



COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: 018879

In the matter between:

The Real Beverage Company (Pty) Ltd

Acquiring Firm

And

**DairyBelle (Pty) Ltd's Yoghurt and
Ultra High Temperature Milk Businesses**

Target Firms

Panel	:	Yasmin Carrim (Presiding Member) Andreas Wessels (Tribunal Member) Andiswa Ndoni (Tribunal Member)
Heard on	:	26 and 27 November 2014
Order issued on	:	28 November 2014
Reasons issued on	:	19 January 2015

Reasons for Decision

Conditional approval

1. On 28 November 2014 the Competition Tribunal ("Tribunal") conditionally approved an acquisition by The Real Beverage Company (Pty) Ltd ("Real Beverage") of DairyBelle (Pty) Ltd's Yoghurt and Ultra High Temperature Milk ("UHT") businesses. The conditions that we have imposed relate to a competition concern concerning the supply of services by the merged entity to a third party post-merger, as well as employment concerns resulting from the proposed transaction, as explained below.
2. The reasons for the conditional approval of the proposed transaction follow.

Parties and their activities

Acquiring firm

3. The primary acquiring firm is Real Beverage. Real Beverage is controlled by Clover S.A. (Pty) Ltd ("Clover SA"). Clover SA is in turn a wholly owned subsidiary of Clover Industries Limited ("Clover Industries"). Clover Industries is listed on the Johannesburg Securities Exchange Limited and is not controlled by any single firm. We shall refer to the acquiring firms collectively as "Clover".
4. Clover is a branded consumer goods company active in the food and beverage industry in South Africa and certain other African countries. Clover's product portfolio comprises a broad range of dairy and non-dairy products, such as milk and milk powder, cheese, butter, cream, and maas, as well as non-alcoholic beverages.
5. Clover is, more specifically, involved in the following activities through its various subsidiaries:
 - the procurement of raw milk from milk producers for its own use and on behalf of Danone Southern Africa (Pty) Ltd ("Danone");
 - the manufacture/processing of milk and dairy products, including fresh milk, UHT milk, cheese, cream, butter, butter spread, whey, ghee, condensed milk, milk powder and maas;
 - the manufacture/processing of dairy products including ice cream, cream, UHT milk, milk powder, creamer and custard on behalf of certain third parties;
 - the provision of sales and merchandising services in respect of its own products and certain products on behalf of third party principals;
 - the import, distribution, marketing and selling of bulk ingredient products;
 - the primary and secondary distribution of its own chilled and ambient products and of certain products for third party principals; and

- the production of fresh fruit juices, dairy-based fruit juices, mineral water and ice tea.
6. We note that Clover is currently not involved in the manufacture and sale of yoghurt.
 7. Of specific relevance to the competition assessment of the proposed transaction are Clover's UHT milk operations that the Competition Commission ("Commission") indicated are in Pinetown in KwaZulu-Natal and Port Elizabeth in the Eastern Cape, as well as its procurement of raw milk from farmers in various geographic regions of South Africa.

Target firms

8. The primary target firms are the Yoghurt and UHT businesses of DairyBelle (Pty) Ltd ("DairyBelle") as going concerns. These businesses will be referred to in these reasons as the "Target Businesses". Pre-merger DairyBelle wholly-owns and controls the Target Businesses.
9. The Target Businesses manufacture, distribute, sell and market yoghurt¹ and UHT milk. The Commission indicated that DairyBelle's yoghurt and UHT milk operations are respectively located at Bloemfontein in the Free State and Cape Town in the Western Cape (also see paragraph 11 below).
10. DairyBelle's activities other than that of the Target Businesses involve the processing, distribution, marketing and sale of juice, cheese and other dairy products.² DairyBelle also processes dairy products for certain retailers' private brands. DairyBelle is further active in the procurement of raw milk from farmers in the Free State, northern part of the Eastern Cape and western part of the Eastern Cape and southern part of Northwest.

¹ DairyBelle's yoghurt brands include *DairyBelle*, *Fruits of the Forest*, *Bliss*, *Rainbow*, *VitaBelle* and *In Shape*.

² The Commission found that DairyBelle manufactures cottage cheese in Bloemfontein (Free State), hard cheese in Cookehouse (Eastern Cape) and Bloemhof (North West) and butter in Cape Town (Western Cape) and Bloemhof. Yoghurt, juice and other dairy products are manufactured in Cape Town and Bloemfontein.

