemption Application, it concluded that the geographic market for the actual farming is South Africa, however the trading of abalone occurs internationally. The Commission in the proposed transaction does not deviate from the above finding.
- [44] In respect of national market for abalone feed, the Commission in its investigation took into consideration that SAF (in which the Acquiring Firm has an indirect minority shareholding of 30%) and Marifeed (in which Aqunion, the Target Firm has a 51% controlling interest in) supply all local abalone farmers with abalone feed. In this regard, the Commission considered a national market for the production and supply of abalone feed, and did not definitively conclude on the relevant geographic market for purposes of the proposed transaction.
- [45] We did not receive evidence to suggest that we should depart from this way of framing the geographic market. While we do not find it necessary to conclude on the precise scope of the relevant geographic markets since no competition concerns arise in the present case whichever approach is taken, we examine each of the above geographic markets in our analysis.

#### *Market shares*

- [46] The Commission considered the market shares and levels of concentration in the markets where the merging parties activities present a horizontal overlap, namely the (i) national market for the harvesting of pelagic fish (anchovies and pilchards) and (ii) international market for the harvesting, processing and supply of abalone.
- [47] In the national market for the harvesting of pelagic fish (anchovies and pilchards), the Acquiring Group has TAC of below 1%, and the Target Firms have between 10%-15%, in respect of anchovies. The merged entity will have a combined TAC of less than 15% in respect of anchovies.

- [48] With regards to pilchards, the Acquiring Firm has a TAC of about 1%-5% and the Target Firms have a TAC of 5% - 10%. Therefore the merged entity will therefore have a combined TAC of 5%- 10%.
- [49] In the national market for the processing and supply of pelagic fish (anchovies and pilchards), the Commission found that the Target Firms have a market share range of 20%-25% in respect of anchovies. The Commission further noted that the Acquiring Group does not process pelagic fish for human consumption. With regards to pilchards, the Commission found that merged entity would have a combined market share range of 10%-15% with an accretion of about 5% - 10%.
- [50] In the international market for the harvesting, processing and supply of abalone, the merged entity will have a combined market share of less than 1%, with an accretion of less than 1%.
- [51] Based on the above, we do not consider it likely that the merged entity will have substantial market power in any of the identified markets and raise unilateral effects concerns.

## **Vertical assessment**

### *Input foreclosure:*

- [52] In respect of the vertical overlap between suppliers of anchovies in the upstream and downstream processors of fishmeal and fish oil, the Acquiring group only has the right to catch less than 1% of the TAC and is not a significant fish supplier to the Target Firms' competitors. In the upstream market for the harvesting of anchovies, the Acquiring group has a TAC range of less than 1%.
- [53] We did not receive evidence to suggest that the merged entity has the ability to foreclose competitors' in the downstream for the processing of anchovies, as it will continue to compete with vertically integrated players who are permitted to harvest anchovies such as Lucky Star Limited ('Lucky Star'), Amawandle Pelagic (Pty) Ltd ('Amawandle Pelagic'), Pioneer Fishing (West Coast) (Pty)

Ltd (“Pioneer Fishing”) and Premier Fishing SA (Pty) Ltd (“ Premier Fishing SA”).

[54] In respect of the vertical overlap between suppliers of pilchards in the upstream and downstream processors of canned pilchards, we considered that the Acquiring Firm’s pelagic fish catch (pilchards) is sold for use as bait in other fishing sectors and are not intended for human consumption and therefore would not give rise to any significant increment in the market share of the Acquiring Group in the upstream harvesting of pelagic fish (pilchards) or any increment in market share in the downstream market share for canned fish.

[55] In light of the above, we did not receive any evidence to suggest that the merged entity has the ability to foreclose downstream rivals for the processing and supply of pilchards, as it will continue to compete with numerous other rights holders who are permitted to harvest anchovies such as Lucky Star, Amawandle, Pioneer Fishing, Premier Fishing SA, Eyethu Fishing (Pty) Ltd (“Eyethu Fishing”) and Gansbaai Marine (Pty) Ltd (“Gansbaai”).

