

ECONOMIC DEVELOPMENT DEPARTMENT**NOTICE 156 OF 2017****COMPETITION COMMISSION****NOTIFICATION TO APPROVE WITH CONDITIONS THE TRANSACTION INVOLVING:****COUNTRY BIRD HOLDINGS PROPRIETARY LIMITED****AND****SOVEREIGN FOOD INVESTMENTS LIMITED****2016AUG0410**

The Competition Commission hereby gives notice, in terms of Rule 38 (3)(c) of the 'Rules for the Conduct of Proceedings in the Competition Commission, that it has approved the transaction involving the above mentioned firms subject to conditions as set out below:

1. On 23 August 2016, the Competition Commission (Commission) received a notice of an intermediate merger according to which Country Bird Holdings Proprietary Limited (CBH) intends to buy Sovereign Food Investments Limited (Sovereign Foods). Following the merger, Sovereign Foods will be controlled by CBH.
2. The primary acquiring firm, CBH, is a private company incorporated according to the company laws of South Africa. CBH is controlled by Synapp International Limited (Synapp) which is ultimately controlled by Mr. Kevin James who does not control any other firms in South Africa. Synapp controls one other firm in South Africa: Arbor Acers South Africa (Pty) Ltd.
3. The primary target firm, Sovereign Foods, is a public company listed on the Johannesburg Stock Exchange and hence not controlled by any firm. Sovereign Foods directly and indirectly wholly owns Sovereign Food Industries Proprietary Limited and Crown Chickens Proprietary Limited.

4. The proposed merger is a hostile takeover in that CBH has made an unsolicited offer directly to the shareholders of Sovereign Foods without the endorsement of Sovereign Foods management. In this regard, the two parties to the merger have not signed a merger agreement and it is not clear what exact percentage CBH will own in Sovereign Foods when the merger is concluded.
5. CBH is a fully integrated chicken producer with its head office in Johannesburg. In addition to South Africa, CBH has operations in Botswana, the DRC, Mozambique, Namibia, Nigeria, Swaziland, Zambia and Zimbabwe. CBH produces chicken products from three production sites in Bloemfontein in the Free State and Klerksdorp and Mahikeng in the North West. Each site has a parent breeding operation, hatchery, feed mill, abattoir, and plant based factory shop.
6. Sovereign Foods is a fully integrated poultry business in South Africa with business units comprising, *inter alia*, breeding, hatchery, broiler operation, feed mill, processing plant and a sales and marketing unit. Sovereign Foods supplies both fresh and frozen chicken portions. Sovereign Foods also has a value added plant which manufactures fully cooked chicken. Sovereign Foods is the only supplier of this product to its various major customers. Sovereign Foods recently acquired the abattoir business of Quantum Foods Proprietary Limited, situated in Hartbeespoort, North West. Prior to this, Sovereign Foods' primary operation was based in Uitenhage, Eastern Cape.
7. Both parties are vertically integrated poultry producers, which raises horizontal overlaps in several levels of the market as well as some potential sub-markets. The Commission has focused on the primary overlap which is in the production and supply of chicken products. The Commission's assessment however focuses on frozen chicken as opposed to fresh chicken as this is primarily where the merging parties' activities overlap. The merger also raises vertical overlaps due to CBH's activities in Grand Parent/Parent chicks and as a supplier of distribution services. The Commission therefore concluded on the following relevant markets:
 - 7.1. The broad market for chicken meat production in South Africa; and
 - 7.2. The market for the production and supply of frozen chicken products in South Africa.