Proposed transaction and rationale

11. In terms of the relevant sale agreements, Real Beverage intends to acquire control of the Target Businesses as going concerns. Upon implementation of the proposed transaction Real Beverage will own and control the Target Businesses, which will include *inter alia*:

11.1. The manufacture (through a factory in Bloemfontein together with various assets and consumables), distribution, sale and marketing of yoghurt (which includes intellectual property, certain relevant contracts and goodwill); and

11.2. The processing, distribution, marketing and sale of UHT milk and equipment in Cape Town, as well as intellectual property, certain relevant contracts and goodwill.

12. The merging parties highlighted that the proposed transaction excludes DairyBelle's Cape Town facilities as it was not for sale and will continue to be used by DairyBelle post-merger for the manufacture of its retained products which include cheese, butter, juice and flavoured milk. Clover however intends to lease a portion of this facility for the manufacture of UHT milk. The merging parties at the time of notification of the proposed transaction submitted that it is contemplated that Clover and DairyBelle will conclude a five year lease agreement, subject to a right of renewal (also see paragraph 54 below).³

13. As rationale for the proposed transaction Clover submitted that it wishes to enter the yoghurt manufacturing sector and the proposed transaction will provide it with established yoghurt brands as well as a yoghurt plant.

14. DairyBelle submitted that it decided to exit the yoghurt and UHT milk businesses to focus on its core categories, for example cheese manufacturing.

³ See letter from the merging parties to the Commission dated 25 August 2014.

Competition analysis

15. The Commission's investigation indicated that the dairy sector can be divided into four levels: (i) the farmers that produce raw milk; (ii) processors of raw milk that procure the raw milk from specific milk producing regions in South Africa; (iii) processors that process the raw milk into dairy products such as UHT milk, yoghurt, milk powder, butter, cheese, butter milk and whey powder; and (iv) processors that on-sell the dairy products either to retailers or in bulk to caterers and other end-users.
16. With regards to yoghurt, the Commission found that there is no horizontal overlap in the activities of the merging. Clover's pre-merger activities in respect of yoghurt are confined to offering secondary distribution services to Danone (see paragraphs 40 to 44 below); Clover itself does not currently produce yoghurt and does not have the facilities/capacity to do so.
17. The Commission identified the following areas of overlap between the activities of the merging parties: (i) the procurement of raw milk from milk producers i.e. from dairy farmers; and (ii) the manufacture and sale of UHT milk. The Commission also considered the potential effects of the proposed transaction on third parties that make use of the merging parties for the provision of secondary distribution services.
18. We first deal with the procurement of raw milk from farmers.

Procurement of raw milk

Market delineation

19. The Commission concluded that the (upstream) procurement of raw milk from dairy farmers constitutes a separate relevant product market. We concur with this product market delineation.
20. With regards to the geographic scope of this market the Commission specifically considered the geographic regions where both Clover and

DairyBelle purchase raw milk. These areas are: (i) the Eastern Cape; (ii) the Free State; and (iii) the Western Cape. The Commission therefore assessed the buyer power that would accrue to the merged entity and the effect that such buyer power would have on the procurement of milk in specific geographic areas. We note that, according to the merging parties, the buying pattern of Clover is driven by certain market characteristics such as factory demand, transport costs and location of manufacturing sites. The merging parties indicated that Clover therefore seeks to purchase raw milk as close to its manufacturing sites as possible.⁴ We concur with the Commission's approach to consider the potential competition effects of the proposed transaction on raw milk purchases in specific geographic regions.

Concerns received

21. The Commission received (unsolicited) concerns from a farmer representative on the potential impact of the proposed transaction on the purchasing of raw milk from farmers. The farmers' concerns related to the removal of DairyBelle after the proposed transaction as an independent buyer of raw milk. According to this farmer representative, Clover will after the proposed transaction have a greater pool of suppliers and an even greater influence on the South African market as it will purchase greater volumes of raw milk. The farmers were specifically concerned about the impact of the proposed transaction in the geographic areas where both Clover and DairyBelle currently procure raw milk.

Commission's findings and our assessment

22. Despite the abovementioned concerns the Commission however ultimately concluded that the proposed transaction is unlikely to substantially prevent or lessen competition in the market(s) for the procurement of raw milk. The Commission found that the proposed merger is unlikely to enhance the buyer power of the merged entity in the various geographic markets for the

⁴ Letter submitted by the merging parties dated 02 October 2014.

procurement of raw milk since the proposed merger is unlikely to distort market outcomes in these markets. The reasons for this include:

22.1. In the Western Cape, Eastern Cape and Free State the merged entity will have estimated post-merger market shares of less than 20% of the total raw milk purchases in the 2013 financial year in each area.

