



COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: 14/LM/MAR10

In the matter between:

Unilever Plc and Unilever N.V.

Acquiring Firms

And

Sara Lee Corporation

Target Firm

Panel : Yasmin Carrim (Presiding Member),
Andreas Wessels (Tribunal Member), and
Andiswa Ndoni (Tribunal Member)

Heard on : 05 November 2010

Order issued on : 08 November 2010

Reasons issued on : 07 December 2010

Reasons for Decision

Approval

[1] On 05 November 2010, the Competition Tribunal (“Tribunal”) conditionally approved the acquisition of Sara Lee Corporation by Unilever Plc and Unilever N.V. The reasons for approving the transaction follow.

The parties and their activities

[2] The acquiring firms are Unilever Plc and Unilever N.V. (“Unilever”). Unilever is listed both on the London Stock Exchange as Unilever PLC and on Euronex, in Amsterdam as Unilever NV. Unilever is a global

company active in the manufacture and supply of a wide range of fast moving consumer goods (“FMCGs”). In South Africa it conducts its business as Unilever South Africa (Pty) Ltd (“Unilever SA”). Worldwide, Unilever operates in the food and beverages, home care and personal care product categories.

- [3] The target firm is Sara Lee Corporation (“Sara Lee”), a global company registered in the United States of America. Its shares are listed on the New York Stock Exchange (“NYSE”) and the London Stock Exchange (“LSE”). In South Africa Sara Lee conducts its business as Sara Lee South Africa (Pty) Ltd and manufactures and supplies bath and shower products. It also has a European laundry care business, which supplies fabrics and laundry aids.

Transaction and rationale

- [4] The proposed merger is for the acquisition of Sara Lee’s worldwide body care and European fabric care businesses by Unilever Plc and Unilever N.V. In South Africa this will be the acquisition of Sara Lee’s Body Care business by Unilever SA.
- [5] Sara Lee’s decision to dispose of its body care business in South Africa is to enable them to concentrate on their core food and beverage businesses. Its intention is to invest the proceeds from the sale into the growth of the core businesses and also to repurchase stock.
- [6] Unilever asserts that this transaction offers it significant growth potential in that Sara Lee’s brands are consistent with Unilever’s existing business, and are complementary to Unilever’s current brands. This will enable Unilever to compete effectively in new areas within the skin cleansing market.

The relevant markets and impact on competition

- [7] In assessing the relevant product markets, the products of the merging parties were differentiated along the lines of brand, price, efficacy,

gender, fragrance and format. Due to this differentiation it was difficult to define the exact parameters of the relevant markets in question. The approach then taken by the Competition Commission (“Commission”) was to consider the closeness of competition between products and the views of market participants, especially customers. The relevant geographical markets were found to be national.

[8] The product markets were analysed under separate categories within the broader personal care product market. It was found that there were no overlaps between the activities of the merging parties in the manufacture and supply of Bath Additives, Fabric Care and Oral Care.

[9] Overlaps between the merging parties activities’ were found in the following product categories:

- a) *Deodorants,*
- b) *Skin cleansing products*
- c) *Skin care products*
- d) *Hair care products*
- e) *Male aftershave market.*

[10] In the deodorants market Unilever Plc and Unilever NV have a collective national market share of approximately 35-40% and Sara-Lee has an approximately 9-15% market share. Both the merging parties manufacture and supply deodorants in South Africa. Unilever has Axe, Shield, Brut and Dove as its brands in this market and Sara Lee has Status and Sanex.

[11] On this basis, the deodorant market was indicated to be one that might raise competition concerns. It is therefore necessary that this market be discussed further.

[12] The merging parties were of the view that the relevant product market is the single (albeit highly differentiated) market for all types of deodorants.

The merging parties indicated that there should be a single market for all types of deodorants and that it is not appropriate to define the relevant product market more narrowly along the lines of gender, age, format, functionality or pricing. In this regard the merging parties were of the view that the proposed transaction will not raise any competition concerns in this market.

[13] The Commission however found that the merger will raise competition concerns in the form of unilateral effects in the deodorant market. It submitted that Status and Axe were considered to be close competitors. The Commission was concerned that after the merger, it will be easy for the merging parties to raise or manipulate their prices to the detriment of the consumer. The view is that customers will not have sufficient bargaining power to deter the merged entity's ability to raise prices significantly as Unilever would have approximately 44-55% market share in a national deodorants market. Third parties interviewed held a view that this merger will remove an effective competitor in deodorant category, in particular Status. They also state that the merger will lead to reduced efforts to innovate and eliminate competition between Status and Axe which will lead to a substantial prevention and lessening of competition.