[56] With regards to the vertical overlap between suppliers of abalone feed in the upstream and downstream firms that harvest, process and supply abalone, the Commission’s investigation found that in South Africa, SAF and Marifeed are there only two suppliers of abalone feed.

[57] The Commission’s investigation further revealed that Marifeed supplies █████ of its abalone feed to its current shareholders (Aqunion and HIK Abalone)<sup>8</sup> on commercial terms negotiated on an arms-length basis. The remaining █████ is supplied to its independent customers in the aquaculture industries, both locally and internationally. Marifeed does not supply the Acquiring Group and Abagold who are the shareholders of SAF.

[58] In light of the above, we did not receive any evidence to suggest that Marifeed is likely to have the ability to foreclosure downstream customers in relation to the supply of abalone feed, as post-transaction, Marifeed will remain a

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<sup>8</sup> See footnote 2 and Para 12 supra.

subsidiary of Aquion with 51.01% of its shares to be held by Aquion (which will be controlled by the Acquiring Group) and 49.09% held by HIK Abalone.

[59] Taking the above into consideration, we are of the view that the proposed merger is unlikely to raise any significant input foreclosure concerns.

*Customer foreclosure:*

[60] We considered the vertical overlap wherein the Target Firms supply abalone feed in the upstream market and the Acquiring Group's harvests abalone in the downstream market.

[61] The merging parties submit that South Africa has several other abalone producers to whom SAF can supply its products should the Acquiring group divert its procurement to the Target Firms. Although the Target Firms currently supply other customers who produce abalone, there are no long-term supply arrangements or similar market dynamics which would prevent customers from swapping to an alternative supplier.

[62] The Commission's investigation found that there are two suppliers of abalone feed in South Africa namely, SAF and Marifeed, as previously mentioned. The Commission's investigation further revealed that the Acquiring group, post transaction will have a minority interest in SAF and a controlling interest in Marifeed.

[63] Given the aforementioned, the Commission considered whether the Acquiring Group will foreclose SAF through self-dealing by procuring abalone feed exclusively from Marifeed which would result in the foreclosure of SAF. The Commission found that the Acquiring Group is a relatively large customer of SAF with their dependency ranging from approximately 39% to 40% from 2021 to 2023.

[64] In its investigation, the Commission engaged with [REDACTED] who submitted that it would be able to source alternative

customers should it lose the business of the Acquiring Group within a period of six to nine months by growing their capabilities in the pet food product line.

[65] The Commission also submitted that there are numerous other customers which SAF could supply abalone feed should the Acquiring Group cease to procure from SAF. [REDACTED] [REDACTED] [REDACTED].

[66] Given the above, we conclude that the proposed transaction is unlikely to raise any customer foreclosure concerns.

#### *Conclusion on the competition assessment*

[67] In light of the above, we do not believe that the proposed transaction is like to raise a substantial lessening of competition concerns as a result of vertical effects.

#### **Co-ordination arising from structural links**

[68] The Commission considered the probability that firms in the market will after the merger act “competitively” or “cooperatively”.

[69] The Commission further considered whether the merging parties have previously been respondents or implicated in a cartel conduct.

[70] In its investigation, the Commission found that in 2012, the Tribunal approved a settlement agreement between the *Commission and Oceana Group Ltd and Oceana Brands Limited* settling a number of price fixing and market allocation contraventions within the pelagic fish industry.<sup>9</sup>

[71] In terms of the settlement, Oceana admitted that Oceana, Foodcorp, Premier Fishing SA, Gaansbaai Marine, Terrassan (the entity which ultimately controls

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<sup>9</sup> Case number: 50/CR/May12/015024.

the Target Firms), Pelagic Fishing, Paternoster Visserye, Pioneer Fishing and Saldanha Foods, as members of the South African Pelagic Fish Processors Association (“SAPFPA”), agreed to fix prices paid to vessel owners/operators, skippers and crew for the service of catching pelagic fish. The Commission further found that the Acquiring Group was not a respondent to the cartel.

