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Structure and Pricing Within the Maize Value Chain

Introduction

At the request of the Minister of Agriculture, the Competition Commission conducted a research into the structure and pricing within the maize value chain. The purpose of this research was to

- examine the market structure of the maize value chain
- analyse prices and pricing trends in downstream and upstream markets
- identify possible competition concerns and to
- propose recommendations to enhance the competitiveness of the maize industry.

This article provides an overview of each set objective.

Market structure

Prior to 1997, the Maize Board and the co-operatives dominated the South African maize industry. With deregulation, most of the co-operatives were converted into privately owned companies. As a result the industry has become vertically related with a competitive upstream level (the producers) supplying maize to an oligopolistic (*) downstream level (intermediaries and retailers). It was found that deregulation's one adverse effect was the difficulties faced by small firms and newcomers. For example, when firms integrate upstream to ensure supplies and reduce the cost of coordinating activities at different stages of production, they put potential new entrants at a cost

disadvantage and increase their sunk costs.

(*) oligopolistic: *a state of limited competition in which a market is shared by a small number of producers or sellers.*

Pricing trends and structures

In terms of pricing trends within the maize value chain, it was found that the Rand / Dollar exchange rate and international prices have the strongest influence on maize's domestic price level. Further, due to the nature of supply and demand elasticities, producers / consumers have little or no countervailing power against maize price increases. This renders them vulnerable to possible anti-competitive behaviour in the relevant markets.

Pricing structures are also complex within some of the levels of the value chain. For example, commercial silo owners distinguish between storage charges for producers (who ultimately market their maize through the particular silo owner's trading division) and traders. In addition, transport costs are a problem, and Spoornet has proven unable to adapt to the market's increased service requirements.

It was also established that there are substantial discrepancies in the proportion of the retail price received by the farmers and the millers, as the miller-to-retail margin remains significantly high whether the domestic price level is high or low. Finally, upstream price increases are more readily passed on to the end consumers than upstream price decreases.

Possible competition concerns

The research identified the following competition concerns within the maize value chain. First of all it was found that it is possible for a silo owner to leverage his dominance in the storage market to secure an advantage for himself in the downstream market for the physical trading of maize, to the detriment of other traders. Secondly, the research discovered that asymmetric price transmission is present within the maize value chain. In other words, this report suggested that millers and / or retailers are able to exercise their market power in the vertically related maize industry. Finally, the rail transport problem is two-pronged: firstly, Spoornet's abject inefficiency is compounded by their monopolisation of rail transportation in the country and secondly, this monopoly gives them the ability to unilaterally adjust rail tariff increases as and when they please.

Commission's recommendation

In light of the results of the research conducted, the following recommendations were made in order to enhance the competitiveness of the maize industry:

- The Commission should respectively scrutinize the Articles of Association and the constitutions of all dominant co-operatives and converted co-operatives to ensure that historic anti-competitive behaviour is not repeated in the current regime.
- The Commission is currently investigating possible anti-competitive behaviour by one silo owner in the market. It is recommended that the Commission should, upon conclusion of this investigation, initiate separate investigations against all the major commercial silo owners.
- The Commission should initiate separate cost-analyses for millers and retailers in order to detect potential anti-competitive behaviour.
- The Commission should monitor the transformation of the maize value chain on an annual basis with regard to new entrants into the relevant markets.
- Government should investigate means to alleviate transport problems in order to ensure efficient and competitive markets in South Africa.

Contributed by: Mapato Rakhudu, Policy and Research Division

Minority Acquisition could as well vest control

When it comes to a merger, the concept of control remains a controversial topic. This is despite several pronouncements that have been made on it by the Competition Tribunal (Tribunal) as well as numerous articulated approaches to it developed by the Competition Commission (Commission). The Commission articulates its approach to the concept in its Update Notices and through the guidance it provides in requested advisory opinions. The Commission's annual review also contains summaries of the vital issues raised on requested opinions in respect of the year under review.

It would be hoped that at this stage, with regard to those instances where the concept of control (as envisaged in the Competition Act 89 of 1998 (the Act)) has been dealt with, we would be sure of what would amount to 'the establishment or

acquisition of control' within the meaning of the Act under any given circumstances but, alas, this is not always the case.

On occasion, the Act has presented interesting debates or enquiries as to whether or not, in the given circumstances, control intended to be vested or not as envisaged in the Act. This particular section of the Act, Section 12 (2) (b), states that *a person controls a firm if that person is entitled to vote a majority of the votes that may be cast at a general meeting of the firm, or has the ability to control the voting of a majority of those votes, either directly or through a controlled entity of that person*. The last clause of the provision has been the one that has caused debate: in this instance, ability appears not to be limited. In other words, even if the ability is slightly removed or real, for as long as the ability exists it is enough to invoke the provisions of this section.

An interesting scenario is the following one where firm Z intended to issue 36% of its shares to firm P. Prior to the intended transfer of shares to P, the shareholding in firm Z was as follows:

- A 18%
- B 21%
- C 20%
- D 17%
- E 8%
- F 16%.

With the intended transfer, the shareholding in firm Z would change as follows:

- A 14%
- B 11%
- C 13%
- D 10%
- E 5%
- F 11%
- P 36%

The main argument in this scenario was that the transfer of shares to P would not amount to the acquisition of de facto control of Z's shareholders' meetings and as such would not constitute control within the meaning of the Act hence no merger would be triggered.

