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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM234Mar15

In the matter between:

Bidvest Namibia Fisheries Holdings (Pty) Ltd	Primary Acquiring Firm
And	
Foodcorp (Pty) Ltd in relation to its ownership of the Glenryck Brand	Target Firm

Panel	: Norman Manoim (Presiding Member)
	: Andiswa Ndoni (Tribunal Member)
	: Medi Mokuena (Tribunal Member)
Heard on	: 20 May 2015
Order Issued on	: 20 May 2015
Reasons Issued on	: 19 June 2015

Reasons for Decision (Non-confidential)

Approval

[1] On 20 May 2015, the Competition Tribunal ("Tribunal") unconditionally approved the merger between Bidvest Namibia Fisheries Holdings ("Bidfish") and Foodcorp (Pty) Ltd ("Foodcorp") in relation to its ownership of the Glenryck Brand.

[2] The reasons for approving the proposed transaction follow.

Background to the present transaction

[3] The proposed transaction emanates from the large merger between Oceana Group Limited ("Oceana") and Foodcorp ("*Oceana matter*")[1] whereby Oceana acquired the entire fishing business of Foodcorp as a going concern.[2] Significantly, the proposed transaction included Foodcorp's fishing assets as well as its fishing rights.

[4] The Commission was of the view that the proposed merger would substantially lessen or prevent competition in the market. The competition concerns effectively arose from the fact that Oceana and Foodcorp were the respective owners of the Lucky Star and Glenryck brands, which are the two biggest competitors in the South African market for canned pilchards. Further, it was estimated that the merged entity's combined market share would be in excess of 80% post-merger in a market characterized by high barriers to entry.

[5] In order to remedy these competition concerns, the merging parties offered to divest of the Glenryck trademark. The Commission was however concerned that the brand would not survive without the fishing quota and so approved the merger subject to the condition that the merged entity divest of the Glenryck trademark, together with the fishing rights.

[6] According to the Tribunal, it was unlikely that the brand, divorced from its quota, would remain an effective competitor post-merger. It thus approved the merger on condition that Oceana divest of the Glenryck Trademark, together with Foodcorp's fishing rights.

[7] The merging parties appealed to the Competition Appeal Court against the Tribunal's conditions on the basis that they had no interest in the Glenryck brand and were only concerned with acquiring Foodcorp's local fishing quota. The appeal was upheld and thus, the merger was approved subject to the following conditions:

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[1] See *Oceana Group Limited and another v Competition Commission* (the Tribunal Case no: 01810. See also *Oceana Group Limited and another v Competition Commission* (CAC Case no: 130/CAC/May14).

[2] The transaction consisted of the business of catching, processing (including Laaiplek processing facility and employees) and selling deep sea trawl hake, lobster and/or pelagic fish carried out by the relevant sellers. It also included the head office of the Cape Town fishing operations which consists of the business assets and liabilities; the business assets of each seller; and all shares (excluding minority shares where there are minority shareholders) of certain subsidiaries of the sellers. See *Oceana Group Limited and another v Competition Commission* (the Tribunal Case no: 018101)

- the merged entity (Oceana) divest of the Glenryck brand, whilst being permitted to retain Foodcorp's fishing quota;
- Foodcorp retain and continue to operate the Glenryck Brand in accordance with good business practice;
- the subsequent sale of the Brand would be notified to the Commission.

[8] The present transaction results from these conditions.

Parties to transaction and their activities

Primary acquiring firm

[9] The primary acquiring firm is Bidvest Namibia Fisheries Holdings (Pty) Ltd ("Bidfish"), a company incorporated in the Republic of Namibia. Bidfish is a wholly-owned subsidiary of Bidvest Namibia Limited ("Bidvest Namibia"), which is listed on the Namibian Stock Exchange. Bidvest Namibia is controlled by Bidvest Group Limited ("Bidvest") with 52.27% shareholding.[3] Bidfish controls Namsov Fishing Enterprises (Pty) Ltd ("Namsov") which in turn controls other fishing entities including Namibian Sea Products (Pty) Ltd which controls United Fishing Enterprises (Pty) Ltd ("UFE").[4]

[10] Bidfish is comprised of a number of subsidiaries that are engaged in various sectors of the Namibian fishing industry. Its product offering includes frozen horse mackerel, monk fish, cannel pilchards, other canned products, fishmeal, fish oil and oysters. Namsov, the main operating company of Bidfish, supplies horse-mackerel.