[72] The Commission further submitted that the measures in the settlement agreement are still binding on the respondents.

[73] Furthermore, the Commission considered the structural links which arise as a result of the proposed transaction and whether these structural links might facilitate information exchange between (i) Acquiring group and Oceana and (ii) SAF and Marifeed. The structural links between the merging parties may create opportunities for the exchange of competitively sensitive information.

[74] In respect of the relationship between the Acquiring group and Oceana, the Commission’s investigation revealed that Brimstone has an interest in Oceana<sup>10</sup>, which owns the canned pilchards brand Lucky Star. Brimstone also has an interest in SHG who will, post-transaction, wholly own and control West Point Fishing which owns the canned pilchards’ brand Saldanha. The Commission was concerned that the proposed transaction will therefore result in the controlling shareholder of SHG having an interest in two large, canned pilchards’ brands in South Africa, being Lucky Star and Saldanha.

[75] In its assessment, the Commission considered the Tribunal’s previous case in the transaction between, *Sea Harvest Corporation (Pty) Ltd, Sea Harvest Group Ltd, Viking Fishing Holdings (Pty) Ltd and Viking Fishing Aquaculture (Pty) Ltd (“Viking Transaction”)*<sup>11</sup>, which was approved subject to information sharing conditions between SHG and Oceana.

[76] The Commission noted that after the implementation of the merger, Brimstone’s interest in SHG will be reduced, and it will not retain any form of control of SHG

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<sup>10</sup> See para 6 supra.

<sup>11</sup> Case no: LM261Jan18.

as it will have the same rights as other shareholders holding shares in the listed entity.

[77] In light of the above, the Commission concluded that it is unlikely that the proposed transaction will facilitate information sharing between Oceana and SHG as the conditions imposed in the 2018 *Viking Transaction* adequately address concerns related to information sharing and are still applicable to the merger parties.

[78] Furthermore, in respect of the relationship between SAF and Marifeed, the Commission noted that the Acquiring Group indirectly through Viking Aquaculture has minority interest in SAF and does not exercise control over it as it can only appoint one director to the SAF board of directors. The Commission's investigation further found that the Acquiring will acquire a controlling interest in Marifeed through the acquisition of Aquunion when the transaction is implemented. This controlling interest enables Aquunion, to appoint at least 1 director to the board of Marifeed.

[79] Having identified the competition concerns arising from the structural links. The Commission proposed the traditional behavioural remedy of "ringfencing" through Chinese walls preventing the sharing of competitively sensitive information, because the merger itself creates structural links.

#### *Conclusion on co-ordination arising from structural links*

[80] The Tribunal has in previous matters imposed behavioural conditions such as "ringfencing" in order to address concerns of information sharing arising from cross-directorships. We are satisfied that the information sharing conditions proposed and agreed to by the merging parties adequately remedy the competition concerns raised by the proposed transaction.

[81] We are also of the view that the measures in the settlement agreement between Oceana and the Commission are still binding between the Parties.



### **Third-Party Submissions**

[82] The Commission engaged with the suppliers and competitors of the merger parties to obtain their views on the proposed transaction.

[83] On 19 April 2024, we convened a pre-hearing and afforded all suppliers and competitors of the merger parties an opportunity to make additional submissions on the proposed transaction (in addition to those provided to the Commission, if any) and/or participate in the merger hearing. No responses were received in this regard.

[84] Several competitors of the merging parties raised concerns with the Commission regarding proposed transaction. For the sake of completeness, we proceed to briefly record the third parties' submissions and the merger parties and/or Commission's response thereto. It should be noted that we considered the third parties' submissions were relevant in the above competition assessment and in the assessment of the public interest effects below.