8. The Commission has not endorsed the approach to the market definition which includes segmenting the market according to customer groups – the Commission is of the view that this approach is unlikely to be reflective of competition dynamics in the market as the underlying products are largely the same, even across different customer groups.
9. Based on market share data submitted by the respective merging parties as well as the market shares published by the Department of Agriculture, Forestry and Fisheries, it is clear that Astral Operations Limited (Astral) and RCL Foods Consumer (Pty) Ltd (RCL) are the two market leading firms in the South African poultry market. The market positions occupied by RCL and Astral do not change appreciably even if imports are included in the market. With each version of the market shares, the merging parties are minor players in the market with market shares of less than 15%. The low market share that will be attributable to the merged entity post-merger suggests that the merger is not likely to substantially prevent or lessen competition in any of the relevant markets.
10. Notwithstanding the Commission's approach to market definition, the Commission also considered the likely impact of the merger on the different market segments proposed by the merging parties. In the market segments for quick service restaurants (QSR) such as KFC, Hungry Lion and the like, and the market for the supply to restaurants, the merged entity will have a market share not exceeding 15% in each market segment.
11. In the other market segments such as retail/wholesale and independent distributors, the merged entity will have a market share of less than 20%, and will face competition from firms such as Astral, Rainbow, Daybreak and Chubby. The only market segment where the merged entity would have a market share of more than 20% is in the supply to Food Services/Manufacturing however even in this market, RCL remain the market leader while Astral will also remain active in the market. It is unlikely that the merged entity would be able to exercise market power in any of these market segments.
12. The Commission has also found that customers are likely to have some countervailing power and that imports play a prominent role in some of the domestic markets and that this is likely to continue to grow. It appears that the market may be characterised by high barriers to entry, however it does not appear that this merger will increase barriers to entry. The Commission

is therefore of the view that the merger is unlikely to substantially prevent or lessen competition.

13. Sovereign Foods has made extensive submissions regarding the impact of the merger on employment at its business and also at the businesses of its suppliers. In addition, the Commission also received more than one hundred Notices of Intention to Participate from the employees of Sovereign Foods which are largely opposed to the merger. Sovereign Foods submits that the merger will result in job losses as CBH uses a different business model that relies on substantially less employees. In dealing with this concern, CBH has agreed to a merger remedy which will ensure that there will be no merger specific retrenchments in perpetuity. The Commission is of the view that the proposed remedy will be sufficient to address the concerns regarding possible job losses.
14. Sovereign Foods also made submissions regarding the likely impact that changing the Sovereign Foods business model would have on Sovereign Foods' commercial viability. Sovereign Foods submits that changing to a business model similar to that used by CBH may compromise the commercial viability of Sovereign Foods in the future. The Commission is of the view that it may not have the authority to impose a particular business model on an acquiring firm or merged entity if it is unrelated to competition or public interest concerns. The commercial viability of Sovereign Foods post-merger is the concern of CBH; the Commission is of the view that it does not have jurisdiction to direct CBH on how to maintain such commercial viability. Even though CBH had indicated that it is amenable to a condition ensuring that it does not alter this aspect of the Sovereign Foods business model, the Commission is of the view that this kind of condition is unwarranted.
15. The Commission also received a concern from one of Sovereign Foods' suppliers suggesting that it may lose the business of Sovereign Foods post-merger and this could have a negative impact on its business and may cause it to retrench some staff. The Commission is of the view that CBH has no incentive to not purchase from Sovereign Foods' suppliers apart from pure commercial reasons. If, at the expiry of the contracts, CBH decides to purchase from other suppliers, it may be because it has received a better price, better quality, better service or any other commercial dynamic which may result from competitive interactions between

competitors. CBH would have no other incentive to not purchase from a particular supplier as there is no overlap in their activities.