22.2. The Commission found that even if Clover was to take over the procurement of raw milk function from DairyBelle, DairyBelle's purchases of raw milk are relatively small in each of the affected regions and it is therefore unlikely that the merged entity's purchasing power would be enhanced to an extent of distorting market outcomes.

22.3. Furthermore, the merging parties submitted that Clover does not intend to take over any of DairyBelle's raw milk supply contracts as these will remain with DairyBelle for use in respect of its retained business activities, for example the manufacturing of cheese.⁵ The merging parties submitted that more than 80% of all raw milk procured by DairyBelle is used in its cheese business.⁶ The purchases of raw milk related to the latter are not affected by the proposed transaction.

22.4. Clover currently procures raw milk on behalf of Danone and this contractual arrangement will terminate. As such the merging parties submitted that Clover will have surplus milk and Danone will be active in the market as an independent buyer of raw milk. This means that the pre-merger situation will be restored since Danone will likely replace the volumes currently purchased independently by DairyBelle for its yoghurt and UHT businesses.⁷

23. The Commission further considered if coordinated effects may arise from the proposed transaction given the alleged history of collusion in the market(s).

⁵ See letter from the merging parties to the Commission dated 10 July 2014.

⁶ See letter submitted by the merging parties dated 02 October 2014. Also see transcript page 7.

⁷ Also see transcript pages 6 to 8.

24. The Commission highlighted certain alleged past cartel activity in the milk industry. This includes a complaint referred to the Tribunal in 2006 against eight milk processors including Clover.⁸ The respondents in this matter were implicated in the direct or indirect fixing of the procurement prices of milk from producers through information exchange, price movement requests or field officers regularly exchanging price information and fixing of the prices of processed UHT milk to the retail market.⁹ It was also alleged that Clover agreed on trading conditions by artificially manipulating the market through arrangements with other processors regarding price signals and raw milk volumes.¹⁰ However, the Tribunal never decided the merits of the referral due to legal challenges, although Clover had applied for leniency in respect of certain of the allegations.¹¹ The Commission further noted that it is currently investigating complaints relating to price fixing and/or fixing of trading conditions for the procurement of raw milk by certain milk processors, brought to the Commission by various parties including farmers and milk processors. The Commission specifically noted an ongoing cartel investigation relating to a complaint of price fixing and/or fixing of trading conditions in KwaZulu-Natal brought to the Commission by DairyBelle in July 2012.¹² The alleged cartel is currently under investigation by the Cartel's Division of the Commission.

25.. For the purposes of assessing whether the proposed transaction could likely result in or increase the likelihood of coordinated effects the Commission analysed the (per litre) farm gate prices paid by producers to dairy farmers over time, i.e. it analysed the parallelism of pricing in specific geographic regions. The Commission however cautioned that any inferences drawn from this pricing analysis should be used in conjunction with all other available evidence. We shall not deal with the Commission's analysis in detail in these reasons, but provide a summary of the Commission's findings.

⁸ Tribunal case no. 103/CR/Dec06.

⁹ Alleged breach of section 4(1)(b)(i).

¹⁰ Alleged breach of section 8(d)(i), alternatively section 8(c), alternatively section 5(1).

¹¹ Refer to the Commission's media release dated 20 April 2011.

¹² DairyBelle however did not proceed with the complaint.

26. Based on the available price data for the Eastern Cape the Commission found a theoretical possibility that DairyBelle pre-merger may be constraining other processors in the procurement of raw milk in the Eastern Cape. The Commission found that DairyBelle in the past offered farmers a better price in the Eastern Cape compared to other processors and thus DairyBelle could be constraining other processors. The Commission however concluded that the proposed transaction is not likely to enhance coordinated effects in the Eastern Cape since DairyBelle manufactures cheese in its Eastern Cape manufacturing facility and would continue to procure milk independently for this purpose after the proposed transaction. (For clarity, Clover is not purchasing DairyBelle's business in the Eastern Cape.)
27. With regards to the Western Cape, the Commission indicated that the observed past pricing behaviour may be an indication of conscious parallelism. The available data suggested that firms behave interdependently, taking into account the actions of their rivals when considering their market response. The Commission also found that in the Free State the raw milk prices paid to farmers tend to closely follow each other in terms of price increases and subsequent declines.
28. However, with regards to both the Western Cape and the Free State the Commission found no price evidence that DairyBelle pre-merger has been constraining other processors in the procurement of raw milk. The Commission therefore concluded that the proposed transaction is unlikely to lead to or enhance coordinated effects in the procurement of raw milk in these geographic areas.
29. The Tribunal asked a number of questions relating to the purchasing of raw milk in various geographic areas, the prices offered to dairy farmers and how these prices are determined/negotiated, including the reasons for the differences in prices offered by the major buyers in specific regions. We furthermore requested clarity from both the Commission and the merging parties regarding the total raw milk purchase volumes per

geographic area in 2013, as well as the Commission's calculation of relevant market shares. We were satisfied with the information and explanations provided by the Commission and the merging parties.¹³