#### *Structural links in the canned pilchards market*

[85] ██████ raised concerns regarding the structural links which arise as a result of the proposed transaction between the merger parties and that these structural links could facilitate information sharing amongst the parties.

[86] In light of the above, we are of the view that the information sharing conditions proposed and agreed to by the merging parties adequately remedy the competition concerns raised by the proposed transaction as discussed in detail above.

#### *Foreclosure in the abalone feed market*

[87] ██████, a minority shareholder in ██████, raised concerns that the Acquiring Group may have the incentive and ability to foreclose ██████

from accessing aquafeed from Marifeed. This is because, [REDACTED] sources 100% of its aquafeed requirement from Marifeed. [REDACTED] further submitted that with its [REDACTED] shareholding it will not have the ability to ensure that Marifeed continues supplying it with aquafeed because it is not a [REDACTED] shareholder.

[88] The merger parties submitted that Marifeed operates as a standalone business with independent commercial operations. The merger parties further submit that Marifeed's product is currently sold to its shareholders on commercial terms negotiated on an arms-length basis. Therefore, the proposed transaction does not give rise to a clear benefit to supporting one producer over another. Viking Aquaculture, like other abalone producers, will be able to purchase feed from either SAF or Marifeed.

[89] The Commission's investigation found that the merged entity is unlikely to have the incentives to engage in foreclosure strategies mainly because the merged entity's interest as a shareholder would be to ensure that SAF and Marifeed remain profitable in the market.

[90] In light of the above, we considered the concerns raised and did not receive any evidence to suggest that the merged entity is likely to have the ability to engage in any foreclosure strategies in the supply of abalone feed.

#### *The consolidation of fishing rights concerns*

[91] [REDACTED] raised concerns that merger goes against clauses 4.2 and 5.4 of the Marine Living Resources Act 18 of 1998 ("MRLA"). In its submission [REDACTED] indicated that the aim of the MRLA is to broaden the ownership of fishing rights, and not concentrate ownership which would allow for prices to be manipulated.

[92] [REDACTED] further submitted that in terms of the recent Fishing Rights Application Process (FRAP), there is a three year moratorium placed on the

transfer of fishing rights. According to [REDACTED], this transaction can only be transferred after March 2025.

[93] In response to [REDACTED], the merger parties submit that the consolidation of fishing rights is not contrary to the principles and objectives of the MLRA. In respect to the moratorium on the transfer of fishing rights, the merging parties submit that this has been dealt with in its exemption application to the Department of Forestry, Fisheries and the Environment (“DFFE”).

[94] The Commission considered the concerns raised by [REDACTED] and found that in the event that the fishing rights of the merging parties are consolidated, this would result in a modest consolidation in relation to pelagic fish as the combined TAC post transaction will be in the share of 10%-15%. Similarly in relation to pilchards, the merged entity will therefore have a combined TAC post transaction of 5% - 10%. The Commission further found that the consolidation of fishing rights does not result in over-concentration or to the creation of market power.

[95] The Commission’s investigation further found that fishing industry is highly regulated. Specifically, in terms of Section 18 of the MLRA, the Minister of the DFFE is the authority responsible for the allocation of rights to undertake commercial fishing, subsistence fishing, engage in mariculture or operate a fish processing establishment. The MLRA further grants the Minister the authority in terms of Section 21 to approve the transfer of commercial fishing rights or part thereof, provided an Application is submitted.

[96] Given the above, we concur that the proposed transaction does not raise any concerns.

## **Public Interest**

### *Effect on employment*

[97] The merging parties submitted that the proposed transaction will not have any negative effects on employment.

