

DEPARTMENT OF ECONOMIC DEVELOPMENT

NO. 1352

17 OCTOBER 2019

COMPETITION COMMISSION

NOTIFICATION TO APPROVE WITH CONDITIONS THE TRANSACTION INVOLVING:

COUNTRY BIRD HOLDINGS (PTY) LTD

AND

OPTI AGRI (PTY) LTD

CASE NUMBER: 2018JUL0020

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 set out below:

1. On 09 July 2018, the Competition Commission (the Commission) received notice of an intermediate merger wherein Country Bird Holdings (Pty) Ltd (CBH) intends to acquire the entire issued share capital of Opti Agri (Pty) Ltd (Opti Agri) from its current shareholder, NWK Holdings Limited (NWK).
2. The primary acquiring firm is CBH, a private company incorporated in South Africa. CBH is a fully integrated chicken producer and controls a variety of different entities with activities at various levels of the chicken supply chain including breeding, processing and distribution of poultry in South Africa. The activities of CBH in South Africa include the production of animal feed and day-old chicks (DOCs). CBH is controlled by Synapp International Limited (Synapp), a company incorporated in the British Virgin Islands.
3. The primary target firm is Opti Agri, a wholly owned subsidiary of NWK. Opti Agri comprises NWK's poultry and animal feed businesses, which were previously held separately by NWK

through Opti Chicks and Opti Feeds respectively before being combined under Opti Agri. Opti Chicks produces day-old chicks, which it sells on the open market.

4. The Commission considered the activities of the merging parties and found that there are overlaps broadly in relation to the production and supply of animal feed as the merging parties manufacture and supply feed for ruminant and monogastric domestic animals. The Commission found that the merging parties' activities overlap with regard to the manufacture and supply of specific types of feeds for broiler chickens, layer chickens as well as sheep and cattle feed. Furthermore, the proposed transaction also has a vertical aspect in relation to the supply of DOCs post-merger.
5. In relation to animal feed, the Commission assessed the impact of the proposed transaction on the broad market for the manufacture and supply of animal feed for all domestic animals including poultry, cattle and sheep as well as dairy feed and on the narrow market for the production and supply of poultry feed (this includes broiler feed, breeder feed and layer feed), as a worst case scenario.
6. The Commission's investigation found that although animal feed can be distributed on a national basis, generally animal feed, including poultry feed, is distributed to parties within an average of 250km from the point of manufacture. Consequently, although leaving the precise geographic market definition open, the Commission assessed the impact of the merger on each of the aforementioned markets on a regional basis, namely the Northern Region, which comprises the Gauteng, North West, Mpumalanga and Limpopo provinces.
7. In line with the market definition, the Commission found that the merging parties' combined market shares in the production and supply of animal feed in the Northern Region would be less than 15% based on the quantity of animal feed produced in the 2017/2018 financial year. In relation to the market for the production and supply of poultry feed, the Commission found that the merging parties will have a post-merger market share of less than 20%, with a minimal accretion based on the quantity of feed sold in the 2017/2018 financial year. The Commission found that post-merger, the merged entity would continue to face competition from other AFMA and non-AFMA producers of broiler feed in the Northern Region such as

AFGRI, Azlu Enterprises, Barnlab, Brencco Feeds, De Heus, Meadow Feeds, Opti Feeds and Nutri Feeds. With regard to wild animal feed, the Commission's investigation found that the merged entity will continue to be constrained by a significant number of AFMA members based in the Northern Region, namely, AFGRI, Alzu Enterprises, Nova Feeds, Brencco Feeds, De Heus, Meadow Feeds, Nova Feeds and Quantum Foods. Non-AFMA members that will continue to constrain the merging parties in the Northern Region Wes Voere, Sukses Voere, Safari Feeds, Boskorse, Rooi Ivoor, Wild Winkel and Ebaro.

8. The proposed transaction only has limited vertical effects in that both CBH and Opti Agri are producers of DOCs but that CBH consumes all its DOCs internally whereas Opti Agri supplies its DOCs in the open market. Therefore, the Commission only considered whether the proposed transaction would raise possible input foreclosure concerns for the current customers of Opti Agri who might lose supply of DOCs (from Opti Agri) in the event that the merged entity prioritises internal supply.
9. In this regard, the Commission notes that there are no upstream suppliers that currently supply DOCs to either of the merging parties. The Commission therefore did not consider any customer foreclosure effects as it was unnecessary to do so in the circumstances. For input foreclosure assessment, the Commission did not consider CBH supply of DOC because all its DOC supply are captive sales which are not available to third parties in the downstream market. The Commission found that in the upstream market, Opti Agri accounts for less than 15% of the market. There are other major players such as National Chix, Eagle Pride's Hatchery, Keystone Hatchery and Lufafa Hatchery who account for the remaining 90% who will continue to constrain the merged entity. Given the lack of ability to foreclose, the Commission has not considered any incentives for foreclosure.
10. Based on the above, the Commission concluded that the proposed transaction was unlikely to substantially prevent or lessen competition in the relevant markets.
11. During its investigation of the proposed transaction, the Commission received a concern from one customer of Opti Agri in relation to Opti Agri's supply of DOCs pursuant to the implementation of the proposed transaction. The customer was worried about the quality of

DOCs it will receive from Opti Agri in the event that Opti Agri will switch from its current breed of DOCs to that of the acquiring firm. The third party subsequently withdrew its complaint.