30. We have found no evidence that the proposed transaction will substantially prevent or lessen competition in the procurement of raw milk in any geographic area in South Africa.

31. We next consider the (downstream) market for the manufacturing and sale of UHT milk.

Manufacturing and sale of UHT milk

32. In line with the merging parties' submissions¹⁴ and the Tribunal's *Clover/Fonterra* decision,¹⁵ the Commission identified a horizontal overlap in the activities of the merging parties in the market for the manufacture and sale of UHT milk. The Commission further indicated that market participants submitted that the manufacture and sale of UHT milk is a separate relevant product market from the manufacture and sale of other dairy products.

33. The Commission's investigation also revealed that the larger processors of UHT milk (for example Clover, Parmalat and Woodlands) usually have one or more UHT manufacturing facility and that their products are distributed nationally. The Commission however also found that there are smaller processors that are not able to distribute products nationally because of a lack of the necessary product volume and distribution infrastructure. The Commission therefore concluded that the market is also comprised of regional producers such as Montic Dairy, Limpopo Dairy, Orange Grove and Homsek Dairy.

34. There is no need for us to take a definitive view on the exact geographic scope of this market since our conclusion regarding the competitive effects

¹³ Transcript pages 56 to 67.

¹⁴ Merger record pages 46 and 47.

¹⁵ Merger between *Clover Fonterra Ingredients (Pty) Ltd* and *Clover SA (Pty) Ltd/New Zealand Milk Products SA Ltd*, Tribunal case no. 92/LM/Nov04.

of the proposed merger remains the same whether the market for the production and sale of UHT milk is viewed nationally or regionally.

35. With regards to market concentration, the Commission considered the manufacturing capacities of the producers in this market (for both the own brands of the processors and the private brands of third parties such as retailers). The Commission found that the retailers in South Africa with their own UHT milk brands do not have facilities to manufacture/process UHT milk, hence the sustainability of their UHT brands depends entirely on the existing processors in the market with spare capacity to accommodate the retailers' needs. The existing processors include the merging parties, Parmalat, Woodlands, Coega Dairy and Dewfresh. This analysis indicated that the merged entity will have a market share of less than 30% based on 2013 production capacities.
36. Furthermore, the merging parties submitted market share information in terms of volumes of UHT milk sold and sale values for the financial year ending February 2014. According to this the merged entity will have, both in terms of volume and value of sales, market shares of less than 25%¹⁶ in a national market for the production and sale of UHT milk.
37. We further have no reason to believe that competition concerns would arise if potential narrower geographic markets than a national market are considered. As indicated above, specific players are active regionally, including Montic Dairy (Gauteng), Imbani Homsek Dairy (Free State), Limpopo Dairy (Limpopo) and Orange Grove (KwaZulu-Natal).
38. We further note that Clover and DairyBelle process and package UHT milk on behalf of a third party.¹⁷ The Commission therefore considered whether or not the proposed transaction would likely result in the foreclosure of this party's private brand. This party however assured the Commission that it is not concerned with the proposed transaction since (an) alternative source(s) of supply is/are available. The Commission therefore concluded

¹⁶ These market shares include the sales of various supermarkets with their dealer own brands such as Spar, Shoprite and Pick n Pay.

¹⁷ Transcript page 13.

that the proposed transaction is unlikely to have a negative impact on the ability of retailers to find alternative supply for UHT processing and packaging services.

39. Based on the above, the Commission concluded that the proposed transaction is unlikely to result in significant competition concerns in the market for the production and sale of UHT milk. We concur with the Commission's finding.