- [98] The Commission contacted the trade unions, South African Equity Workers' Association ("SAEWA"), Food and Allied Workers Union ("FAWU") and Agricultural, Food, Fishing and Retail Industry Workers' Union ("AFRIWU") who represents the employees of the Acquiring Group. SAEWA did not make submissions to the Commission. FAWU, and AFRIWU raised concerns related to job security and change in employment conditions of its employees.
- [99] The Commission further contacted the Target Firms' trade unions: SAEWA, FAWU, Federal Council of Retail and Allied Workers ("FEDCRAW"), and Agricultural Food and Allied Democratic Workers Union ("AFADWU"). FEDCRAW did not make submissions to the Commission.
- [100] AFADWU raised concerns related to job security and change in employment conditions of its employees.
- [101] At the pre-hearing convened by the Tribunal on 19 April 2024, AFRIWU and SAEWU indicated that they wished to be provided with a copy of the conditions before making a decision as to whether they will participate in the Tribunal's hearing.
- [102] Both AFRIWU and SAEWU indicated that they had no concerns with the proposed transaction after they were furnished with the conditions.
- [103] FAWU did not attend the hearing, however provided written submissions after being provided with the conditions. FAWU submitted that a moratorium of 5 years on retrenchment be imposed. FAWU further submitted that the merger parties must include in the conditions that they will meaningfully consult with employees on employment terms, benefits, and transfer of benefits.
- [104] In response to FAWU, the merger parties submitted that they will undertake to meaningfully consult with the employees on topics such as employment terms and benefits as they are bound by the Labour Relations Act 66 of 1995 ("LRA") to do so, and therefore it was not necessary to include this on the conditions.

- [105] We agree with the merger parties that the concerns raised by FAWU are issues provided for in the LRA and the merger parties are bound by the LRA.
- [106] The merging parties further submitted that they undertake not to retrench any employee as a result of the merger. The merger parties further submit that the condition is not limited to a specific time period. The prohibition on merger-specific retrenchments is perpetual.
- [107] The Department of trade and Competition ("DTIC") sought to obtain a 36 months moratorium on retrenchments commitment from the merger parties.
- [108] The Commission accepted the merging parties unequivocal undertaking that the proposed transaction will not result in any retrenchments which ultimately persists for a longer period than the proposed 3-year moratorium period.
- [109] To protect the merger parties' employees and prevent merger-specific retrenchments, we approved the proposed transaction subject to the following employment Conditions:

109.1. The Merging Parties shall not retrench any permanent or fixed-term contract employees as a result of the Merger ("Merger specific retrenchments") during the Moratorium Period;

109.2. For the avoidance of doubt, 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 66 of 1995; (iv) resignations or retirements in the ordinary course of business; (v) retrenchments lawfully effected for operational requirements unrelated to the Merger; (vi) terminations in the ordinary course of business, including but not limited to, dismissals as a result of misconduct or poor performance; and (vii) any decision not to renew or extend a contract

of a fixed-term third party contract employee or contract with a third party.

[110] 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 ownership*

[111] The Commission found that the Acquiring Group currently has an effective shareholding by Historically Disadvantaged Persons (“HDPs”) of approximately 95.82%.

[112] The Commission’s investigation further found that the following in respect of the Target firms:

112.1. Pre-transaction, Aquion has a shareholding by HDPs of 46.51%. Post-transaction, Aquion will have a shareholding by HDPs of approximately 60.43%.

112.2. Pre-transaction, Saldanha Sales and Marketing has a shareholding by HDPs of 43.17%. Post-transaction, Saldanha Sales and Marketing’s will have a shareholding by HDP’s of 95.82%.

112.3. Pre-transaction, West Point Fishing has a shareholding by HDPs of 66.55%. Post-transaction, West Point Fishing will have a shareholding by HDPs of 95.82%.

[113] Accordingly, the proposed transaction will result in a positive increase in the levels of ownership by HDPs.

*Other public interest*

[114] The proposed transaction raises no other public interest issues.

