



COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: 87/LM/Sep12

[015644]

In the matter between:

Business Venture Investments No. 1658 (Pty) Ltd

Acquiring Firm

And

**AFGRI Operations Limited;
Senwes Limited; and
Senwes Capital (Pty) Ltd**

Target Firms

Panel	:	Andreas Wessels (Presiding Member) Medi Mokuena (Tribunal Member) Merle Holden (Tribunal Member)
Heard on	:	10 April 2013
Order issued on	:	12 April 2013
Reasons issued on	:	07 May 2013

Reasons for Decision

Conditional approval

1. On 12 April 2013 the Competition Tribunal ("Tribunal") conditionally approved the merger between Business Venture Investments No. 1658 (Pty) Ltd ("Newco"), the primary acquiring firm, and AFGRI Operations Limited ("Afgri"), Senwes Limited ("Senwes") and Senwes Capital (Pty) Ltd ("Senwes Capital"), the primary target firms.

2. The reasons for our conditional approval of the proposed transaction follow.

Background

3. The proposed transaction involves the establishment of a joint venture between Afgri and Senwes by each of these parties selling certain parts of their businesses to Newco, including both parties' farming requisite retail stores, as well as Afgri's farming wholesale businesses which largely supply agricultural products to farming requisite stores. These farming requisite stores sell a range of key agriculture inputs to farmers such as fertiliser, animal feed, seed, fuel and lubricants, vaccinations and crop protection. In addition, these stores also sell non-farming specific product lines such as hardware, outdoor and building materials to farmers and to the general public.
4. The horizontal relationship between Afgri and Senwes is however not limited to their above-mentioned retail activities since they are both also involved in grain and oilseed storage and trading and the provision of certain financial services to farmers. The merging parties *inter alia* offer "30 day" store credit to customers currently through the respective credit divisions of Afgri and Senwes (also see paragraph 24 below). Thus there is so-called "multimarket contact" between Afgri and Senwes that extends beyond the activities of the planned joint venture.
5. After investigation of the proposed transaction, the Competition Commission ("Commission") identified both a competition concern, relating to post-merger likely coordinated conduct, as well as a public interest concern relating to anticipated employment losses as a result of the proposed transaction.
6. The Commission's theory of competitive harm related to the likelihood of coordinated effects resulting from the proposed merger through information exchange. The Commission, in essence, was concerned that the joint venture will create a forum for the exchange of competitively

sensitive information given the multimarket contact between Afgri and Senwes.

7. Prior to the Tribunal hearing, the Commission and the merging parties however agreed¹ on a set of behavioural conditions that, according to the Commission, addressed both its competition (i.e. coordination) and public interest (i.e. employment-related) concerns.
8. At the Tribunal's request, two witnesses of the merging parties gave evidence on this transaction at the merger hearing, namely (i) Mr. Chris Venter, the CEO of Afgri; and (ii) Mr. Francois Strydom, the MD of Senwes. The Tribunal questioned the witnesses on, amongst other things, the events leading up to the proposed transaction, the rationale for the proposed joint venture, the anticipated efficiencies associated with the proposed deal, the reasons for the current limited geographic overlap between the retail stores of Afgri and Senwes, why the merging parties decided not to individually expand their retail footprint and the benefits that farmers could expect from the proposed transaction.
9. The Tribunal further requested that a number of enhancements be made to the merging parties' tendered set of behavioural conditions, including that all permanent, contract and temporary employees be bound to certain terms of the conditions which are aimed at preventing the post-merger anti-competitive exchange of information between Afgri and Senwes.
10. The merging parties and the Commission agreed on and made the necessary changes to the proposed set of behavioural conditions.
11. We have approved the proposed transaction subject to the merging parties' tendered final set of conditions, with certain added enhancements. We further, as part of several monitoring conditions, imposed an additional condition on the merging parties which requires reporting on an annual basis to the Commission on compliance with the imposed conditions.

¹ See *inter alia* page 25 of the transcript.

Merging parties and their activities

12. The primary acquiring firm is Newco, a private company incorporated in terms of the laws of the Republic of South Africa. Newco is a newly incorporated special purpose vehicle established for the purpose of the proposed transaction. As such Newco does not directly or indirectly control any firm prior to the proposed transaction. On completion of the proposed transaction, Newco will be directly controlled by Afgri and Senwes, each holding 50% of Newco's issued share capital.
13. The primary target firms are (i) Afgri; (ii) Senwes; and (iii) Senwes Capital. Both Afgri and Senwes are public companies incorporated in terms of the laws of the Republic of South Africa. Senwes Capital, an investment and property company, is a wholly owned subsidiary of Senwes (also see paragraph 22 below).