16. The Commission also considered the impact of the merger on an empowerment deal that was being proposed by Sovereign Foods pre-merger. Particularly, CBH and other shareholders in Sovereign Foods had voted against a proposed empowerment prior to the filing of the merger. The Commission proposed that CBH consider, as a condition to the merger, a remedy that would ensure that CBH will put in place a similar deal post-merger if it has the necessary shareholding enabling it to do so. CBH submitted that it was supportive of empowerment initiatives and that it would support the empowerment deal as long as it has the shareholding required to approve the deal. The Commission is satisfied that this proposed condition will ensure that the merger does not result in a dilution of HDI shareholding in the relevant markets.
17. Sovereign Foods has rejected all the conditions that have been put on the table by CBH and maintains that the only viable option is a prohibition of the merger. The Commission has not found any evidence that suggests that a prohibition of the proposed merger is warranted. The Commission is of the view that the merger is unlikely to substantially prevent or lessen competition.
18. The Commission has considered all the proposed conditions and is of the view that they address the public interest concerns identified. Most importantly, it should be noted that CBH has agreed to the following public interest conditions: (1) No job losses for an indefinite period; and (2) Introduction of B-BBEE shareholding in Sovereign Foods up to a level similar to what would have resulted from the initial empowerment deal within two years of CBH acquiring the necessary shareholding in Sovereign Foods in order to approve the deal. It is for these reasons that the Commission is satisfied that the proposed conditions will ensure that the proposed merger does not result in any negative effects on all the public interest concerns identified above.
19. The Commission therefore approves the merger subject to the conditions attached as **Annexure A**.

ANNEXURE A**COUNTRY BIRD HOLDINGS (PROPRIETARY) LIMITED****AND****SOVEREIGN FOOD INVESTMENTS LIMITED****CASE NO. 2016AUG0410**

CONDITIONS

1. INTERPRETATION

- 1.1 The following terms shall have the meaning assigned to them hereunder and cognate expressions shall have corresponding meanings, namely:
- 1.1.1 “**Act**” means the Competition Act 89 of 1998, as amended;
- 1.1.2 “**Approval Date**” means the date referred to in the Commission’s Merger Clearance Certificate (Form CC15);
- 1.1.3 “**B-BBEE**” means Broad-Based Black Economic Empowerment as defined or envisaged in the Broad-Based Black Economic Empowerment Act 53 of 2003, as amended;
- 1.1.4 “**CBH**” means Country Bird Holdings (Proprietary) Limited;
- 1.1.5 “**Commission**” means the Competition Commission of South Africa, a statutory body established in terms of section 19 of the Act;
- 1.1.6 “**Conditions**” mean the conditions as set out herein;

- 1.1.7 “**Days**” means any day other than a Saturday, Sunday or official public holiday in the Republic of South Africa;
- 1.1.8 “**Employees**” mean any permanent employee or employee on a fixed term contract, employed by the Merging Parties in South Africa, including employees employed through a temporary employment service as that term is defined in the LRA and who fall within the ambit of section 198A of the LRA;
- 1.1.9 “**Historically Disadvantaged Persons**” means historically disadvantaged persons within the meaning of section 12A(3)(c) of the Act;
- 1.1.10 “**Implementation Date**” means the date, occurring after the Approval date, on which the merger is implemented by the Merging Parties;
- 1.1.11 “**LRA**” means the Labour Relations Act No. 66 of 1995, as amended;
- 1.1.12 “**Merger**” means the acquisition of control by CBH over Sovereign Foods, notified as an intermediate merger to the Commission under case number 2016Aug0410;
- 1.1.13 “**Merging Parties**” means CBH and Sovereign Foods;
- 1.1.14 “**Sovereign Foods**” means Sovereign Food Investments Limited and all its subsidiaries;
- 1.1.15 “**Threshold Shareholding**” means the shareholding in Sovereign Foods necessary for CBH to approve the B-BBEE deal contemplated in clause 4 below; and
- 1.1.16 “**Tribunal**” means the Competition Tribunal of South Africa as established in terms of section 26 of the Act.