Provision of secondary distribution services

40. During the Commission's investigation period Danone raised concerns regarding the provision of secondary distribution services to it by Clover after the proposed merger. These secondary distribution services refer to the storage of Danone's yoghurt products in Clover's warehousing facilities and a distribution service offered at the national level. These include the transportation of products from the central warehousing and distribution centres to wholesalers and retailers including supermarkets, grocers and cafes in South Africa as well as all ancillary services thereto.
41. As background, in 1996, Clover and Danone established a joint venture that terminated in January 2010 when Clover sold its shares to Danone. In 2009, Clover and Danone entered into agreements in relation to the procurement of raw milk, the manufacture of custard and the provision of secondary distribution services by Clover to Danone in respect of yoghurt.
42. The Commission investigated the potential foreclosure of Danone after the proposed merger and found that Danone would not readily have available alternatives to Clover for the provision of secondary distribution at the required scale. The Commission found that Danone's attempts to find interim alternatives have not been successful due to the unavailability of capacity and unwillingness of logistics companies to expand capacity for a short-term period. The Commission further found that any interim foreclosure of Danone from secondary distribution services will result in significant job losses across Danone's business operations, of which the

majority relate to semi- and unskilled employees. Considering the potential impact on employment, the Commission recommended that Clover should continue to supply Danone with secondary distribution services until 30 June 2015 in accordance with contractual terms acceptable to both Danone and Clover, and thereby prevent the likely interim job losses that would occur.

43. Following the Commission's referral of the merger to the Tribunal for adjudication, Danone expressed its intention to intervene in the merger proceedings. On 12 November 2014 the merging parties' attorneys however advised the Tribunal that Danone and Clover had resolved their commercial dispute in relation to the secondary distribution services provided by Clover to Danone and that Danone would therefore not intervene in the merger proceedings. The merging parties and Danone further agreed on a condition to be imposed on the approval of the proposed transaction that addresses Danone's competition concerns.¹⁸ The Commission at the hearing confirmed that the condition as agreed to between the relevant parties, adequately addresses the Commission's concerns in relation to the post-merger provision by the merged of secondary distribution services to Danone.

44. The agreed condition - that we have imposed as a condition to approving the proposed transaction - is that Clover Industries, Clover SA and its subsidiaries shall continue to supply Danone with secondary distribution services in terms of the *Secondary Distribution and Warehousing Agreement* (as amended) between Clover and Danone until 30 June 2015.

Conclusion on effect on competition

45. We concur with the Commission's findings that the proposed transaction is unlikely to substantially prevent or lessen competition in any relevant market other than in relation to the post-merger provision of secondary distribution services by the merged entity to Danone. As indicated above, we have imposed a condition in relation to the latter.

¹⁸ Transcript pages 2 and 3.

46. The Commission did however also identify public interest, i.e. employment concerns resulting from the proposed merger. We deal with this immediately below.

Public interest

47. The Commission found that the proposed merger raises significant employment concerns, but found that the proposed transaction raises no other public interest concerns. We concur with the Commission that the proposed merger raises no public interest issues other than in relation to employment. We next deal with the employment issue.

Employment

Merging parties' submissions

48. The merging parties in their merger filing submitted that the proposed transaction "*will not result in any merger specific retrenchments*".¹⁹ They confirmed this at the hearing.²⁰ They however during the Commission's investigation phase of the merger indicated that they would agree to a one year moratorium being placed on merger-specific retrenchments as a condition to approving the proposed merger. During the merger hearing they further agreed to extend this period to a two year moratorium on merger-specific retrenchments.²¹

Commission's investigation and recommendation

49. The Commission received concerns from SACCAWU regarding the potential effect of the proposed transaction on employment in South Africa. SACCAWU was of the view that the proposed transaction is likely to result in retrenchments based on past experience with merger transactions involving Clover and recent retrenchments excises conducted by

¹⁹ Merger record, page 13. Also see the *Joint Competitiveness Report* submitted by the merging parties, merger record pages 41 and 53.

²⁰ Transcript page 21.

²¹ *Inter alia* transcript page 91.

DairyBelle in 2012. SACCAWU submitted that DairyBelle in 2012 retrenched about 350 employees²². SACCAWU further submitted that 40 of the employees were retrenched from DairyBelle's yoghurt business as DairyBelle moved the yoghurt business from Cape Town to its current location in Bloemfontein. The remaining employees were retrenched in a restructuring process across other business operations in DairyBelle's warehouse and distribution, finance, sale and risk and engineering divisions.

50. We note that although SACCAWU engaged with the Commission it did not make any submissions to the Tribunal or participate in the merger hearing.