Afgri

14. Afgri is directly controlled by AFGRI Limited. The shares of AFGRI Limited are listed on the JSE Limited and are widely held. No single firm controls AFGRI Limited.
15. Afgri directly controls a number of firms, both domestic and foreign,² including AFGRI Animal Feeds (100%) and AFGRI Grain Marketing (100%). We note that the latter firms do not form part of the proposed transaction. The following two wholly owned subsidiaries of Afgri however do form part of the proposed transaction:
- (i) Domanko Dertig (Pty) Ltd ("Domanko"), trading as Agri-Onderdele. Agri-Onderdele's focus is on the wholesale and distribution of spare parts for Massey-Ferguson, Ford and Fiat tractor brands. It also sells some transmission parts such as bearings, belts, chains and sprockets; and

² Merger record, page 68.

- (ii) Partrite (Pty) Ltd ("Partrite"), a wholesaler of various types of agricultural and industrial parts, as well as a range of more general retail product lines such as animal health products, automotive accessories, garden and forestry equipment, hardware, outdoor equipment and tools, paint and related products. A primary line of Partrite's business is the sourcing and distribution of mechanisation components. This essentially consists of parts for various types of agricultural and industrial equipment such as hydraulic hoses and fittings, bearings, gearboxes, electric motors, mowers and fertilizer spreaders, sprayer pumps and valves, rotary cutters, gardening tools and pruning equipment.

Senwes

16. Senwes's issued shares are held by various shareholders, comprising two large shareholder blocks and a group of dispersed shareholders, who include producers (i.e. farmers). Producers hold approximately 16.31% of the aggregate issued shares in Senwes. Senwes's two large shareholder groups as at financial year end 30 April 2012 were:

- Senwesbel Limited ("Senwesbel") (58.8%). Senwesbel is an investment holding company and its shareholders are predominantly producers (i.e. farmers). Senwesbel exercises control over Senwes. Senwesbel does not hold any other investments other than in Senwes; and
- Treacle Nominees (Pty) Ltd and related parties, being a black empowerment investment group (17.1%).

17. Senwes controls a number of firms,³ *inter alia* Senwes Graanmakelaars (Pty) Ltd. We note that the latter firm does not form part of the proposed transaction.

³ See page 8 of the Commission's Report.

18. Both Afgri and Senwes are involved in a range of agricultural activities including farming requisite retail stores, the storage and trading of grain and oilseed and the provision of financing and insurance services. Afgri is also involved in various other activities such as the production of animal feed, participation in the poultry broiler industry and the processing of oilseed, soya beans and yellow maize. As stated above, Afgri is also a wholesale supplier of certain agricultural inputs/products.

Proposed transaction and rationale

19. As stated in paragraph 3 above, the proposed transaction involves the establishment of a joint venture between Afgri and Senwes by each of these parties selling certain parts of their businesses to Newco and receiving shares in Newco as consideration.

20. In terms of the proposed transaction, Afgri intends to sell to Newco:

- certain farm requisite retail stores and depots of Afgri;
- all of the issued shares in Domanko; and
- all of the issued shares in Partrite.

21. Thus, in addition to certain farming requisite retail stores, Afgri will also transfer to the joint venture its farming wholesale businesses (Domanko and Partrite) which largely supply agricultural products to farming requisite stores.

22. In terms of the proposed transaction, Senwes and Senwes Capital intend to sell to Newco:

- certain farm requisite retail stores of Senwes; and
- the property leasing business of Senwes Capital.

23. As stated in paragraph 12 above, on completion of the proposed transaction Senwes and Afgri will each hold 50% of Newco's issued share capital. Post-merger Newco will be jointly controlled by Afgri and Senwes.

