

SOUTH AFRICA / JUDGMENT

Capitau Investments Management Ltd v New Foodcorp Holdings Pty Ltd (112/LM/Dec12) [2013] ZACT 33 (8 May 2013) [2013] ZACT 33

COURT

Competition Tribunal

BEFORE

Norman Manoim, Yasmin Carrim, Merle Holden

CASE / FILE NUMBER

112/LM/Dec12

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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: 112/LM/Dec12

016113

In the matter between:

Capitau Investments Management LimitedAcquiring Firm

And

New Foodcorp Holdings Pty LtdTarget Firm

Panel : Norman Manoim (Presiding Member), Yasmin Carrim (Tribunal Member) and Merle Holden (Tribunal Member)

Heard on : 25 April 2013

Order issued on : 25 April 2013

Reasons

issued on : 08 May 2013

Reasons for Decision

Approval

On 25 April 2013, the Competition Tribunal (“Tribunal”) conditionally approved the merger between Capitau Investment Management Limited (“Capitau”) and New Foodcorp Holdings (Pty) Ltd (“Foodcorp Holdings”) in respect of which Capitau and Rainbow Chicken Limited (“Rainbow”) will indirectly acquire 76.1% of the ordinary share capital in

Foodcorp Holdings. The reasons for conditionally approving the proposed transaction follow below.

Parties to the transaction

The primary acquiring firm is Capitau which is controlled by Rainbow, which in turn is controlled by Remgro Limited (“Remgro”).

Remgro also has a non-controlling stake in Unilever South Africa (Proprietary) Limited (“Unilever”).¹

Rainbow is the holding company of three principal operating subsidiaries namely: Rainbow Farms (Proprietary) Limited (“Rainbow Farms”), Vector Logistics (Proprietary) Limited (“Vector”) and RCL Group Services (Proprietary) Limited (“RCL Group Services”). These subsidiaries enable Rainbow to operate as a vertically integrated chicken producer.

The primary target firm Foodcorp Holdings which is the sole controller of Foodcorp (Proprietary) Limited (“Foodcorp”) a group of businesses engaged predominantly in the production, marketing and distribution of food products from basic essentials such as maize meal to top end desserts and convenience meals.

Rationale for the transaction

The transaction will provide an attractive investment opportunity for Remgro to realise its strategy to develop a portfolio in food and reduce its dependence on chicken, a cyclical business which has recently faced significant import competition.

Relevant markets and impact on competition

Vertical issues

The Commission submitted that the proposed transaction would give rise to vertical overlaps in the following markets:

Market for fresh and frozen chicken products,

Market for fishmeal, which is used as an input in the production of animal feed,

Market for bran, which is a by-product of the wheat milling process to produce flour,

Market for defatted maize germ and maize oil are by-products in the milling of maize for human consumption,

And market for the production and distribution of sugar.

After assessing the above-mentioned markets, the Commission came to the conclusion that there would be no competitive concerns as there were alternative firms that would continue to compete with the merged entity post merger in the various markets. In addition to this, in most of these markets the purchases between the merging parties were so insignificant that any likelihood of customer foreclosure was unlikely.²

The Commission's investigation into the vertical issues was very thorough and we agree with its conclusions that the vertical relationships that arise are not significant enough to give rise to an incentive or an ability to foreclose rivals in either upstream or downstream markets.

Horizontal issues

There are no overlaps between the activities of Rainbow and those of Foodcorp. However, Remgro, Rainbow's parent and which is the ultimate acquiring firm, owns shares in another food producer, Unilever, which entitles it to board representation on the Unilever board. Unilever produces salad dressing and mayonnaise as does Foodcorp. The merging parties point out that Remgro does not have a controlling interest in Unilever and that the combined market shares for the firms for these two products are insignificant.³

Further the merging parties point out that in terms of concerns over information exchange, a clause exists in the present shareholders agreement between Unilever and Remgro, which prevents Remgro from appointing a director to sit on the Unilever board, who sits on a competitor board.

The Commission was satisfied that this clause was sufficient to regulate any possible information exchange between the firms. At the hearing we asked the Commission whether it would have imposed such a condition if it was not contained in the shareholders agreement. The Commission said it would.

Condition Imposed to Transaction

Due to the high rate of past collusion in the markets where the merging parties are active a condition to prevent information exchange is appropriate. In this respect we agree with the approach taken by the Commission that information exchange is a potential harm occasioned by the merger. Notwithstanding the apparent present low market shares of the merging parties this concern still justifies the imposition of a condition.

Where we depart from the approach of the Commission is its satisfaction that the existence of the parties' private arrangement to prevent information exchanges contained in the shareholders agreement suffices to replace the need for a condition. We cannot rely on the provision in the shareholders agreement to usurp what should be the proper function of public enforcement because if the parties do not enforce the agreement or amend it, there is no remedy available to the Commission to enforce its adherence. Hence the undertaking has been made a condition for the approval of the merger.

The merging parties undertook to furnish a condition to this effect which is similar to one imposed on Remgro in another merger.⁴ We are satisfied that the terms of the condition are sufficient to prevent information exchange between the two competing boards.⁵

In terms of the condition the merging parties elevate the obligations contained in the shareholders agreement to a merger condition and to adhere to that for so long as they have an indirect or direct interest in Unilever SA and regardless of any amendments to the shareholders' agreement or the status of that agreement from time to time.⁶

There were no public interest concerns, and the proposed transaction had no effect on employment.⁷

CONCLUSION

We approve the proposed merger with the condition set out in the Annexure to these reasons.

____ 08 May 2013

Norman Manoim DATE

Yasmin Carrim and Merle Holden concurring.

Tribunal Researcher: Caroline Sserufusa

For the merging parties: Chris Charter of Cliffe Dekker Hofmeyer

For the Commission: Thelani Luthuli

¹For more on Unilever SA, see merger record para 5.3.6, page 63, in the merging parties' Competitiveness Report.

²See Commission Report para 10, page 64.

³In the mayonnaise market the combined market shares for the merging parties is 8%, and in the salad dressing market their combined

estimated market share is 2% (See page 19 and 21 of Merger Record).

⁴Remgro Limited vs. Venfin Limited: Case No: 54/LM/Jul09

⁵See Transcript para 20, page 6.

⁶See Transcript para 5, page 11.

⁷See merger record para 22, page 83.

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