[14] The Commission further found that even if new entrants managed to enter this market, it is highly unlikely that their entry would be timely enough to deter the merged firm's ability to raise prices specifically because some brands submitted that in this market they have not managed to gain any significant market shares nor been able to compete effectively. This is mainly due to the barriers faced by new entrants and third party manufactures in this market, such as brand development and shelf space allocation. Although players from adjacent markets may not face all of the barriers faced by third party manufacturers and new entrants, brand development and shelf space allocation are also very significant constraints to the entry of any of these parties.

[15] In our view the two brands do compete closely with each other and do not face meaningful nor effective competition from the other brands in the category. The merger is therefore likely to lead to a substantial lessening of competition in the deodorants market.

The proposed conditional acceptance

[16] Since the proposed merger is likely to result in the elimination of competition between two brands of the merging parties in the deodorant market, the Commission was of the view that requiring the merging parties to divest the business of Status (“the divested business”) would cure the anti-competitive effect of the transaction.

[17] It is not uncommon for the competition authorities or the courts in other jurisdictions to impose divestiture as a condition for the approval of a merger. Of importance in a divestiture condition is the identification of the assets to be diversified, the provision of clear and comprehensive details by the merging parties on how divestiture will take place, the time required to divest the asset must be short¹ and the merged firm has to undertake that it will not take steps that would adversely affect the business that is to be divested.² We note further that the litmus test of the effectiveness of divestiture is whether it maintains competition in the post-merger relevant market or in the language of the Act, whether or not it permits of a transaction that does not “substantially prevent or lessen competition”.³ In addition provision must be made for monitoring compliance with such a condition.

[18] We are satisfied that the proposed divestiture conditions meet these criteria.

Public interest: employment issues

[19] When considering a merger the Act enjoins us to take into account public interest issues, including in terms of section 12A(3)(b) the effect of the

¹ JD Group / Ellerines Case No. 78/LM/July 00 at page 82.

² Mercanto IM (Pty) Ltd /Johnic Case No. 78/LM August 05 at page 60 -61.

³ JD Group / Ellerines Op cit note 2.

merger on employment. This obligation must also be read in the context of section 2(c) of the Act, which states that amongst the purposes of the Act is to “promote employment and advance the social and economic welfare of South Africans”. This means that we must look at whether the merger will result in the creation or loss of employment and weigh this against other factors that we have to consider in terms of the Act.

[20] This merger raises public interest issues in that Unilever has stated that to the extent that the proposed merger results in a “duplication of roles” required for the merged operation, it was anticipated that up to 60 roles would become redundant. The Commission proposed the approval of the merger subject to certain Employment Conditions. These conditions related to an obligation on the merging parties to put in place training or re-skilling measures for employees that may be affected by the transaction. The Competition Tribunal (“Tribunal”) however was not satisfied that a condition relating to the actual number of retrenchments had not been imposed.⁴ We have therefore imposed an obligation on Unilever to limit the total number of employees that are dismissed in South Africa as a result of the merger to a maximum of 60 employees.

Conclusion

[21] We therefore approve the merger with the following conditions:

- (i) The merging parties shall dispose of the business identified as the “divested business” to a buyer being an independent third party approved by the Commission in accordance with the provisions of the Divestiture Conditions and Trustee Mandate set out in Annexure “A” and “B” to the order.
- (ii) Unilever SA shall limit the number of the employees that are dismissed in South Africa, as a result of the merger, to a maximum of 60 employees (“affected employees”). Unilever shall

⁴ Page 20 of the Record.

provide training or re-skilling measures for qualifying employees as agreed to in the Employment Conditions set out in Annexure C to the order.

07 December 2010

Andiswa Ndoni

DATE

Yasmin Carrim and Andreas Wessels concurring

Tribunal Researcher : Mahashane Shabangu
For the merging parties : Jerome Wilson instructed by Webber
Wentzel and Derek Lotter instructed by
Bowman Gilfillan
For the Commission : Bakhe Majenge of the Legal Services
Division
For the Union : Wilile Noling on behalf of
CEPPWAWU