51. The Commission informed the merging parties of the concerns raised by SACCAWU and the merging parties submitted that there would be no merger-related retrenchments since Clover is not acquiring the Cape Town facility (see paragraph 12 above). Further and in terms of the Sale of Shares Agreements, Clover indicated to the Commission that it undertakes that all the employees of the Target Businesses will be taken over in terms of Section 197 of the Labour Relations Act. With respect to the retrenchments undertaken in 2012, the merging parties submitted that these retrenchments were due to rationalisation, which was brought to the Commission's attention in 2012 in the merger between Strategos Consulting (Pty) Ltd and DairyBelle.²³ According to the Commission's Report, this matter is currently in arbitration.²⁴

52. The Commission's assessment of the potential impact on employment and the arguments that it persisted with at the hearing however were focused on evidence relating to the current proposed transaction. The Commission during its investigation of the matter found that the merging parties' own strategic documents refer to the possibility that DairyBelle's yoghurt business in Bloemfontein in the Free State will be integrated with Clover's

²² Of which 271 employees were SACCAWU members.

²³ Commission case no. 2012Jul0404.

²⁴ Also see transcript page 46.

Queensburgh manufacturing facility in KwaZulu-Natal.²⁵ The Commission engaged with the merging parties on this possible integration and the merging parties submitted that the integration of the Bloemfontein and Queensburgh facility (if it occurs) will likely be undertaken in the next three to five years. The merging parties submitted that there are no supporting documents on the consideration to integrate the business,²⁶ but at the hearing conceded that the integration is a "possibility".²⁷

53. The Commission was of the view that should the possible integration of Clover's Queensburgh business with DairyBelle's Bloemfontein yoghurt business be implemented, it would result in substantial job losses. The Commission further found that these job losses could be directly linked to the proposed merger.

54. The Commission initially also raised concerns with respect to the UHT milk business, namely that since Clover is not purchasing the Cape Town UHT milk facilities, Clover may terminate operations from the Cape Town facilities and merge with its existing UHT milk operations in Pinetown (KwaZulu-Natal) or Port Elizabeth (Eastern Cape) leading to likely retrenchments in the merged entity's UHT milk business. However, the Commission at the hearing indicated that its concerns in this regard have been alleviated by the fact that a lease agreement in respect of the UHT Cape Town facility has now been concluded for a period of five years.²⁸ The Commission only became aware of the conclusion of this agreement at the merger hearing. Thus the Commission did not persist with this issue.²⁹ We therefore do not discuss this any further in these reasons.

55. To mitigate the alleged anticipated retrenchments, the Commission initially recommended to the Tribunal that the proposed transaction should be approved on condition that no retrenchments should result from this merger, without any time limit being placed on such condition. The

²⁵ Refer to Annexure D to the merger filing for the board minutes and presentations on the proposed transaction.

²⁶ Refer to a response letter from Judd Lurie to the Commission dated 10 July 2014.

²⁷ Transcript page 47.

²⁸ Transcript pages 39 and 40.

²⁹ Transcript page 49.

Commission however, after the Tribunal made enquiries about the open-endedness of this condition,³⁰ explained that this condition should be read as a ban on merger-related retrenchments for a period of two years following the proposed merger.³¹ In addition the Commission recommended that - in the event that retrenchments did occur as a result of the integration of the merging parties' production facilities in years three to five following the proposed merger³² - the merging parties must relocate the affected "unskilled employees" to other Clover operations. The Commission's suggested conditions further included that Clover must offer "unskilled employees" that are not relocated and/or that may be retrenched as a result of the integration of the merging parties' businesses, a training or re-skilling allowance of R30 000 for use in order to attend a bona fide skills development course of the employee's choice. The employee would also have the option to receive an employee grant of R30 000 to start a small business should he/she opt to not take up the re-skilling allowance.

56. The merging parties objected to the latter employment conditions recommended by the Commission. As stated above, the merging parties however agreed to a two year moratorium on merger-related retrenchments.

Assessment

57. Having heard the arguments of both the Commission and the merging parties on potential employment effects resulting from the proposed transaction, and having asked numerous questions and raised a number of issues regarding these potential effects, the formulation, intentions and consequences of the Commission's proposed conditions for workers and the merging parties, the Tribunal on 27 November 2014 invited comments from both parties were we to place a single employment-related condition on the approval of the proposed merger that is limited in time, i.e. a three year moratorium on merger-related retrenchments.

³⁰ Transcript page 17.

³¹ Transcript page 20.

³² See transcript page 20.

