COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No:32/LM/MAR12
(014787)

In the matter between:

Boxer Super Stores (Pty) Ltd	Acquiring Firm
And	
The Target Firms under the control of Metcash Trading Africa (Pty) Ltd	Target Firm

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Panel	:	Norman Manoim (Presiding Member), Yasmin Carrim (Tribunal Member) Andiswa Ndoni (Tribunal Member)
Heard on	:	04 July 2012
Order issued on	:	04 July 2012
Reasons issued on	:	19 July 2012

Reasons for Decision

Approval

[1] On 4 July 2012 the Competition Tribunal ("Tribunal") unconditionally approved the large merger between Boxer Super Stores (Pty) Ltd and the target firms under the control of Metcash Trading Africa (Pty) Ltd. The reasons for approving the proposed transaction follow below.

Parties to transaction

[2] The primary acquiring firm is Boxer Super Stores (Pty) Ltd ("Boxer"), a company incorporated in terms of the company laws of the Republic of South Africa. Boxer is a wholly owned subsidiary of Boxer Holdings (Pty) Ltd, which in turn is wholly owned by Pick 'n Pay Holdings Limited ("Pick 'n Pay").

[3] The primary target firms are the Cofimvaba, Giyani, Hebron, Lusikisiki, Maclear, Matatiele, and Middleburg Metro Cash and Carry Stores ("the target firms"). These stores are controlled by Metcash Trading Africa (Pty) Ltd ("Metcash"), a company incorporated in terms of the company laws of the Republic of South Africa.

Activities of merging parties

[4] Boxer has four retail divisions, namely Superstores, Build, Super Liquors and Punch, but for the purposes of this transaction, Boxer's relevant activities are those of its Superstores divisions. Stores in this division operate primarily as retailers of groceries and general merchandise. The division also operates a few hybrid retail-wholesale stores.

[5] The target firms have historically been wholesalers of groceries and general merchandise in the towns in which they are located. In recent years, these stores have been converted into hybrid stores able to accommodate retail sales.

Proposed transaction and rationale for transaction

[6] The proposed transaction entails Boxer acquiring the target firms from Metcash as going concerns. Boxer will thus acquire sole ownership and control of the seven target firms.

[7] According to Boxer, it wishes to enter the market for the wholesale of groceries and general merchandise products, and the proposed transaction provides it with such an opportunity.

[8] From Metcash's perspective, it is selling its stores in a piece-meal fashion to ease its current financial difficulties, and to meet its debts in a manner that mitigates the risk of significant financial losses to its investors. Other stores are being sold to other buyers.

Relevant markets and impact on competition

[9] In defining the relevant product market the Commission followed the Tribunal's decisions in *Massmart/Jumbo*[1] and *Masscash/Finro*[2] where it was held that wholesale and retail constitute sub-markets in the broader market for groceries and general merchandise. While dedicated retail and wholesale outlets do not exert competitive constraints on each other as their target customers and mode of operation are different, hybrid stores (i.e. stores with both a retail and a wholesale component) are able to exert competitive constraints in both sub-markets. In the retail market, this competitive constraint is limited to the proportion of the hybrid's sales that are to retail customers, and likewise for the wholesale market.

[10] Given that Metro has converted its wholesale stores into hybrids, the Commission assessed each individual target firm to determine the degree to which it competes in the grocery and general merchandise retail market, and whether it could be classified as a retail hybrid store. Towards this end the Commission used its field investigations and the factors that distinguish retail and wholesale stores, such as the location of the store, the format of display and pricing, the presence of service departments such as a bakery, and the revenue split between wholesale and retail stores. The Commission determined that all the target firms except Cofimvaba[3] could be classified as retail hybrids, i.e. predominately engaged in retail activities. The Commission concluded that the relevant markets are:

- the retailing of grocery and general merchandise in Giyani town;

[1] Case number: 39/LM/Jul01
[2] Case number: 04/LM/Jan09
[3] Note that the Commission did not make a determination regarding the Hebron and Maclear Metro stores because Boxer does not have any presence in those two towns.

- the retailing of grocery and general merchandise in Middleburg CBD;
- the retailing of grocery and general merchandise in Cofimvaba town;
- the retailing of grocery and general merchandise in Lusikisiki town;
- the retailing of grocery and general merchandise in Matatiele town; and
- the wholesaling of grocery and general merchandise in Cofimvaba and the towns within a radius of 80-120km of Cofimvaba.