24. With regards to Afgri's and Senwes's provision of financing facilities, we note that the merging parties have agreed to exclude the "30 day" store credit from the proposed joint venture. The store credit will continue to be dealt with by Senwes and Afgri separately. The merging parties submitted that Afgri's credit customers and Senwes's credit customers will remain their separate credit customers and each of the parties will only communicate available account limits and balances on accounts to Newco stores. Newco will not be involved in the approval of limits or any of the management and administration of the accounts and will also not be in a position to prescribe to customers from which firm they should obtain credit and the terms of such credit.⁴
25. The John Deere franchises operated by each of the parties, including the sale of related mechanisation components, will also not form part of the joint venture.
26. In terms of practical operations and the running of the joint venture, the merging parties submitted that Afgri and Senwes may provide administrative support to Newco. Initially, [...] will provide such administrative services to Newco, after which Newco will establish its own administrative infrastructure.
27. The merging parties submitted that the rationale for the proposed transaction is rooted in optimising efficiencies in terms of building economies of scale and diversifying business operations.
28. The merging parties anticipate that the proposed transaction will allow for the ability to negotiate bigger volume discounts with large suppliers for key inputs⁵ as well as allow for the more efficient central management of important operational elements such as procurement and logistics. The parties further envisage cost saving benefits which will result from shared

⁴ Letter from Webber Wentzel to the Commission dated 14 January 2013, see record page 5120.

⁵ Also see Strydom's testimony, transcript page 29.

overhead structures including updating and integrating a system-wide IT system.⁶

29. According to the merging parties, the proposed transaction will diversify the areas of operation and thereby decrease the geographic and crop specific risk which Afgri and Senwes face and the consolidation of their retail businesses will enable the creation of further economies of scale. With regards to the issue of crop specific risk Strydom at the hearing explained that *"if the crops suffer due to drought, then your client base has limited financial potential. So, if you could expand your geographical footprint, then that de-risks that specific drought issue, which is very relevant in our country."*⁷

30. The vertical nature of the transaction will allow Senwes to diversify activities and participate in the wholesale of certain product lines, whilst Partrite would benefit from the greater volumes purchased by Senwes which will allow for increased economies of scale.

Competition analysis

Horizontal overlap

31. From the perspective of the activities of the proposed joint venture, the Commission identified a horizontal overlap in the (downstream) activities of the merging parties in respect of the retail market for farming requisite stores.

32. In some instances Afgri and Senwes facilitate direct sales between the farmer and the supplier. Other transactions relate to the physical sale of products through the farming requisite stores and comprise both relatively small transactions as well as larger warehouse sales.

33. According to the Commission, Afgri has 38 farming requisite stores located in Gauteng, Mpumalanga, KwaZulu-Natal and the eastern corner of the

⁶ Also see Strydom's testimony, transcript page 29.

⁷ Transcript page 30.

Free State. Senwes, on the other hand, has 28 farming requisite stores predominantly located in the Free State and North West, with only one store located in (the southern part of) Gauteng.

34. The Commission identified a limited number of locations where there is a geographic overlap between the farming requisite stores of respectively Afgri and Senwes. These areas were: (i) Theunissen/Marquard; (ii) Kroonstad/Senekal; (iii) Welkom/Senekal; (iv) Heilbron/Grootvlei; and (v) Heidelberg/Vereeniging. However, of these overlap areas, only in the latter geographic area, i.e. Heidelberg (Afgri store) / Vereeniging (Senwes store), are the merging parties' farming requisite stores located within a 50 km radius of each other.
35. We note that we, given the history of collusion between Afgri and Senwes (see paragraph 46 below), questioned Venter and Strydom with regards to the history and the reasons for the current limited geographic overlap between the retail stores of respectively Afgri and Senwes.⁸
36. In its market investigation the Commission specifically targeted farmers in the Heidelberg/Vereeniging area. These farmers confirmed to the Commission that they do not have concerns regarding the proposed transaction and that they have a sufficient number of alternative suppliers for the relevant inputs/products sold by the merging parties' stores.
37. In terms of unilateral effects the Commission thus concluded that the proposed transaction is unlikely to substantially prevent or lessen competition given the limited geographic overlap between the retail activities of Afgri and Senwes and the lack of competition concerns of customers. The Commission's market investigation found that farmers have a sufficient number of alternatives to their disposal in all the affected locations. Based on these interviews with customers the Commission concluded that for certain product lines these alternatives include direct supplies (via agents) from manufacturers to farmers (for example primary inputs such as fertilizer and seed requirements), as well as specialist

⁸ See transcript, pages 34 to 36 and 41 to 43.

stores selling individual line items to farmers (for example irrigation equipment, tools, parts for planters, animal health products, animal feed and other general agricultural machinery and parts).