58. The Commission raised no issues in relation to such employment condition being placed on the approval of the proposed merger. There is therefore no need for us to deal in these reasons with the Commission's initial sought conditions relating to the relocation and re-skilling of unskilled employees (that the merging parties objected to) since we have not imposed such conditions and the Commission raised no objection to the alternative condition that was put to them by the Tribunal.
59. The merging parties however objected to a three year rather than a two year moratorium on merger-related retrenchments.³³ They however confirmed their agreement to a two year moratorium on merger-related job losses after the proposed merger.³⁴
60. The merging parties contended that the Commission had not proven that there will be an employment loss of a considerable magnitude³⁵, or that the short-term prospects for re-employment for a substantial portion of the affected class are limited. The merging parties further stated that over time the distinction between operational and merger-specific job losses elides, referring to the Tribunal decision in *BB/Adcock*.³⁶ They further stated that the Commission undertook no assessment of the counterfactual.
61. We first deal with the issue of the relevant counterfactual.
62. We note that the merging parties did not clearly indicate in their merger filing that they will be relying on the so-called "failing firm defence", but indicated that *"it is pointed out that but for Real Beverages purchase of the Target Firms, it is likely that they would have otherwise been shut down. This is because the target firms are operating at a loss"*. The merging parties submitted the Rand value of the losses made by the Target Businesses in the last financial year, but did not submit any further information as required in the Form CC4(2) in relation to a failing firm

³³ See letter from Bowman Gilfillan dated 28 November 2014.

³⁴ Draft conditions were sent to both the Commission and the merging parties for comment.

³⁵ Referring to the Tribunal decision in *Metropolitan Holdings Limited / Momentum Group Ltd*, case no. 41/LM/Jul10, at paragraph 69.

³⁶ *BB Investment Company (Pty) Ltd / Adcock Ingram Holdings (Pty) Ltd*, case no 018713, paragraph 118.

defence.³⁷ The merging parties further at the hearing alleged that DairyBelle would have retrenched workers absent the merger.

63. In short, the merging parties put up no actual evidence in support of a failing firm defence or of DairyBelle dismissing workers absent the proposed merger, other than indicating the past financial losses being made by the Target Businesses. However, information on financial losses alone does not satisfy the failing firm doctrine.

64. We further note that Mr Fourie of DairyBelle in response to questions from the Tribunal indicated that DairyBelle, although he could not speak to the details, had "*a number of discussions with various parties*" regarding the sale of the Target Businesses.³⁸ No other representative/witness was however put up by the merging parties to provide further details. Mr Fourie further submitted that "*we [DairyBelle] would never wish to rely on the failing firm argument per se because these are public proceedings*"³⁹

65. Since the merging parties did not submit concrete evidence or put up a witness that could speak to a counterfactual other than the status quo, we shall not consider any alternative counterfactual as alleged by the merging parties.

66. We next consider the evidence from the merging parties' strategic documents in relation to an integration of facilities after the proposed transaction.

67. Counsel for the merging parties stated that Clover's board minutes of 26 November 2013, when it first considered the transaction, confirm that the location of the to be acquired yoghurt manufacturing facility from DairyBelle in Bloemfontein is not ideal. The merging parties stated that the reason for this is because this facility is not in the best milk procurement area.⁴⁰ At a later date a presentation was made to the investment

³⁷ Merger record, page 23.

³⁸ See transcript pages 74 and 75.

³⁹ Transcript page 76.

⁴⁰ *Inter alia* transcript page 26. Merger record page 615.

committee. This presentation ultimately led to the decision to proceed with the proposed transaction.⁴¹ The documents indicate that Mr. Voster, the CEO of Clover, *"advised the meeting that the integration of the Bloemfontein yoghurt facility into Clover's Queensborough facility may come sooner rather than later as it would be situated in a high milk density area [Queensborough] which is very important to Clover. However the integration project will be brought to the Committee as a separate business case"*.⁴²

68. From the above it is clear that the CEO of Clover, at the time when the proposed transaction is considered by Clover, envisages an integration of the Bloemfontein yoghurt facility and Clover's Queensborough facility and that the business rationale for this is the non-ideal location of the Bloemfontein facility from a milk procurement perspective, i.e. KwaZulu-Natal is a higher milk density area and the factory in Bloemfontein is in *"a high milk price area"*.⁴³

69. We conclude that one can infer from the merging parties' own strategic documents that the potential integration of the Bloemfontein yoghurt facility and Clover's Queensborough facility, although not approved as yet by the board, is contemplated and indeed advised by the CEO of Clover, and not mere speculation and conjecture by the Commission as alleged by the merging parties.