## Conclusion

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

[116] 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: 2024-06-07 10:33:40 +02:00  
Reason: Witnessing Liberty Mncube

*L-Mncube*

**07 June 2024**

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**Prof L Mncube**

**Presiding Member**

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**Date**

**Prof I Valodia and Adv G Budlender concurring**

Tribunal Case Manager: Nomkhosi Mthethwa-Motsa

For the Acquiring Firms: Clare-Alice Vertue, Robert Wilson and Monde Mbali – Webber Wentzel Inc.

For the Target Firms: Albert Aukema, Reece May – Cliffe Dekker Hofmeyr Inc

For the Commission: Tarryn Sampson and Grashum Mutizwa

## ANNEXURE A

### SEA HARVEST PELAGIC FISHING (PTY) LTD & SEA HARVEST AQUACULTURE (PTY) LTD

and

### TERRASAN BELEGGINGS (PTY) LTD

Case No: LM151DEC23

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## CONDITIONS

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### 1. DEFINITIONS

1.1. The following expressions shall bear the meaning assigned to them below, and cognate expressions bear a corresponding meaning –

1.1.1. **“Acquiring Firms”** means Sea Harvest Pelagic Fishing (Pty) Ltd & Sea Harvest Aquaculture;

1.1.2. **“Approval Date”** means the date referred to on the Tribunal’s Merger Clearance Certificate (Notice CT10) in terms of the Competition Act;

1.1.3. **“Acquiring Group”** means Sea Harvest Group Limited and all firms controlled by Sea Harvest Group Limited, including Sea Harvest Aquaculture, Sea Harvest Pelagic Fishing Pty (Ltd) and Viking Aquaculture;

1.1.4. **“Aqunion”** means Aqunion (Pty) Ltd, a private company in which Sea Harvest intends to acquire a 63.07% shareholding interest pursuant to the Proposed Transaction;

1.1.5. **“Authorised Directors”** means a director duly appointed and authorised by the Acquiring Group to provide the affidavits required from time to time by these Conditions. For the avoidance of doubt, the Authorised Director shall not represent the Acquiring Group on the boards of either Marifeed or SAF;



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- 1.1.6. **“Commission”** means the Competition Commission of South Africa, a statutory body established in terms of section 19 of the Competition Act;
- 1.1.7. **“Commission Rules”** means the Rules for the Conduct of Proceedings in the Commission;
- 1.1.8. **“Competition Act”** means the Competition Act 89 of 1998, as amended;
- 1.1.9. **“Competitively Sensitive Information”** means confidential information relating to markets in which Marifeed and SAF compete in South Africa and includes, but is not limited to, any and all information relating to:
- 1.1.9.1. Pricing – including but not limited to pricing of specific products, prices/discounts offered to specific clients and planned price reductions or increases;
  - 1.1.9.2. Margin information by product or by client;
  - 1.1.9.3. Cost information for particular products;
  - 1.1.9.4. Information on specific clients and client strategy, including information with respect to sales volumes of clients; and
  - 1.1.9.5. Marketing strategies.
- 1.1.10. **“Conditions”** means these conditions;
- 1.1.11. **“Confidentiality and Information Exchange Policy”** means the policy set out in clause 2.3 of the Conditions;
- 1.1.12. **“Days”** means any calendar day other than a Saturday, a Sunday or an official public holiday in South Africa;
- 1.1.13. **“Implementation Date”** means the date occurring after the Approval Date, on which the Merger is implemented by the Merging Parties;
- 1.1.14. **“Marifeed”** means Marifeed (Pty) Ltd, a private company controlled by Aquinion as to 51.01%;