38. We have no reason to doubt the Commission's conclusion on unilateral effects and do not deal with this aspect in any further detail in these reasons.

Vertical assessment

39. From a vertical perspective, Afgri is active in the wholesale of agricultural products through Partrite and Agri-Onderdele (see paragraph 15 above). Afgri is also active in the production and sale of various animal feeds through its AFGRI Feeds business. AFGRI Feeds sells its products to retail outlets, such as farming requisite stores, as well as directly to farmers. AFGRI Feeds however does not form part of the proposed transaction and is only relevant to the extent that it supplies certain product lines to the farming requisite stores.

40. The Commission concluded that the proposed transaction is unlikely to result in any foreclosure concerns. With regards to potential input foreclosure, the Commission found that downstream rivals, i.e. other retail stores, will continue to have credible alternative wholesale suppliers for the relevant Afgri products, i.e. for the products supplied by Partrite, Agri-Onderdele and AFGRI Feeds. The Commission also concluded that the proposed transaction is unlikely to result in any customer foreclosure concerns since the upstream rivals of Afgri will post-merger still be able to access a sufficient customer base.

41. We have no reason to doubt the Commission's conclusion on vertical effects and do not deal with this aspect in any further detail in these reasons.

Coordinated effects

42. As stated in paragraphs 5 and 6 above, the Commission's only competition concern regarding the proposed transaction related to post-merger coordination given the multimarket contact between Afgri and Senwes.

43. The Commission found that apart from the horizontal overlap between the retail activities of Afgri and Senwes, their activities also horizontally overlap in respect of (i) the storage of grain and oilseed; (ii) the trading (physical trading and on SAFEX) of grain and oilseed; and (iii) the provision of financing and insurance services. Afgri's and Senwes's customers in their respective farming requisite stores are the same customers serviced by the merging parties in other areas which do not form part of the proposed transaction, for example the storage and handling of grain and the provision of certain financing and insurance services.

44. The Commission was concerned that post-merger coordination may occur in two ways, viz (i) between Afgri and Senwes in the overlapping business activities which do not form part of the joint venture; and (ii) Newco can be used as a platform for information sharing in relation to the other operations of Afgri and Senwes.

45. In order to determine whether the flow of information from the joint venture to the merging parties' management could likely lead to coordination, the Commission considered, amongst other things, the shareholders agreement in relation to Newco. Although the merging parties had attempted to address potential coordination concerns by including a confidentiality undertaking clause in the shareholders agreement, the Commission found this undertaking insufficient from a competition perspective. The Commission submitted that it studied the relevant clauses of the agreement wherein the merging parties attempted to regulate how information will flow between the shareholders and Newco and how directors and executives will be appointed for Newco. The

Commission however concluded that these clauses do not sufficiently guard against potential information exchange as it merely advocates for good governance.

46. The Commission further considered that there is a history of collusion between the merging parties in relation to grain silo operations where Afgri and Senwes participated in fixing grain storage tariffs. Consent agreements were concluded between the Commission and each of Afgri and Senwes in terms of which both firms admitted to participating in the fixing of the daily grain storage tariffs in contravention of section 4(1)(b) of the Competition Act of 1998⁹ ("the Act"). These consent agreements were made orders of the Tribunal in 2011.

47. The Commission was of the view that it was highly probable that the joint venture may facilitate the exchange of competitively sensitive information, given the merging parties' history of collusion and the nature, activities and envisaged management structure of the joint venture. Accordingly the Commission found it imperative that proper mechanisms be put in place in order to ensure that competitively sensitive information, such as customer information and pricing policies, are not disseminated through Newco. More specifically, the Commission sought to limit the potential for the exchange of competitively sensitive information between the Afgri and Senwes as a result of the proposed joint venture (and or Directors appointed by the Afgri and Senwes to the Board of Newco) in terms of their own businesses relating to competition, in particular, storage and handling fees, terms for granting production credit, terms for granting 30 day revolving credit, marketing and operating methods and promotional plans of Afgri's and Senwes's other businesses.

48. The Commission therefore proposed certain conditions to be attached to the merger, *inter alia* that all directors and executives of Newco sign confidentiality agreements and develop and implement a comprehensive compliance programme at Newco.

