competitiontribunal
south africa

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: 107/LM/Dec12

[016055]

In the matter between:

Diageo Africa B.V.	Acquiring Firm
And	
Newshelf 1167 (Pty) Ltd	Target Firm

Panel	:	Andreas Wessels (Presiding Member) Anton Roskam (Tribunal Member) Mondo Mazwai (Tribunal Member)
Heard on	:	19 February 2013
Order issued on	:	19 February 2013
Reasons issued on	:	15 April 2013

Reasons for Decision

Approval

1. On 19 February 2013 the Competition Tribunal (the "Tribunal") unconditionally approved the acquisition by Diageo Africa B.V. ("Diageo Africa") of Newshelf 1167 (Pty) Ltd ("Newshelf").

2. The reasons for the approval of the proposed transaction follow.

The Parties and their activities

3. The primary acquiring firm is Diageo Africa, a company incorporated and registered in the Netherlands. Diageo Africa is a wholly-owned subsidiary of Selviac Netherlands B.V. which is in turn indirectly owned by Diageo Plc ("Diageo"). Diageo is a public company listed on the London Stock Exchange and the New York Stock Exchange and is accordingly not controlled by any one firm. Diageo has subsidiaries[1] in England, the United States of America, the Netherlands, Scotland, Ireland and France, which are primarily involved in the production, marketing and distribution of alcoholic beverages.

4. Diageo Africa brews, markets and distributes beer and a variety of other alcoholic beverages in a number of countries throughout the world. In South Africa, Diageo Africa's alcoholic beverages are marketed and distributed by Brandhouse Beverages (Pty) Ltd ("Brandhouse"). These products include a number of flavoured alcoholic beverages ("FABs") such as Smirnoff Spin, Smirnoff Storm, Archers Aqua, Captain Morgan Cola, and J&B Soda. Diageo Africa also produces, markets and distributes a number of spirits such as Johnny Walker Scotch Whisky, Captain Morgan Rum and Smirnoff Vodka as well as wine products on a global basis.

5. The primary target firm is Newshelf, a company incorporated in terms of the laws of the Republic of South Africa. Newshelf is owned by Pestello Investment Inc ("Pestello"), which is ultimately controlled by an off-shore investor, namely, Mr. Vijay Mallya. Newshelf controls Reldann Investment (Pty) Ltd ("Reldann"), which in turn controls United National Breweries (SA) (Pty) Ltd ("UNB"). UNB controls National Sorghum Breweries Properties (Pty) Ltd ("NSB"). Newshelf and its subsidiaries are hereinafter referred to as the UNB Group.

6. The UNB Group manufactures traditional African sorghum beer, Umqombothi and Mageu. These products are distributed from four

[1] See annexure 1 to form CC4(2) for a list of Diageo's subsidiaries.

breweries and various distribution depots situated throughout South Africa. The UNB Group also recently introduced a new product called City Jive, which is categorised as a FAB. City Jive is currently being marketed in Gauteng, Mpumalanga, KwaZulu-Natal and the Eastern Cape.

Proposed transaction and rationale

7. In terms of the proposed transaction, Diageo Africa intends to acquire a 50% shareholding in Newshelf from Pestello. On completion of the transaction, Newshelf will be operated as a 50/50 joint venture and will be jointly controlled by Diageo Africa and Pestello.

8. Diageo Africa's rationale is that this transaction will provide it with an entry point in relation to sorghum beer, which it may be able to leverage in the future across other countries in the rest of Africa.

9. From Pestello's perspective, this transaction offers an opportunity to be part of a multinational company and to grow its sorghum beer brands in South Africa.

Competition analysis

10. The merging parties are both involved in the production and supply of alcoholic beverages, i.e. Diageo Africa in clear beer, which is characterised by its see-through nature[2] and FABs and the UNB Group in sorghum beer, which is opaque, thick and frothy in nature and FABs.

11. In defining the relevant product market the Competition Commission ("Commission") assessed whether sorghum beer and clear beer are in the same product market. In this regard the Commission found that sorghum

[2] Diageo's beer brands in South Africa are "Guinness" and "Kilkenny" and are distributed by Brandhouse, a joint venture company, jointly controlled by Diageo, Heineken International NV and Namibian Breweries Limited. Brandhouse also distributes Windhoek Lager, Windhoek Light, Heineken, Amstel and Tafel.

beer and clear beer differ in terms of the following: (i) each appeals to different customer segments (sorghum beer is mostly consumed by consumers in the lower LSM category); (ii) packaging (sorghum beer is packaged in plastic containers or paper-based cartons of different sizes); (iii) distribution (sorghum beer is traded mostly through the informal sector whereas clear beer is distributed through the formal sector e.g. to retail customers and the hospitality industry); (iv) appearance (sorghum beer is an opaque, thick and frothy liquid which can be messy to drink and is more likely to make the drinker feel full); and (v) pricing, (i.e. there is a significant price difference between sorghum beer and clear beer).