Horizontal Analysis

a. Giyani, Middleburg, Lusikisiki and Matatiele

[11] The Commission found that there is a horizontal overlap in the activities of the merging parties in Giyani, Middleburg CBD, Lusikisiki and Matatiele. The merging parties' combined, post-merger shares in these markets are 30%, 38%, 37% and 21% respectively. However, the merged entity will still face competition from other national retailers who operate on an equivalent scale to Boxer and Metro such as Spar, Shoprite and Rhino, who all have market shares in the 15-25% band. In addition, the merged entity will also face competition from a number of smaller retailers. The Commission thus found that consumers will have viable alternatives if the merged entity increases its prices. Furthermore, the availability of other retailers in a market where retailers compete for customers based on price, affords consumers in these towns a certain degree of countervailing power. The Commission thus concluded that the merger is unlikely to lead to a substantial lessening or prevention of competition in these markets.

b. Cofimvaba

[12] In Cofimvaba there is a limited overlap between Metro and Boxer's activities in the retail of groceries and general merchandise market because the Metro store, although classified as a wholesale hybrid, has minimal retail activities. This Metro is, however, predominately a wholesaler. The store has a warehouse design, bulk packaging and

pricing, no service departments aimed at retail customers, and it is located some distance from the CBD and importantly the taxi rank. Boxer has two retail stores in Cofimvaba, both with the competitive advantage of being located in close proximity to a taxi rank.[4] The merged entity's combined, post-merger market share is 54%, and it will only face competition from four independent retailers, namely Buzi (16%), Save Rite (6%), Evergreen (16%) and Eastern Cash and Carry (8%). Although the Cofimvaba Metro has no service departments, thus lacking a key characteristic to compete as a retailer, the Commission argued that it could become an effective retail competitor given its strategic direction. The Commission was therefore concerned that the transaction may be removing a potential effective competitor in the retail market.[5]

[13] Furthermore, these independent retailers source most of their grocery products from Metro. However, since December 2011, these retailers have started switching to alternative suppliers located in Queenstown because of stock shortages at the Cofimvaba Metro.[6] The Commission was concerned that if, as the merging parties submitted, the Metro is converted into a hardware store post-merger,[7] these retailers will be forced to source all their stock from wholesalers in Queenstown, which will place upward pressure on their prices and adversely affect their ability to remain competitive. The Commission was therefore concerned that the transaction would result in the removal of an effective supplier for Boxer's competitors in Cofimvaba.[8]

[14] The Commission determined that the counterfactual, however, is that the Cofimvaba Metro store will cease trading altogether, and the independent retailers will still be forced to source their stock from wholesalers in Queenstown. The Metro store is a failing firm. Metro is in financial distress and Metcash's strategic documents indicated that all unsold stores will be closed imminently.[9] The Metcash representative confirmed at the hearing

[4] Commission's Competition Report, page 47
[5] Transcript, page 3
[6] Commission's Competition Report, page 49
[7] Commission's Competition Report, page 50; Trancript, page 8
[8] Transcript, page 3
[9] Commission Competition Report, pages 51-52

that all unsold stores will be closed by the end of July 2012.[10] The merging parties submitted that the Cofimvaba store is not commercially viable as a wholesaler. It has incurred losses in February, March and April this year of R10 000, R86 000 and R64 000 respectively. The merging parties further submitted that there are no other buyers interested in purchasing the Cofimvaba store.[11] The Commission reasoned that if Metcash could have found an alternative purchaser for this store, they would have since they have been aware of the Commission's concerns regarding this store for some time.[12] Furthermore, the most likely alternative purchaser, Massmart, evinced no interest in purchasing the store when the Commission approached them.[13] The Commission thus accepted that absent the merger, the Cofimvaba Metro store will be closed down.[14] Accordingly, the Commission concluded that the conversion of the Metro into a hardware store will not result in a significant lessening of competition.

[15] We accept the failing firm defence[15] advanced at the hearing by the Commission[16] because the Cofimvaba Metro is incurring losses, will be closed down at the end of July if it is not sold to Boxer and there are no alternative purchasers. We thus agree with the Commission that the proposed transaction is unlikely to substantially prevent or lessen competition in the markets.

Public Interest

[16] The merging parties submitted that the proposed transaction will have no adverse effects on employment since they do not foresee any retrenchments as a result of the merger.[17] No other public interest issues arise due to this transaction.

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[10] Transcript, page 11
[11] Transcript, pages 8-9, 11
[12] Commission's Competition Report, page 52
[13] ibid
[14] ibid, page 11
[15] This test is set out in the our decision in *Iscor Ltd v Saldanha Steel (Pty) Ltd*, case number: 67/LM/Dec01
[16] Transcript, page 5
[17] See pages 38 and 56 of the Record

Conclusion

[17] Having regard to the facts above, we find that the proposed merger is unlikely to substantially lessen or prevent competition in any relevant markets. Furthermore, the proposed transaction raises no public interest concerns. Accordingly, we approve the merger unconditionally.

____________________ 19 July 2012

Norman Manoim **DATE**

Y Carrim and A Ndoni concurring

Tribunal Researcher:	Elizabeth Preston-Whyte
For the merging parties:	Anthony Norton and Mfundo Ngobese of Nortons Inc
For the Commission:	Themba Mahlangu and Grace Mohamed