- 1.1.15. **“Merger”** means the acquisition of sole control of the Target Firms by the Acquiring Firms;
- 1.1.16. **“Merged Entity”** means the Target Firms, subject to the control of the Acquiring Group;
- 1.1.17. **“Merging Parties”** means the Acquiring Firms and the Target Firms;
- 1.1.18. **“Moratorium Period”** means a period of 3 (three) years from the Implementation Date and includes the period between the Approval Date and the Implementation Date;
- 1.1.19. **“Proposed Transaction”** means the Acquiring Firms’ acquisition of the Transferred Firms;
- 1.1.20. **“SAF”** means Specialised Aquatic Feeds (Pty) Ltd, a private company in which Viking Aquaculture has a minority shareholding of [REDACTED] and the power to appoint one director to the SAF board of directors;
- 1.1.21. **“Saldanha Sales and Marketing”** means Saldanha Sales and Marketing (Pty) Ltd, a private company in which the Acquiring Group intends to acquire 100% shareholding interest pursuant to the Proposed Transaction;
- 1.1.22. **“Sea Harvest Aquaculture”** means Sea Harvest Aquaculture (Pty) Ltd, a private company wholly owned by Sea Harvest Group Limited;
- 1.1.23. **“Sea Harvest Group Limited”** means Sea Harvest Group Limited, a public company with widely held shareholding and no controlling shareholder following the implementation of the Merger;
- 1.1.24. **“South Africa”** means the Republic of South Africa;
- 1.1.25. **“Target Firms”** means Aquunion, Saldanha Sales and Marketing and West Point Fishing;

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1.1.26. **“Tribunal”** means the Competition Tribunal of South Africa, a statutory body established in terms of section 26 of the Competition Act;

1.1.27. **“Tribunal Rules”** mean the Rules for the Conduct of Proceedings in the Tribunal;

1.1.28. **“Viking Aquaculture”** means Viking Aquaculture (Pty) Ltd, a private company in which Sea Harvest Aquaculture has an 87% controlling interest; and

1.1.29. **“West Point Fishing”** means West Point Fishing Corporation (Pty) Ltd, a private company in which the Acquiring Group intends to acquire a 100% shareholding interest pursuant to the Proposed Transaction.

## CONDITIONS

### 2. INFORMATION EXCHANGE CONDITIONS

#### 2.1. Board seats

2.1.1. The Merged Entity shall ensure that it does not nominate or appoint the same individuals to the boards of directors of Marifeed and SAF.

#### 2.2. Information flow restrictions

2.2.1. The Merged Entity shall procure that its representative/s on the board of directors of Marifeed shall sign confidentiality undertakings in terms of which they agree that they shall maintain confidentiality over Competitively Sensitive Information which may be in their possession and shall not share or discuss the Competitively Sensitive Information with any other employee or director of the Merged Entity who has interaction with SAF.

2.2.2. The Merged Entity shall procure that its representative/s on the board of directors of SAF shall sign confidentiality undertakings in terms of which they agree that they shall maintain confidentiality over Competitively Sensitive Information which may be in their possession

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and shall not share or discuss the Competitively Sensitive Information with any other employee or director of the Merged Entity who has interaction with Marifeed.

### **2.3. Confidentiality and Information Exchange Policy**

2.3.1. The Merged Entity shall design and implement a Confidentiality and Information Exchange Policy to the satisfaction of the Commission. The Confidentiality and Information Exchange Policy will stipulate, *inter alia*, that none of the Merged Entity's representatives on the boards of either Marifeed or SAF will share or discuss any Competitively Sensitive Information with each other.

## **3. EMPLOYMENT**

- 3.1. The Merging Parties shall not retrench any permanent or fixed-term contract employees as a result of the Merger ("Merger specific retrenchments") during the Moratorium Period.
- 3.2. For the avoidance of doubt, 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 66 of 1995; (iv) resignations or retirements in the ordinary course of business; (v) retrenchments lawfully effected for operational requirements unrelated to the Merger; (vi) terminations in the ordinary course of business, including but not limited to, dismissals as a result of misconduct or poor performance; and (vii) any decision not to renew or extend a contract of a fixed-term third party contract employee or contract with a third party.