[11] Relevant to the proposed transaction is Namsov's subsidiary, UFE, which is active in the harvesting and processing of pilchards. In this regard, UFE owns and operates its own vessels in relation to the harvesting of pilchard and has a processing canning facility in Namibia. UFE previously sold small volumes of pickled and curried hake into South Africa under the Oceana Fresh brand. Other canned products of UFE, are marketed under the Ocean Fresh and Ekunde labels. UFE has never marketed its canned pilchards in South Africa under its own brand. Thus, its activities are limited to the upstream segment of harvesting, processing and selling pilchard as an input to

[3] Bidvest is a company listed on the Johannesburg Stock Exchange ("JSE") and is not controlled by any single firm.
[4] UFE is of particular relevance to the present transaction as it is involved in the Pilchard fishing industry.

third party customers in various countries including South Africa, Namibia and Botswana. These third party customers use the pilchard sourced from UFE as inputs into their own brands for on-sale; and UFE does not sell any raw/frozen/fresh pilchard to any customer to process and can. All pilchards are processed and canned in 400gm and/or 155gm cans.

Primary target firms

[12] The primary target firm is The Glenryck Brand, which is owned by Foodcorp. Foodcorp is a wholly-owned subsidiary of Foodcorp Holdings (Pty) Ltd ("Foodcorp Holdings"). Foodcorp is wholly owned by RCL Foods Limited ("RCL"). RCL is controlled by Remgro Limited which owns 77.7% of the issued share capital of RCL.

[13] The Glenryck brand is a canned pilchard brand found in most grocery stores at retail and wholesale level. The brand is currently manufactured by Oceana and Pioneer Fishing (Pty) Ltd ("Pioneer") on behalf of Foodcorp following the merger with Oceana, but was historically manufactured and marketed by Foodcorp.

Proposed transaction and rationale

[14] In terms of the proposed transaction, Bidfish will acquire sole, unfettered control of the Glenryck brand.[5]

[15] Bidfish's submitted rationale is that the proposed transaction presents an opportunity for acquisitive growth in the canned pilchard sector. Foodcorp submitted that its quota allocations were in jeopardy as a result of a dilution of its empowerment shareholding. Thus, it took the decision to divest of its entire fishing division and sell it to an entity that would satisfy the DAFF BEE requirements. Further, the proposed transaction was in line with Foodcorp's strategy to dispose of its fishing operations in order to focus on grain based products as its core operations in the future. The proposed transaction also tied in with the order of the CAC that the Glenryck brand be divested.

[5] This includes the Glenryck Trademarks, Glenryck Know-How being all the confidential information relating to the Glenryck Trademarks and its exploitation including designs, formulae, processes, recipes, specification and information concerning materials, suppliers, customers, manufacturing techniques, marketing and distribution.

Relevant market

[16] In defining the relevant market, the Competition Commission ("Commission") considered the activities of the merging parties in light of the Tribunal's decision in the *Oceana/ Foodcorp* merger. In that merger, the Tribunal held that the market is a vertically integrated market which includes the harvesting, processing and canning of pilchard products further divided into canned pilchard and fishmeal. The vertically integrated market was defined as national in geographic scope.

[17] The market is further characterised by firms which operate at certain levels of the supply chain but which are not vertically integrated. These players are smaller right holders that possess quota and merely on-sell their fish to larger players or process and can the fish for larger players. The larger players such as Oceana, Pioneer, Saldanha and Gansbaai Marine (Pty) Ltd ("Gansbaai") are all vertically integrated.

[18] In relation to the present transaction, the Commission found that Bidfish is a vertically integrated firm involved in the harvesting, processing and canning of pilchards. Prior to the *Oceana/ Foodcorp* merger, Foodcorp was also a vertically integrated firm operational throughout various levels of the supply chain. As stated above, the net result of that merger was that Oceana purchased the entire fishing business of Foodcorp including its quota and processing capabilities, leaving behind only the divested Glenryck Brand. During the period between that merger and the present transaction, the Glenryck branded products were supplied by Oceana and Pioneer.

[19] The Commission accordingly followed the Tribunal's decision in the *Oceana / Foodcorp* merger, defining the relevant market as the vertically integrated market for canned pilchards which includes the harvesting, processing and canning of pilchards.

[20] In terms of the geographic market, the Commission found that Bidfish is based in Namibia and does not have any harvesting, processing or canning facilities in South Africa. As stated above, the Glenryck Brand is currently manufactured through agreements between Foodcorp, Oceana and Pioneer. As such, there is no geographic overlap in the activities of the merging parties.

Commission's competition analysis

[21] The Commission found that there is no horizontal overlap between the merging parties' activities as Bidfish does not have a canned pilchard brand in South Africa. Thus there will be no market share accretion as a result of the proposed merger. Oceana's Lucky Star brand will remain dominant with approximately 70% market share whilst Glenryck will remain the second biggest competitor with approximately 8% of the market. On such basis, the Commission did not believe the proposed transaction raised any competition concerns.