⁹ Act No. 89 of 1998, as amended.

49. The merging parties agreed to a set of behavioural conditions to address the Commission's coordination concern.
50. We conclude that there are significant "spill over effects" from the proposed joint venture due to the multimarket contact between Afgri and Senwes in a number of upstream markets. This, together with the history of collusion between Afgri and Senwes, results in the increased likelihood of post-merger coordination between the merging parties.
51. We therefore concur with the Commission's finding that conditions are warranted to address the identified competition concern of likely post-merger coordination. We further find that the imposed set of conditions is proportionate to the identified concern.
52. As stated in paragraph 9 above, the Tribunal requested that certain enhancements be made to the merging parties' tendered set of conditions, including that all permanent, contract and temporary employees be bound to certain terms of the conditions which are aimed at preventing the anti-competitive exchange of information between Afgri and Senwes.
- 53.. We have approved the proposed transaction subject to the following competition-related conditions:
- 53.1. The Directors and Executives of Newco shall be appointed in accordance with clause 8 of the Shareholders Agreement in relation to Newco.
- 53.2. The following persons shall not be appointed as an employee(s) of Newco or serve on any management committee of Newco:
- 53.2.1. a member of the board of directors or any board committee of a Shareholder¹⁰ and/or any company or other juristic person Related¹¹ to a Shareholder; or

¹⁰ i.e. Afgri and Senwes and any of their direct or indirect subsidiaries.

¹¹ "Related" means related as defined in section 2(1)(a) to (c) of the Companies Act.

53.2.2. a representative of a Shareholder and/or any person Related to a Shareholder, or a member of, any industry body of which a Shareholder and/or any person Related to a Shareholder is a member, or which is otherwise relevant to the business of such Shareholder and/or any other person Related to a Shareholder; or

53.2.3. the operations of the other businesses of the Shareholders.

53.3. Newco shall not request and/or receive from any of the Shareholders any Competitively Sensitive Information¹² regarding the operations of the other businesses of the Shareholders.

53.4. Each Director, nominated by a Shareholder, and Employee¹³ of Newco appointed from time to time, shall enter into a confidentiality agreement with Newco in which each Director and/or Employee commits not to:

53.4.1. discuss or divulge to any other Director or any Employee of another Shareholder any Competitively Sensitive Information relating to the nominating Shareholders' business activities.

53.4.2. disclose to Newco including any Employee of Newco any Competitively Sensitive Information relating to any Shareholder's business activities other than Competitively Sensitive Information that relates to their interests in Newco.

¹² "Competitively Sensitive Information" means information belonging to a Shareholder relating to credit terms, pricing including but not limited to prices and discounts, margins, handling and storage tariffs, costs and volumes and any confidential, strategic, promotional or business plans or long term plans, budgets, methods of operating, internal control systems, contractual arrangements and financial arrangements/models not related to Newco, (i) whether oral or recorded in writing or in any other form, (ii) whether formally designated as confidential or not, and (iii) howsoever known, communicated or retained but excluding information that is readily and generally available in the market, such as crop estimates and market indicators, the exchange of which between the Shareholders may contravene section 4(1) of the Competition Act.

¹³ "Employees" means all permanent employees including those employed at the head offices of the Target Firms, affected by the Merger and for the purpose of clauses 2.4 and 2.5 of the imposed conditions shall include contract workers and temporary employees of Newco from time to time.

53.4.3. disclose any Confidential Information belonging to Newco to any Director or Employee of the nominating Shareholders' other businesses activities, save for the Board of Directors of the Shareholders.

53.5. Newco shall put in place an on-going competition compliance programme to advise the Chairman of the Board, Directors, Executives, Management and Employees of Newco on its competition law obligations including under these conditions. The competition compliance programme shall be updated and reviewed from time to time with any new Chairman, Directors, Executives and Management being provided with such competition compliance programme as soon as reasonably practical after taking up their respective positions. For the purposes of this clause the external auditors of Newco shall verify the compliance with the competition compliance programme and annually issue an external audit report as part of the year-end audit, which report shall be available for inspection by the Commission.

54. The above-mentioned competition-related conditions shall remain in place for as long as the Shareholders have control, as defined in terms of Section 12(1) of the Act, over Newco.