2. RECORDAL

- 2.1 On 22 August 2016, CBH and Sovereign Foods submitted separate notifications of the Merger to the Commission.
- 2.2 The Commission’s investigation of the Merger found the following public interest concerns:

- 2.2.1 As Sovereign Foods is head-quartered in Uitenhage, Eastern Cape, an area with substantial unemployment, any job losses as a result of the Merger will have a negative effect on employment;
- 2.2.2 CBH currently outsources the business of growing chickens from day-old chicks to broilers ready for slaughter. Sovereign Foods largely does not make use of contract growers (outsourcing) but primarily insources the growing function. If CBH introduced a contract grower model in respect of Sovereign Foods, it is likely to negatively affect the employees of Sovereign Foods;
- 2.2.3 A purpose of the Act is the promotion of the greater spread of ownership of the economy by Historically Disadvantaged Persons. Although the Commission reserves its views on the rationale for Sovereign Foods attempting to implement an empowerment transaction, it is clear that CBH does not support this particular transaction, although it is supportive of transformation in general. The Commission wishes to ensure that transformation is achieved in the business of Sovereign Foods regardless of its ownership.
- 2.3 In order to remedy the abovementioned negative impact on public interest, the Commission hereby imposes the Conditions as set out below.

3. **EMPLOYMENT**

- 3.1 The Merging Parties shall not retrench the Employees as a result of the Merger.
- 3.2 For the sake of clarity, retrenchments do not include (i) voluntary separation arrangements; or (ii) voluntary early retirement packages, (iii) unreasonable refusals to be redeployed in accordance with the provisions of the Labour Relations Act 66 of 1995; (iv) resignations or retirements in the ordinary course of business; (v) retrenchments lawfully effected for operational requirements unrelated to the Merger; (vi) terminations in the ordinary course of business, including but not limited to, dismissals as a result of misconduct or poor performance; and (vii) any decision not to renew or extend a contract of an employee on a fixed term contract.

4. **B-BBEE**

- 4.1 CBH will ensure compliance by it and all companies controlled by it with all applicable B-BBEE legislation.
- 4.2 It is recorded that it is the intention of CBH to acquire 100% of the issued shares in Sovereign Foods. If CBH acquires the Threshold Shareholding, CBH will propose a B-BBEE transaction that results in the transfer the same percentage of the issued shares in Sovereign Foods to Historically Disadvantaged Persons as would have been achieved through the deal proposed by Sovereign Foods on the same terms.
- 4.3 The B-BBEE transaction referred to in paragraph 4.2 will be implemented within 2 (two) years of the date on which CBH acquires the Threshold Shareholding.

5. **APPLICATION OF CONDITIONS**

- 5.1 The Conditions (other than the Condition set out in paragraph 4.2) will apply if CBH, together with its Concert Parties, obtains control over Sovereign Foods by acquiring 50% plus 1 of the issued ordinary shares in Sovereign Foods.

6. **MONITORING**

- 6.1 The Merging Parties shall circulate a copy of the Conditions to the Employees and their relevant trade unions or employee representatives within 5 (five) Days of the Approval Date.
- 6.2 As proof of compliance thereof, a senior official of the Merging Parties shall within 10 (ten) Days of circulating the Conditions, submit an affidavit attesting to the circulation of the Conditions and provide a copy of the notice that was sent to the Employees.
- 6.3 CBH shall inform the Commission of the Implementation Date within five (5) Days of its occurrence.
- 6.4 CBH shall notify the Commission within 10 (ten) Days of the date on which CBH acquires the Threshold Shareholding.

- 6.5 CBH shall notify the Commission within 20 (twenty) Days of the date on which The B-BBEE transaction is implemented and provide proof of the implementation.
- 6.6 An apparent breach by the Merging Parties of any of the Conditions shall be dealt with in terms of Rule 39 of the Rules for the Conduct of Proceedings in the Commission.
- 6.7 The Merging Parties may at any time, on good cause shown, apply to the Commission for the Conditions to be lifted, revised or amended. Should a dispute arise in relation to the variation of the Conditions, the Merging Parties may apply to the Tribunal, on good cause shown, for the Conditions to be lifted, revised or amended.
- 6.8 All correspondence in relation to these conditions must be submitted to the following e-mail address: mergerconditions@compcom.co.za

Enquiries in this regard may be addressed to Manager: Mergers and Acquisitions Division at Private Bag X23, Lynnwood Ridge, 0040. Telephone: (012) 394 3298, or Facsimile: (012) 394 4298