12. The Commission has not found any compelling evidence to suggest that switching from the Cobb breed (which Opti Agri used prior to the merger) to the Arbor Acres breed, which CBH uses, will in any way reduce the quality of Opti Agri's DOCs. In this regard, the Commission notes that the Arbor Acres is currently used by reputable companies such as Pick 'n Pay, KFC, Nandos and Shoprite Checkers, which are the end-customers of CBH. The Commission also notes that besides a concern from the aforesaid third party, none of the customers of the merging parties have raised any concerns with the proposed transaction.
13. The Commission is of the view that Opti Chicks' switch to the acquiring firm's breed is unlikely to result in any competition concerns as CBH has reiterated that it has no intention to stop supplying DOCs into the open market. The only difference is that from May 2019, the breed will change to Arbor Acres instead of Cobb. Moreover, for those customers who do not wish to switch to the Arbor Acres breed, the merging parties have submitted that the Cobb breed is therefore likely to be available and supplied by Opti Chicks until around April 2019. In this regard, the Commission found that if any of Opti Agri's customers wish to end the relationship with Opti Agri because of the change of breed, there are various other suppliers who will continue to supply the Cobb breed. These suppliers include Eagle's Pride, Lufafa Hatchery, Quantum Foods and Keystone Hatchery amongst others.
14. In light of the above, the Commission is of the view that the proposed transaction is unlikely to result in any substantial prevention or lessening of competition in any relevant market.

Public interest

15. Regarding public interest, the Commission received a concern from the National Union of Food Beverage Wine Spirits and Allied Workers (NUFBWSAW) in relation to the target firm's employees' collective bargaining rights following the implementation of the proposed transaction. NUFBWSAW was concerned that in the absence of organisational rights at the Target Firm post-merger, the Affected Employees would lose the ability to bargain

collectively through NUFBWSAW, on issues pertaining to their employment terms and conditions, in particular, pension fund benefits.

16. In order to mitigate the concerns raised by NUFBWSAW, the merging parties' made a number of commitments, including that the merger will not result in any job losses or material changes to the affected employees' current terms and conditions of employment; that NUFBWSAW will be granted organisational rights at the Target Firm post-merger in terms of the guidelines and thresholds of the grain industry bargaining council applicable prior to the Implementation date; that the Affected Employees' membership of the Vuka Risk Solutions funeral scheme will continue on the same terms and conditions as they enjoy pre-merger, and further that the affected employees will transfer to the Alexander Forbes Retirement Fund.
17. In view of the foregoing, and in order to address the employment concerns raised in the Merger, the Commission approached the merging parties to commit to some of their employment related commitments being made into the conditions. The Merging Parties have accordingly agreed to the conditions.
18. The proposed merger is unlikely to raise any other public interest concerns.
19. The Commission therefore approves the proposed transaction subject to the conditions attached hereto as **Annexure A**.

**ANNEXURE A
COUNTRY BIRD HOLDINGS (PTY) LTD**

AND

OPTI AGRI (PTY) LTD

CASE NUMBER: 2018JUL0020

CONDITIONS

1. DEFINITIONS

1.1. The following expressions shall bear the meanings assigned to them below and cognate expressions bear corresponding meanings:-

1.1.1. **"Affected Employees"** means all employees who are employed by Opti Agri post-merger and who are members of NUFBWSAW;

1.1.2. **"Alexander Forbes Retirement Fund"** means the umbrella pension fund to which the Acquiring Firm's Employees belong and to which, post-merger, the Affected Employees will belong;

1.1.3. **"Approval Date"** means the date referred to on the Commission's Clearance Certificate;

1.1.4. **"Acquiring Firm"** means Country Bird Holdings (Pty) Ltd ("CBH");

1.1.5. **"Commission"** means the Competition Commission of South Africa;

1.1.6. **"Conditions"** means the conditions set out herein, agreed to by the Merging Parties and the Commission;

1.1.7. **"Days"** means any calendar day which is not a Saturday, Sunday or an official holiday in South Africa;

1.1.8. **"Implementation Date"** means the date, occurring after the Approval Date, on which the Merger is implemented by the Merging Parties;

1.1.9. **"Merger"** means the proposed acquisition by of Opti Agri by CBH;

1.1.10. **"Merging Parties"** means CBH and Opti Agri, jointly;

1.1.11. **"Merged Entity"** means the entity that will exist after the implementation of the Merger;

1.1.12. **"NUFBWSAW"** means National Union of Food Beverage Wine Spirits and Allied Workers being a trade union that currently represents a substantial number of the employees of the Target Firm;

1.1.13. **"Pension Funds Act"** means the Pension Funds Act No. 24 of 1956;

1.1.14. **"Recognition Agreement"** means the agreement to be concluded between the Merging Parties and NUFBSAW granting, *inter alia*, NUFBSAW organisational rights at the Target Firm;

1.1.15. **"Target Firm"** or "Opti Agri" means Opti Agri (Pty) Ltd; and

1.1.16. **"Tribunal"** means the Competition Tribunal of South Africa.