55. In terms of monitoring compliance with the above-mentioned behavioural conditions we have imposed the following additional conditions:

55.1. With regards to the above-mentioned confidentiality agreement(s) (see paragraph 53.4 above), Newco shall submit to the Commission the confidentiality agreement(s) as contemplated as soon as reasonably practical but within a period of 30 days from Approval Date and for subsequent Directors and Employees, Newco shall ensure that the confidentiality agreements shall form part of Directors' appointment letters and Employees' service agreements within a period of 30 days after the appointment of the Director(s) and Employee(s).

- 55.2. Should either of the Shareholders dispose of their interest in Newco, they shall inform the Commission of such disposal within 30 days of concluding a sale agreement, irrespective of whether the transaction is notifiable in terms of the Act.
- 55.3. Newco shall submit an affidavit from one of its directors within 60 days of the effective date of the Merger confirming that the above-mentioned compliance programme (see paragraph 53.5 above) has been implemented.
- 55.4. For as long as these conditions remain in place, Newco shall annually, within 90 calendar days of the financial year end of Newco, submit to the Commission an affidavit from one of its directors confirming compliance with the competition-related conditions.

Public interest

Employment

56. The merging parties in their merging filing indicated that the implementation of the merger may result in the duplication of certain positions. They however indicated that no retrenchments of unskilled employees or employees in the Paterson Grading job levels A1 to B2 were anticipated as a result of the proposed transaction.¹⁴ The merging parties further submitted that the number of negatively affected employees equates to approximately [1-5]%¹⁵ of the total employees of Newco.
57. Given these anticipated job losses, the Commission raised an employment-related public interest concern. To address this concern the merging parties gave certain commitments to limit the impact of the proposed transaction on employment. Based on these commitments, the Commission recommended the approval of the joint venture on the basis that there will be no retrenchment of any employees in the respective Afgri

¹⁴ Merger record, page 17.

¹⁵ For the exact figure see page 17 of the merger record.

and Senwes retail businesses to be transferred to Newco and in the case of Afgri in its Partrite business, within a period of 12 (twelve) months after the effective date of the implementation of the merger. Furthermore, Newco, Senwes and Afgri undertook not to retrench more than 50 (fifty) employees as a result of the proposed merger in months 13 to 24 after the effective date of the proposed merger.

58. According to the Commission, this proposal was accepted by the relevant trade union(s) involved.

59. The Tribunal at the hearing questioned the merging parties regarding the anticipated retrenchments, including whether these employees are employed at retail or head office level and what the skills levels of the affected employees are in terms of the Paterson Grading System. The merging parties confirmed that the affected employees are all currently employed at head office level and that they are all skilled employees in the Paterson Grading job levels B3 to E5.¹⁶

60. We subsequently approved the proposed transaction subject to the condition that Senwes and Afgri shall procure that Newco shall not retrench any employees in their respective retail businesses to be transferred to Newco and, in the case of Afgri, in its Partrite business, within a period of 12 (twelve) months after the effective date of the implementation of the merger. Furthermore, Newco, Senwes and Afgri may retrench a maximum of 50 (fifty) employees altogether, which the merging parties have confirmed will be limited to head office employees (from Patterson Job Grades B3 to E5) as a result of the proposed merger in months 13 to 24 after the effective date of the proposed merger.

61. We have further ordered that a copy of the Tribunal's order and the imposed conditions must be provided to all employees within 7 (seven) days of the merger approval date, in the same manner that a copy of the Merger Notice was provided to the employees.

¹⁶ See transcript pages 24 and 25.

62. We are satisfied that the imposed employment-related conditions are fair both to the affected employees and the merging parties.

Other public interest

63. The proposed transaction raises no other public interest concerns.

Conclusion

64. We approve the proposed transaction subject to the conditions as per the attached "**Annexure A**".



Andreas Wessels

07 May 2013

Date

Medi Mokuena and Merle Holden concurring

Tribunal researcher:	Ipeleng Selaledi
Tribunal economist:	Andrew Sylvester
For Afgri:	Webber Wentzel
For Senwes:	Cliffe Dekker Hofmeyer Inc
For the Commission:	Ngoako Moropene

ANNEXURE A

CONDITIONS

**BUSINESS VENTURE INVESTMENTS NO.1658 (PTY) LTD
and
AFGRI OPERATIONS LIMITED AND SENWES LIMITED**

Tribunal case no.: 87/LM/Sep12 [015644]

