COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM192Mar22

In the matter between:

The Foschini Group Limited	**Primary Acquiring Firm**
and	
Tapestry Home Brands (Pty) Ltd	**Primary Target Firm**

Panel	:	L Mncube (Presiding Member)
	:	Y Carrim (Tribunal Member)
	:	T Vilakazi (Tribunal Member)
Heard on	:	26 July 2022
Order issued on	:	26 July 2022
Reasons issued on	:	24 August 2022

REASONS FOR DECISION

Introduction

[1] On 26 July 2022, the Tribunal conditionally approved the large merger in which The Foschini Group Limited ("TFG") will acquire the entire share capital of Tapestry Home Brands (Pty) Ltd ("Tapestry").

Primary acquiring firm

[2] TFG is not controlled by any firm but controls a number of firms such as Prestige Clothing (Pty) Ltd, Foschini Stores (Pty) Ltd, Cotton Traders (Pty) Ltd and Markhams (Pty) Ltd, amongst others.

[3] TFG and all the firms directly and indirectly controlled by it (the "TFG Group") is an independent chain-store group in South Africa with a diverse portfolio of 30 fashion retail businesses offering clothing, jewellery, cellphones, accessories, cosmetics, luggage, sporting apparel and equipment, homeware, and furniture, from value to upper market segments.

[4] TFG also operates an upstream textiles manufacturing operation, Cotton Traders, which supplies manufactured textiles to various TFG and other third-party retail businesses, including to the target firm's downstream retail businesses.

[5] Of particular relevance to the proposed transaction are the activities of TFG in the broader homeware sector, which, according to the parties, form a very limited proportion of the overall TFG business as it accounts for less than 10% of its operations.

Primary target firm

[6] Tapestry is a company incorporated under the laws of South Africa and is a manufacturer and retailer of household textiles, furniture and bed sets and mattresses.

[7] Tapestry and all the firms directly and indirectly controlled by it (the "Tapestry Group") has upstream activities in home textiles, furniture and bed sets and mattress manufacturing activities which are dedicated to supplying the needs of its downstream retail businesses. In this respect, the Tapestry Group does not sell manufactured goods to other downstream retailers.

[8] The Tapestry Group also offers a portfolio of popular home furnishing consumer brands such as Dial-a-Bed, the Bed Store, Volpes and Coricraft in the middle-to-upper LSM segments.

[9] Unlike the TFG Group, all of the Tapestry Group's activities fall within the homeware market segment.

Overlaps

[10] There is no horizontal overlap between the activities of the merging parties in the market for the manufacturing of furniture products and manufacturing of bed sets and mattresses. The merging parties' activities overlap in the manufacturing of household textiles.

[11] A pre-existing vertical overlap is evident between the merging parties as Cotton Traders supplied household textile products to the Tapestry Group.

Relevant counterfactual

[12] The Tribunal assessed the proposed transaction's impact relative to the situation that would prevail absent the proposed transaction and concluded that it is unlikely to negatively impact any market participant.

Competition Assessment

Market definition: relevant product market

[13] In its investigation, the Commission considered the business activities of the merging parties and found that they operate in the broad market for the supply of houseware products, and more specifically in the manufacturing and retail of (i) household textiles; (ii) furniture products; and (iii) bed sets and mattresses.

[14] The TFG Group does not manufacture (i) furniture products and (ii) bed sets and mattresses whereas the Tapestry Group also manufactures these products, however, their manufacturing activities are exclusively dedicated to supplying the needs of its downstream retail businesses.

[15] The Tribunal did not receive any evidence indicating that the product frame of reference should be any wider than the above markets.

Relevant geographic market

[16] The merging parties manufacture and distribute their household textile products to retailers located across South Africa but the Commission did not conclude on the definite geographic market for all the (i) upstream market for the manufacturing of household textiles; (ii) downstream market for the retail of household textiles; (iii) downstream market for the retail of furniture products; and (iv) downstream market for the retailing of bed sets and mattresses.

[17] Based on the above, the Tribunal assessed the impact of the proposed transaction on a national basis.