2. RECORDAL

2.1. On 09 July 2018, the Commission received notice of the Merger.

2.2. The Merging Parties notified the Commission that there are no public interest concerns arising as a result of the Merger. However, the Commission received a concern from NUFBWSAW in relation to collective bargaining at the Target Firm post-merger. In particular, NUFBWSAW was concerned that post-merger, the Acquiring Firm may not allow the Affected Employees to maintain their current affiliation to NUFBWSAW due to NUFBWSAW being denied organisational rights at the Target Firm. NUFBWSAW was further concerned that in the absence of organisational rights at the Target Firm post-merger, the Affected Employees would lose the ability to bargain collectively through NUFBWSAW, on issues pertaining to their employment terms and conditions, in particular, pension fund benefits.

2.3. In order to mitigate the concerns raised by NUFBWSAW, the Merging Parties' made a number of commitments, including that the Merger will not result in any job losses or material changes to the Affected Employees' current terms and conditions of employment; that NUFBWSAW will be granted organisational rights at the Target Firm, post-merger in terms of the guidelines and thresholds of the grain industry bargaining council applicable prior to the Implementation date; that the Affected Employees' membership of the Vuka Risk Solutions funeral scheme will continue on the same terms and conditions as they enjoy pre-merger; and further that the Affected Employees will transfer to the Alexander Forbes Retirement Fund.

2.4. In view of the foregoing, and in order to address the employment concerns raised in the Merger, the Commission approached the Merging Parties to commit to some of their employment related commitments being made into the Conditions. The Merging Parties have accordingly agreed to the Conditions.

3. CONDITIONS

3.1. The Target Firm will use reasonable endeavours to conclude a Recognition Agreement with NUFBWSAW within 90 (ninety) Days of the Approval Date, granting NUFBWSAW

organisational rights at the Target Firm based on the same thresholds and related rights which apply to the main agreement of the grain industry bargaining council.¹

3.2. Within 30 (thirty) Days of the Implementation Date, the Acquiring Firm shall initiate the transfer of the Affected Employees to the Alexander Forbes Retirement Fund. It is recorded that the transfer of the Affected Employees to the Alexander Forbes Retirement Fund is required to be performed in terms of section 14 of the Pension Funds Act.

3.3. CBH shall not alter any material terms of Opti Agri's employees' current employment as a result of the merger.

3.4. The Acquiring Firm shall ensure that the Affected Employees' membership of the Vuka Risk Solutions funeral scheme continues on the same terms and conditions as they currently enjoy pre-merger.

4. MONITORING OF COMPLIANCE WITH THE CONDITIONS

4.1. The Merging Parties shall inform the Commission of the Implementation Date within 10 (ten) Days of it becoming effective.

4.2. The Target Firm shall circulate a copy of the Conditions within 10 (ten) Days of the Approval Date to all the employees of the Target Firm in South Africa, NUFBWSAW and the employee representative of the Target Firm. By no later than 10 Days from the Approval Date, the Target Firm shall provide the Commission with an affidavit deposed to by the Target Firm's Chief Executive Officer, attesting to the circulation of the Conditions and attaching a copy of the said notice.

4.3. Within 10 (ten) Days of the signature of the recognition agreement contemplated in clause 3.1 above, the Target Firm shall provide the Commission with a copy of the signed recognition agreement.

¹ As stipulated in paragraphs 4.3 and 4.5 of the current Recognition and Collective Bargaining agreement concluded by and between the Employers Organisation for the Grain Industry and FAWU, Solidariteit and NUFBWSAW.

4.4. Within 10 (ten) Days of procuring the transfer of the Affected Employees contemplated in clause 3.2 above, the Acquiring Firm shall provide the Commission with an affidavit deposed to by its Chief Executive Officer, attesting to the transfer of all of the Affected Employees to the Alexander Forbes Retirement Fund.

5. GENERAL

5.1. All correspondence in relation to these Conditions must be submitted to the following e-mail address: mergerconditions@compcom.co.za.

5.2. In the event that the Commission discovers that there has been an apparent breach by the Merging Parties of these Conditions, this shall be dealt with in terms of Rule 37 of the Rules for the Conduct of Proceedings in the Tribunal, read together with Rule 39 of the Rules for the Conduct of Proceedings in the Commission.

5.3. 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 or the Commission may apply to the Tribunal, on good cause shown, for the Conditions to be lifted, revised or amended.

Enquiries in this regard may be addressed to Manager: Mergers and Acquisitions Division at Private Bag X23, Lynnwood Ridge, 0040. Telephone: (012) 394 3755, or Facsimile: (012) 394 4755.