1. Definitions and interpretation

The following expressions shall bear the meanings assigned to them below and cognate expressions bear corresponding meanings –

- 1.1. **"Afgri"** means AFGRI Operations Limited;
- 1.2. **"Approval Date"** means the date referred to in the Competition Tribunal's Merger Clearance Certificate (Form CT10);
- 1.3. **"Commission"** means the Competition Commission of South Africa;
- 1.4. **"Competitively Sensitive Information"** means information belonging to a Shareholder relating to credit terms, pricing including but not limited to prices and discounts, margins, handling and storage tariffs, costs and volumes and any confidential, strategic, promotional or business plans or long term plans, budgets, methods of operating, internal control systems, contractual arrangements and financial arrangements/models not related to Newco, (i) whether oral or recorded in writing or in any other form, (ii) whether formally designated as confidential or not, and (iii) howsoever known, communicated or retained but excluding information that is readily and generally available in the market, such as crop estimates and market indicators, the exchange of which between the Shareholders may contravene section 4(1) of the Competition Act;
- 1.5. **"Competition Act"** means the Competition Act no. 89 of 1998, as amended;
- 1.6. **"Conditions"** means these conditions;
- 1.7. **"Confidential Information"** means any trade secrets of Newco; information of Newco in respect of know-how, processes, systems, business methods, pricing, marketing methods, methods of operating, promotional plans, financial models, long term plans and any other similar information; details of all internal control systems of Newco; details of the financial structure and operating results of Newco; the contractual and financial arrangements between or among Newco and third parties with whom Newco has business arrangements of whatever nature; and all other information of Newco which is not generally known and which, if known, would be advantageous to a competitor of Newco or disadvantageous to Newco, in each case (i) whether oral or recorded in writing or in any other form, (ii) whether formally designated as confidential or not, and (iii) howsoever known, communicated or retained;

- 1.8. **"Director"** means a director as defined in terms of section 1 of the Companies Act 71 of 2008;
- 1.9. **"Employees"** means all permanent employees including those employed at the head offices of the Target Firms, affected by the Merger and for the purpose of clauses 2.4 and 2.5 shall include contract workers and temporary employees of Newco from time to time;
- 1.10. **"Management"** means Directors and prescribed officers, as defined in the companies Act 71 of 2008 of Newco;
- 1.11. **"Merger"** means the acquisition of equal control over Newco by the Shareholders; in which the Shareholders will contribute their respective farming requisite retail stores and in the case of AFGRI Operations Limited, certain other related businesses as contemplated in the Shareholders Agreement;
- 1.12. **"Merging Parties"** means the Shareholders;
- 1.13. **"Newco"** means Business Venture Investments No 1658 (Pty) Ltd;
- 1.14. **"Nominee Director"** means the Director(s) nominated by the Shareholders;
- 1.15. **"Related"** means related as defined in section 2(1)(a) to (c) of the Companies Act;
- 1.16. **"Senwes"** means Senwes Limited;
- 1.17. **"Shareholders"** means Afgri and Senwes; and any of their direct or indirect subsidiaries;
- 1.18. **"Shareholders Agreement"** means the shareholders' agreement in relation to Newco entered into between Afgri, Senwes and Business Venture Investments No 1658 (Pty) Ltd on 5 September 2012, as amended by a first addendum dated 4 December 2012 and a second addendum dated 14 December 2012;
- 1.19. **"Target Firms"** means the retail store business of Afgri Operations Limited, Dormanko Dertig (Pty) Ltd (trading as Afgri Onderdele), Partrite (Pty) Ltd, the farming requisite business of Senwes Limited and the property leasing business of Senwes Capital (Pty) Ltd; and
- 1.20. **"Tribunal"** means the Competition Tribunal.