Market shares

[18] The merging parties submitted market share estimates, based on revenue in the 2021 financial year, as follows:

18.1 a national estimated market share of [redacted] in the upstream market for the manufacturing of household textiles, with a market share accretion of [redacted];

18.2 In the downstream market for the retailing of household textiles in the LSM 7-10 segment, the merging parties will have a national estimated market share of [redacted], with a market share accretion of [redacted];

18.3 In the downstream market for the retailing of furniture products in the LSM 7-10 segment, the merging parties will have a national estimated market share of [redacted], with a market share accretion of [redacted]; and

18.4 In the downstream market for the retailing of bed sets and mattresses in the LSM 7-10 segment, the merging parties will have a national estimated market share of [redacted], with market share accretion of [redacted].

[19] The above estimates demonstrate that the merging parties' combined share of supply in less than [redacted] except in the downstream market for the retailing of furniture products in the LSM 7-10 segment. However, the merged entity will continue to face competition from players such as, Sedgars Rochester, and Essops, amongst others.

Horizontal unilateral effects assessment

[20] Horizontal unilateral effects may arise when one firm merges with a competitor that previously provided a competitive constraint, allowing the merged firm profitably to raise prices or to degrade quality on its own and without needing to coordinate with its rivals.

[21] In its assessment, the Tribunal considered the market shares; closeness of competition between the parties; and competitive constraints posed by alternative suppliers.

[22] The merging parties will continue to face competition from a number of upstream household textile manufacturers accounting for [redacted] of the market. In addition, a

competitor of the merging parties confirmed that there other manufacturers in the respective market which the merged entity will continue to compete. Importantly, the target firm does not necessarily compete in upstream market for the supply of textiles to downstream retailers as it produces textiles only for internal supply within the Tapestry Group and the market share attributable to the target firm is therefore entirely notional.

[23] In addition, the merging parties will continue to face competition from other established players in the market and it is unlikely that the merger will grant the merged entity the ability to price unilaterally post-merger. The merging parties are only competitors in the retailing of bed sets and mattresses to a limited extent and any accretion arising from the transaction is likely to be minimal and would not raise competition concerns.

[24] Therefore, the proposed transaction is unlikely to substantially prevent or lessen competition in the respective markets.

Vertical effects assessment

[25] Vertical effects may arise when a merger involves firms at different levels of the supply chain, for example a merger between an upstream supplier and a downstream customer or a downstream competitor of the supplier's customers.

[26] In the present case, the Tribunal considered whether the merging parties would have the ability and incentive to engage in input foreclosure by not supplying or increasing the costs of distribution of household textile products to competitors of the TFG Group.

[27] The merging parties will not have the ability to engage in anticompetitive input foreclosure, as there are a number of players that will pose as a competition constraint in the respective market. Furthermore, the TFG is already vertically integrated and was supplying competing firms and the Commission did not find any evidence suggesting this would change post-merger. Therefore, the merged entity is unlikely to have the incentive to foreclose the Tapestry Group's competitors from access to household textiles.

[28] In addition, the Tribunal considered if the merging parties would have the ability and incentives to engage in significant customer foreclosure.

[29] The merging parties will not have the incentive to engage in customer foreclosure, as majority of its products and services are procured from other suppliers other than the TFG Group. The merging parties also confirmed that post-merger the Tapestry Group will continue to procure the household textile products from third parties due to the long-standing relationships with its suppliers and on account of the fact that the Tapestry Group has carefully identified suppliers that can provide it with quality products at competitive prices. Therefore, the merging parties will not have the ability to engage in anticompetitive customer foreclosure, as they are not a significant player in the respective market.

[30] Having considered the above in assessing the proposed transaction, the Tribunal concluded that it is unlikely that the proposed merger will result in a substantial prevention or lessening of competition in any relevant market.

Third party concerns

[31] The Minister of the Department of Trade, Industry and Competition ("dtic") filed a notice of intention to participate and sought to understand the impact of the merger on public interest issues relating to the likelihood of the proposed transaction creating new jobs along the acquiring firm's value chain; local supplier development opportunities including small- and medium businesses, or firms owned/controlled by HDPs; and improving the target firm's B-BBEE shareholding from zero to a level commensurate with that of the acquiring firm (32.62%).