12. Based on these factors the Commission concluded that sorghum beer and clear beer are in separate product markets and that there is no overlap between the activities of the merging parties in relation to these two types of beers. Further, customers of the UNB Group contacted by the Commission confirmed that they consider sorghum beer and clear beer to be in separate markets.

13. In respect of FABs, the Commission identified a horizontal overlap in the activities of the merging parties as they both manufacture and supply FABs. As indicated above, Diageo's FABs include Smirnoff Spin, Smirnoff Storm, Archers Aqua, Captain Morgan Cola, and J&B Soda. Newshelf has recently introduced "City Jive" which may be regarded as a FAB.

14. The Commission found that there are very broad ranging categories within the market for FABs (i.e. aggregation of malt, wine, spirit and other types of premixed drinks), but did not find it necessary to come to a definitive conclusion on the relevant product market as the overlap between the activities of Diageo Africa and the UBN Group is very minimal.

15. Regarding the geographic market, both the Commission and the merging parties were of the view that the market is national as suppliers of FABs distribute these products throughout the Republic of South Africa.

16. However, there is no need for us in this case to take a definitive view on whether or not a separate product market exists for FABs since this does not alter our ultimate conclusion on the competitive effects of the proposed transaction.[3]

17. The merging parties' national post-merger market share in FABs is approximately 19%, with an accretion of less than 1%, attributed to Newshelf's City Jive. Competitors of the parties include Distell, SAB, Halewood International and others. Given the limited product overlap between the activities of the merging parties, the proposed merger raises no likely competition concerns when potential alternative relevant markets are considered.

Third Party Concerns

18. A letter was submitted to the Commission after the Commission had taken a decision to refer its recommendation to the Tribunal by a third party who requested that its identity remain anonymous. The Commission advised the third party to make its submissions to the Tribunal. On the eve of the hearing, the Tribunal received a letter from the same third party, again requesting its identity to remain anonymous.[4] In that letter the anonymous party made it clear that it did not wish to formally intervene in the matter but raised the following concerns regarding the proposed transaction, which are substantially similar to the ones raised belatedly with the Commission:

(i) Food security – as sorghum beer is produced from sorghum grain, Diageo would, post-merger, expand its operations and productions throughout Africa, which expansion would invariably lead to an increase in the consumption of sorghum raw material in South Africa which might lead to shortages of sorghum grain.

[3] Also see the Tribunal's decision in the matter involving *Distillers Corporation (SA) Ltd and Stellenbosch Farmers Winery Group Ltd, Case No: 08/LM/Feb02.*

[4] Letter dated 18 February 2013.

(ii) Effect on prices of sorghum based products - the increase in demand for raw sorghum grain by Diageo post-merger will place pressure on the price and availability of raw sorghum in the South African market, which in turn will lead to increases in the prices of sorghum based products.

(iii) Portfolio effects – UNB is the dominant producer of sorghum beer in South Africa and this transaction will, post-merger, afford Diageo a dominant position in the sorghum beer market. Diageo would be able to leverage this dominant position and induce customers to purchase its complete line of alcoholic beverages products, which might result in competing suppliers being foreclosed from access to a significant segment of customers in the relevant market(s).

(iv) Expanding the monopoly profits and cross subsidisation - as a near-monopolist producer of sorghum beer, Diageo will be in a position to increase prices in this market and divert some of its monopoly profits to subsidising the supply of its other alcoholic beverage products in order to eliminate competitors or potential competitors in the market.

19. At the hearing we requested the Commission and the merging parties to respond to the concerns raised. However, there is no need for us to deal with these issues in any detail in these reasons. After hearing the responses from the Commission and the merging parties, we were satisfied that the concerns raised were either not merger-specific (i.e. the proposed merger is not the cause of the concerns) or not supported by any evidence that the proposed transaction would result in a substantial prevention or lessening of competition as alleged by the anonymous party.[5] While we accept that there may be exceptional circumstances where submissions or a complaint may be made anonymously, we expect a party claiming anonymity to show good reason for the claim. In this case that was however not shown.

[5] See transcript pages 4 to16.

20. Nevertheless, despite the late submission and unsubstantiated anonymity claim, we requested the merging parties and the Commission to address the submissions made, and as stated above, were satisfied with their answers and that the proposed transaction was unlikely to substantially prevent or lessen competition.

21. We therefore agree with the Commission's conclusion that the proposed merger is unlikely to substantially prevent or lessen competition in any relevant market.

Public interest

22. The merging parties confirmed that the proposed transaction will have no adverse effect on employment and will not result in any retrenchments in South Africa.[6] The proposed transaction raises no other public interest concerns.

Conclusion

23. For the reasons mentioned above, we approve the proposed transaction unconditionally.

Mondo Mazwai | 15 April 2013 **Date**

Anton Roskam and Andreas Wessels concurring

Tribunal researcher: Ipeleng Selaledi

For Diageo: Anthony Norton of Nortons Inc.

For Newshelf: Heather Irvine of Norton Rose

For the Commission: Selelo Ramohlola

[6] See merger record, pages 9 and 74. Also see paragraph 8.1 of the Commission's merger report.