[22] However, the Commission noted that a vertical relationship exists in that Bidfish sells approximately 65% of its produce to the South African market. The Commission thus considered whether Bidfish would be able to support the Glenryck Brand and remain competitive in the South African market for canned pilchards. More specifically, whether Bidfish would withdraw its current supply and divert it to sustaining the Glenryck brand post-merger. These concerns will be dealt with below.

Brand sustainability

[23] The Commission investigated the current needs of the Glenryck Brand and compared it to the capacity of Bidfish.

[24] As mentioned above, Glenryck is currently being supplied by Oceana and Pioneer. According to the Commission, Foodcorp consumed a total of approximately **[CONFIDENTIAL]** tons from January-April 2015.[6] The terms of the supply agreement between Oceana and Foodcorp were such that Oceana would supply Foodcorp with a maximum of 1000 tons of canned pilchard per month (12 000 tons per annum or 600 000 cartons). This was in line with the production levels and brand requirements as set out in the Ocean/Foodcorp merger. Further, Bidfish has the capacity to harvest and process **[CONFIDENTIAL]** tons of pilchards per annum from its own allocation of TAC (quota) and other independent third party quota holders in Namibia.

[25] Based on these figures, the Commission found that Bidfish would be able to support the Glenryck Brand post-merger and still have a surplus of roughly **[CONFIDENTIAL]** tons for other customers. Further that Bidvest South Africa's

[6] See Table 4 on page 23 of the Commission's Report.

strength in resources and expertise will ensure that Glenryck is able to compete effectively in South Africa.

Withdrawal of supply

[26] Bidfish submits that it will effectively withdraw 1 million trays of canned pilchard from supply into SA and divert it to the Glenryck Brand. Based on the merging parties' submissions, the Commission found that approximately 65% of Bidfish's total production of canned pilchards is sold to the South African market. Of this 65%, **[CONFIDENTIAL]** is sold collectively to Monteagle[7] and Saldanha. Both these firms indicated that they do not have concerns as there are other locally available sources such as Pioneer and Gansbaai. Further, Pioneer and Oceana will have excess supply of canned pilchards as they will no longer need to supply the Glenryck Brand.

Our analysis

[27] Although the Commission has analysed the merger as one of a vertically integrated market for the supply of pilchards, the effects of this merger should be analysed as the effect it has on the wholesale market for the supply of canned pilchards to retailers.

[28] If one adopts this approach then the transaction is a vertical one as an existing wholesaler (Bidfish) is buying an input (a brand) from a firm that has since exited this market. The effect of the merger is that Bidfish now has a brand that enables it to compete in the higher value branded canned pilchard segment, where it previously did not compete, as it did not use the brand it has in Namibia to compete in South Africa. Rather Bidfish was a supplier of unbranded cans to others where its product ended up primarily as household brands or white label products.

[29] Given that the pre-merger counterfactual is not Foodcorp as it was prior to the merger with Oceana, but Foodcorp as it is now (as in no longer possessing a TAC allocation or processing facilities and which is conditionally required to sell the Glenryck brand), then the merger may be pro-competitive in the branded segment as a stronger company with a supply of pilchards will be incentivized to enter this segment aggressively and compete for market share with the overwhelmingly dominant Oceana brand. The Glenryck brand also appears to have been weakened

[7] Monteagle mostly supplies white label or house brands.

of late, due in part to the protracted merger process with Oceana and Foodcorp's desire to exit the sector. In the hands of Bidfish, which it appears has access to its parent's distribution network, this might well change.

[30] Of course this means that depending on how successful it is in strengthening demand for Glenryck, Bidfish has the incentive to divert its pilchards from the lower priced household brands segment to the higher priced branded segment. However, some of the previous supply that went into Glenryck, as the Commission has pointed out, will still be in the market to replace it. Furthermore, if there is intensified competition in the branded segment this is likely to either lead to fish being displaced from that segment into the household branded segment, if for instance, Oceana loses market share and divests its supply into the household branded segment, or it may lead to lower prices in the premium segment with a knock-on effect in the household segment, for which the branded segment constitutes a price leader.

[31] We concur with the Commission's competition assessment, i.e. that the proposed transaction is unlikely to substantially prevent or lessen competition in the relevant market.

Public interest

[32] The proposed transaction does not raise any substantial public interest concerns since this only involves the purchase of a brand and related intellectual property

Conclusion

[33] In light of the above, we conclude that the proposed transaction is unlikely to substantially prevent or lessen competition in the relevant market. In addition, no public interest issues arise from the proposed transaction. Accordingly we approve the proposed transaction unconditionally.

Norman Manoim | 19 June 2015 **DATE**

Andiswa Ndoni and Medi Mokuena concurring

Tribunal Researcher:	Derrick Bowles
For the merging parties:	Jocelyn Katz (ENS) for the Acquiring Firm and Chris Charter (Cliffe Dekker Hofmeyr) for the Target Firm.
For the Commission:	Lindiwe Khumalo and Mogau Aphane