2. Conditions to the approval of the merger

- 2.1. The Directors and Executives of Newco shall be appointed in accordance with clause 8 of the Shareholders Agreement.
- 2.2. The following persons shall not be appointed as an employee(s) of Newco or serve on any management committee of Newco:
 - 2.2.1. a member of the board of directors or any board committee of a Shareholder and/or any company or other juristic person Related to a Shareholder; or
 - 2.2.2. a representative of a Shareholder and/or any person Related to a Shareholder, or a member of, any industry body of which a Shareholder and/or any person Related to a Shareholder is a member, or which is otherwise relevant to the business of such Shareholder and/or any other person Related to a Shareholder; or

- 2.2.3. the operations of the other businesses of the Shareholders.
- 2.3 Newco shall not request and/or receive from any of the Shareholders any Competitively Sensitive Information regarding the operations of the other businesses of the Shareholders.
- 2.4. Each Director, nominated by a Shareholder, and Employee of Newco appointed from time to time, shall enter into a confidentiality agreement with Newco in which each Director and/or Employee commits not to:
- 2.4.1. discuss or divulge to any other Director or any Employee of another Shareholder any Competitively Sensitive Information relating to the nominating Shareholders' business activities.
 - 2.4.2. disclose to Newco including any Employee of Newco any Competitively Sensitive Information relating to any Shareholder's business activities other than Competitively Sensitive Information that relates to their interests in Newco.
 - 2.4.3. disclose any Confidential Information belonging to Newco to any Director or Employee of the nominating Shareholders' other businesses activities, save for the Board of Directors of the Shareholders.
- 2.5. Newco shall put in place an on-going competition compliance programme to advise the Chairman of the Board, Directors, Executives, Management and Employees of Newco on its competition law obligations including under these conditions. The competition compliance programme shall be updated and reviewed from time to time with any new Chairman, Directors, Executives and Management being provided with such competition compliance programme as soon as reasonably practical after taking up their respective positions. For the purposes of this clause the external auditors of Newco shall verify the compliance with the competition compliance programme and annually issue an external audit report as part of the year-end audit, which report shall be available for inspection by the Commission.
- 2.6. Senwes and Afgri shall procure that Newco shall not retrench any Employees in their respective retail businesses to be transferred to Newco and, in the case of Afgri, in its Partrite business, within a period of 12 (twelve) months after the effective date of the implementation of the Merger. Furthermore, Newco, Senwes and Afgri may retrench a maximum of 50 Employees altogether, which the Merging Parties have confirmed will be limited to head office employees (from Patterson Job Grades B3 to E 5) as a result of the proposed Merger in months 13 to 24 after the effective date of the proposed Merger. For the sake of clarity, retrenchments do not include (i) voluntary separation arrangements; (ii) voluntary early retirement packages; and (iii) refusals to be redeployed whether on reasonable or unreasonable grounds.

3. Duration

- 3.1. The undertakings in clause 2.1 to 2.5 of these conditions shall remain in place for as long as the Shareholders have control, as defined in terms of Section 12 (1) of the Act, over Newco.
- 3.2. The undertakings in clause 2.6 shall apply for the periods as set out therein.
- 3.3. At any time during the duration of these conditions the Commission may approach the Tribunal to lift, revise or amend these conditions upon being approached by Newco and its Shareholders on good cause shown.

4. Monitoring of compliance with the Conditions

- 4.1. Newco shall submit to the Commission the confidentiality agreement(s) as contemplated under clause 2.4 of these conditions as soon as reasonably practical but within a period of 30 days from Approval Date and for subsequent Directors and Employees, Newco shall ensure that the confidentiality agreements shall form part of Directors' appointment letters and Employees' service agreements within a period of 30 days after the appointment of the Director(s) and Employee(s).
- 4.2. Should either of the Shareholders dispose of their interest in Newco, they shall inform the Commission of such disposal within 30 days of concluding a sale agreement, irrespective of whether the transaction is notifiable in terms of the Act.
- 4.3. Newco shall submit an affidavit from one of its directors within 60 days of the effective date of the Merger confirming that the compliance programme has been implemented in accordance with condition 2.5 above.
- 4.4. For as long as these conditions remain in place, Newco shall annually, within 90 calendar days of the financial year end of Newco, submit to the Commission an affidavit from one of its directors confirming compliance with conditions 2.1 to 2.5 above.
- 4.5. With respect to condition 2.6 above, Newco and the Shareholders shall provide a copy of the Tribunal order and the conditions to all Employees within 7 days of the merger approval date, in the same manner that a copy of the Merger Notice was provided to the Employees.
- 4.6. A senior official within Newco, and within each of the Shareholders, shall submit an affidavit to the Commission within 10 days of circulating the conditions confirming compliance with condition 4.5 above, together with a copy of the notice that was provided to its Employees.
- 4.7. All correspondence in relation to the Conditions shall be submitted to the following email address mergerconditions@compcom.co.za.