## **4. MONITORING OF COMPLIANCE WITH THE CONDITIONS**

- 4.1. The Acquiring Group shall inform the Commission in writing of the Implementation Date within 5 (five) Days of it becoming effective.
- 4.2. The Merged Entity shall circulate a copy of the employment conditions to the Merging Parties' employees and employee representatives within 5 (five) Business Days of the Implementation Date.

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- 4.3. The Acquiring Group shall, within 3 (three) months of the Approval Date, develop and submit a Confidentiality and Information Exchange Policy to the Commission in line with the Conditions.
- 4.4. The Commission shall provide comments on the Confidentiality and Information Exchange Policy contemplated in these conditions within 60 (sixty) days of receipt thereof.
- 4.5. Within 30 (thirty) Days of the Implementation Date, the Acquiring Group shall submit to the Commission an affidavit, deposed to by an Authorised Director:
- 4.5.1. Listing the names of the Acquiring Group's representatives on the Marifeed board;
  - 4.5.2. Listing the names of the Acquiring Group's representatives on the SAF board;
  - 4.5.3. Confirming that the Acquiring Group's representatives on each of the Marifeed and SAF boards are not the same individuals;
  - 4.5.4. Attaching a copy of the signed confidentiality undertakings referred to in clauses 2.2.1 and 2.2.2 of these Conditions;
  - 4.5.5. Confirming that a copy of these conditions has been circulated to the Merged Entity's representatives on each of the Marifeed and SAF boards;
  - 4.5.6. Confirming the circulation of the Conditions in compliance with clause 4.2; and
  - 4.5.7. Providing a copy of the notices that were circulated to the employees and their employee representatives
- 4.6. Within 45 (forty-five) Days of the Implementation Date for the duration of the Conditions, the Merged Entity shall provide the Commission with an affidavit, deposed by an Authorised Director –
- 4.6.1. Attesting to compliance with clause 2.1 of the Conditions;
  - 4.6.2. Attesting to compliance with clauses 2.2 of the Conditions;
  - 4.6.3. Attesting to compliance with clause 2.3 of the Conditions; and
  - 4.6.4. Highlighting any changes to the Merged Entity's representatives on each of the Marifeed and SAF boards.
- 4.7. Within 45 (forty-five) Days of each anniversary of the Implementation Date up until the third anniversary of the Implementation Date, the Merged Entity shall provide the Commission with an

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affidavit, deposed to by an Authorised Director attesting to compliance with clause 3 of the Conditions.

- 4.8. The Commission may request any additional information from the Merger Parties that the Commission may deem necessary from time to time for purposes of monitoring the extent of compliance with these Conditions.

## **5. DURATION OF THE CONDITIONS**

- 5.1. These Conditions, excluding the commitment made in 3 above and the related reporting obligation at 4.7 above, shall automatically terminate at the earlier of (i) Acquiring Group no longer holding a shareholding interest in either of Marifeed or SAF; or (ii) Acquiring Group no longer have any representatives on the board of either Marifeed or SAF; or (iii) Marifeed and SAF no longer being competitors for the supply of abalone feed.

## **6. APPARENT BREACH**

- 6.1. Should the Commission receive any complaint in relation to non-compliance with the above Conditions or otherwise determine that there has been an apparent breach by the Merging Parties of these Conditions, the breach shall be dealt with in terms of Rule 37 of the Tribunal Rules read together with Rule 39 of the Commission Rules.

## **7. VARIATION**

- 7.1. The Merger Parties and/or the Commission may at any time, and on good cause shown, apply to the Tribunal for any of the Conditions to be lifted, revised or amended.

## **8. GENERAL**

- 8.1. All correspondence in relation to the Conditions must be submitted to the following e-mail addresses: [mergerconditions@compcom.co.za](mailto:mergerconditions@compcom.co.za) and [ministry@thedtic.gov.za](mailto:ministry@thedtic.gov.za).