[32] Following the merging parties elaborating on their commitments, the dtic submitted that it had no new input in the matter, however it required the merging parties to formally commit to new stores opening as well as the jobs they claim will be created in the merged entity.

[33] Several competitors and customers of the merging parties raised concerns regarding the merging parties being big players in the respective markets and that the proposed transaction will result in the merged entity becoming a dominant firm. However, there is no evidence to support the contention that the merged entity will be dominant or have market power.

[34] Only one party, which requested to remain anonymous, indicated that they wished to participate in the Tribunal's proceedings. They made written submissions in respect of competition concerns on whether the proposed transaction will give the merged entity the ability or the incentive to pursue an input or customer foreclosure strategy that favours the merged entity.

[35] The merging parties' response in respect of the concerns showed that the proposed transaction will not result in the establishment of a dominant firm or not confer upon the merged entity market power.

[36] The Tribunal was of the view that the merging parties adequately addressed the concerns, in addition to the findings from the Commission's investigation, and concluded that the low market shares and accretion support the findings on a lack of incentive and ability to foreclose.

Creeping merger assessment

[37] The Commission considered the manufacturing and retail homeware stores acquired by the TFG Group in the past five years and found that the TFG Group has a market share of approximately less than 10% in the national market for the manufacturing and retailing of household textiles and as such the TFG Group does not appear to command any market power and currently continues to face constraint from many viable competitors.

[38] However, the Commission will closely monitor future acquisitions by the TFG Group post the proposed transaction.

Public Interest

Effect on employment

[39] The merging parties submitted that the implementation of the proposed transaction will not result in any retrenchments in South Africa and that the proposed transaction is likely to result in the creation of new jobs throughout the TFG value chain (including employment opportunities in upstream manufacturing activities and downstream retail activities).

[40] During the Commission's investigation, the South African Clothing and Textile Workers Union ("SACTWU") and the General Industrial Workers Union of South

Africa ("GIWUSA") raised concerns relating employees of the Tapestry Group. The merging parties submitted responses to the questions posed and agreed to an employment condition that it will not retrench any employees as a result of the proposed transaction for a period of at least three years.

[41] SACTWU did not oppose the proposed transaction. GIWUSA, however, indicated that they wished to participate in the Tribunal proceedings. In the end, GIWUSA did not file any submissions and following a meeting between the representatives of Tapestry and GIWUSA, it submitted that it no longer had concerns with the proposed transaction.

[42] Accordingly, the proposed transaction is unlikely to raise employment concerns.

Effect on the spread of ownership

[43] The merging parties submitted that pre-merger the TFG Group has 32.62% broad-based-black economic empowerment ("B-BBEE") shareholding, while the Tapestry Group pre-merger does not have any B-BBEE shareholding.

[44] The Commission had requested that the merging parties indicate how the merger will promote a greater spread of ownership by HDPs and workers and the merging parties submitted that the proposed transaction will already have a positive impact post-merger, as it will introduce a HDP shareholder within the Tapestry Group. Considered in this context, the merging parties submitted that no conditions are required in this regard and the Commission did not engage on this further.

[45] The merging parties and the Commission agreed on conditions that the merged entity will establish [redacted] new retail stores in South Africa across the Tapestry Brands and create [redacted] new retail positions to service the new retail stores.

[46] Having considered the above, the Tribunal concluded that the proposed transaction does not raise any other public interest concerns

Conclusion

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

[48] Furthermore, the conditions relating to expansion commitments and employment adequately address any public interest concerns.

[49] In order to give effect to the above, the Tribunal approved the proposed transaction on the above conditions which are attached as "**Annexure A**" hereto.

Signed by:Liberty Mncube
Signed at:2022-08-24 17:48:19 +02:00
Reason:Witnessing Liberty Mncube

L-Mncube

24 August 2022

Professor Liberty Mncube **Date**

Ms Yasmin Carrim and Dr. Thando Vilakazi concurring

Tribunal Case Manager:	Juliana Munyembate
For the Merging Parties:	Mark Garden of ENSAfrica and Nina Greyling of Nortons Inc
For the Commission:	Ratshidaho Maphwanya and Rethabile Ncheche