70. It was common cause that in order for the Tribunal to consider any potential job losses resulting from the abovementioned integration of facilities these job losses would have to be merger specific, i.e. they must be attributable to the proposed merger. Counsel for the Commission argued that without this merger there would be no facilities to integrate.⁴⁴ We concur that this is indeed so. We thus conclude that there is a clear nexus between the proposed transaction and the potential job losses

⁴¹ See Extract from Minutes of Special meeting of the Clover Investment Committee held on 25 February 2014. Merger record page 175 and following.

⁴² Merger record page 176.

⁴³ Transcript page 91.

⁴⁴ Transcript page 51.

associated with an integration of facilities as referred to in the merging parties' strategic documents.

71. With regards to the potential numbers of workers affected by an integration, although the merging parties submitted lists of potentially affected employees to the Commission, the Commission and the merging parties were in dispute regarding the skills classification of these workers. However, the merging parties at the hearing confirmed that there are currently 165 employees in Bloemfontein of which 59 are "unskilled" employees on the merging parties' definition of unskilled.⁴⁵ The Commission on its definition of unskilled argued that there are 123 "unskilled" employees in Bloemfontein. However, nothing turns on the exact number since it was common cause that there are at least 59 unskilled employees in Bloemfontein who are at risk of losing their jobs as a result of the proposed merger.

72. Regarding the mobility of the affected employees, the Commission's focus was on those employees that fall within the unskilled category. The Commission argued that the unskilled employees are much more vulnerable because if you remove them from the merged entity that may well be the end of their employment life since they have no other skill that is easily tradable with other entities. We have accepted that the prospects for re-employment of the unskilled workers are limited. The merging parties produced no evidence that shows otherwise.

73. We conclude that the potential retrenchment of at least 59 unskilled workers in a specific geographic area, i.e. Bloemfontein, will have a substantial effect on employment.

74. In *Metropolitan/Momentum* we held that "*once a prima facie ground has been alleged that a merger may not be justifiable on substantial public interest grounds, the evidential burden will shift to the merging parties to*

⁴⁵ Transcript page 77.

rebut it."⁴⁶ In this case the merging parties submitted no evidence that the public interest in preventing employment loss is balanced by an equally weighty, but countervailing public interest, justifying the job loss and which is cognisable under the Act.

75. We therefore have approved the proposed merger subject to the following employment condition: for a period of three years from the date of the Tribunal approving the proposed transaction, the merging parties will not retrench any of their employees as a result of the merger. We note that this condition that we have imposed restricts only merger-related retrenchments. Furthermore, retrenchments do not include: (i) voluntary separation arrangements; (ii) voluntary early retirement packages; and (iii) unreasonable refusals to be redeployed in accordance with the provisions of the Labour Relations Act, 1995, as amended.

76. The condition that we have imposed is furthermore limited in time. The appropriate time period for a moratorium on retrenchments must be determined on a case-by-case basis, considering the relevant facts, including the nature of the industry/markets under consideration and the integration plans and processes (in this case manufacturing facilities, with longer lead times, being integrated). We have limited the condition to a three year period (and not five years as initially suggested by the Commission) bearing in mind that as time proceeds the distinction between operational and merger specific job losses may elide. We consider this period to be appropriate in the context of this case since the merging parties themselves indicated that any job losses resulting from an integration, which we have concluded are merger-related, will be implemented over a period of more than two years, i.e. in three to five years, given that *"integration of this facility will have a long lead time"*.⁴⁷ We further note that the CEO of Clover advised that the integration *"may come sooner rather than later"* (see paragraph 67 above).

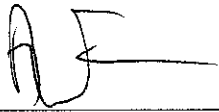
⁴⁶ *Metropolitan Holdings Limited / Momentum Group Ltd*, case no. 41/LM/Jul10, at paragraph 68.

⁴⁷ *Inter alia* transcript page 93.

77. We conclude that the imposition of a three year condition is appropriate and proportional to the employment concerns that result from the proposed merger since it balances the interests of the affected unskilled workers and the commercial interests of the merging parties.⁴⁸

CONCLUSION

78. For the reasons mentioned above, we approve the proposed transaction subject to the supply and employment conditions attached hereto market as "**Annexure A**".



Andreas Wessels

19 January 2015

Date

Andiswa Ndoni and Yasmin Carrim concurring

Tribunal researcher : Ipeleng Selaledi

For the merging parties : Jean Meijer of Bowman Gilfillan

For the Commission : Adv. Sesi Baloyi

⁴⁸ Refer to the Preamble of the Act.