The evaluation indicated that P has a bigger number of shares than the rest of the shareholders. Therefore it would not be inappropriate, in a sense, to say that P is a majority shareholder despite the fact that P has less than 50% shares. However the argument that was being put forward was that, since there were no voting pool agreements in place in firm Z, the voting in the meetings could go either way notwithstanding P's bigger shareholding. This went on to say that if there were to be a resolution that needed to be passed, P would not necessarily attain the majority vote on its own to pass that resolution. Ironically, if one or two shareholder(s) were to vote in support of P a resolution voted for by P could be passed. Similarly, if one or two shareholder(s) were to abstain from voting, P could still manage to get its resolution passed. In light of this it became a compelling argument that the ability (as indicated in section 12(2) (b) of the Act) seems to exist in respect of P in firm Z following the transfer of shares.

In this scenario, the voting history did not help: no general pattern had previously been followed and no pattern existed in previous activities from which an inference could be made. Previously parties were allowed to vote in any manner making it difficult to predict how things would turn out with the inclusion of P.

Accordingly P, with its greater shareholding, appeared to possess the ability to indirectly control the voting of the majority. To cap it all, since P was coming in as a new shareholder in firm Z where there was no shareholder that seemed to be vested with control over others, it was apparent that P would be acquiring de facto control in firm Z in the same way as other existing parties. Thus P would be able to exert an influence over the firm as if they had control. Therefore, it become clear that even if section 12(2) (b) of the Act were to be considered inapplicable to the scenario, section 12(2)(g) of the Act relating to the 'ability to influence strategic commercial behaviour' would for all intents and purposes be applicable.

In consideration of the aforesaid, the scenario was viewed as amounting to a merger within the meaning of the Act.

Contributed by: Thanduxolo Lubanga, Compliance Division

The Mittal-Arcelor Merger: The Commission's Assessment

The Commission recommended to the Tribunal that the proposed transaction between Mittal Steel Company (Mittal Steel) and Arcelor be approved without any conditions.

Mittal Steel (the primary acquiring firm) is an international company that produces a range of finished and semi-finished carbon steel products. Mittal Steel has steel operations in sixteen countries (on four different continents) and sales and marketing offices in a further eleven countries. Mittal Steel South Africa Ltd (Mittal SA) has four production facilities (incorporating Vanderbijlpark Steel and Saldanha Steel) that produce flat, finished products. They also own Newcastle and Vereeniging Steel, that produce long, finished steel products.

Arcelor, the target of the takeover bid, is one of the world's largest steel producers.

Internationally, Mittal Steel and Arcelor are both involved in the manufacturing and distribution of steel products but in different segments of the industry. Mittal Steel has a local manufacturing base, while Arcelor only imports semi-finished and finished steel products. This means that between Mittal Steel and Arcelor, the overlap in carbon steel activities only related to the supply of semi-finished and finished steel products. While Arcelor also has a presence in the stainless steel segment, neither Mittal Steel nor Arcelor are active in high-alloy steel.

The transaction was assessed cautiously by the Commission because of Mittal Steel's eminent dominance and the high concentration ratio in the SA steel market. Concerns over an alleged abuse of dominance on the part of Mittal SA through the implementation of excessive pricing practices in the downstream markets was also taken into careful consideration.

Nonetheless, the post-merger scenario reflected that the merged entity's market share would only increase in the overlapping products and this would be by approximately 1, 3%. This increment in market share was also deemed to be negligible taking into account that there are more finished and semi-finished product categories in which the parties did not compete. It was also clear, even without considering substitutable products, that the SA market share incease was small in the product categories described above reflecting that Arcelor was only a *de minimis* supplier in this country and was active only through imports into the country. The Commission's competitive analysis thus concluded that the transaction gave rise to insignificant horizontal effects in the local steel industry

The Commission was of the view that the transaction would not change the existing status quo with regards to entry barriers. It necessarily follows that the merger would produce no immediate change in the level of concentration in the relevant market.

The Commission concluded that this transaction would not result in any significant change in the competitive structure of the SA steel industry. From a horizontal perspective, the Commission concluded that the proposed transaction was unlikely to substantially prevent or lessen competition in the overlapping markets despite Mittal Steel being a significant local producer; this being the result of Mittal Steel's acquisition of the incumbent local steel producer, Iscor.

Vertically, the efficiency arguments raised in favour of the merger outweighed any anti-competitive effect, though the benefits accruing from the transaction were more prominent in the broad international market. Both Mittal and Arcelor have extensive sales networks. Largely the focus of these is geographically complementary: Mittal's sales network is focused on Asia, Eastern Europe, Southern Africa and North America and Arcelor is focused on Europe and South America. The benefit of combining these complementary networks will enable e.g. South African customers to access and purchase Arcerlor's products more easily or South American customers to purchase Mittal's products more conveniently.

Importantly the Commission's competitive analysis also considered whether the merged entity would be in a position to profitably increase current prices in the market by between 5% and 10%. As a South African *de minimus* supplier active only through imports into the country, Arcelor would offer little or no impact on the competitive structure of the industry after the merger, and hence, not affect the pricing of steel products to South African customers post-transaction.

There were also no job losses or other significant public interest issues that arose from the proposed transaction. The Commission accordingly recommended that the merger be approved without conditions. The transaction was notified in other jurisdictions (including the EU, the United States, Canada, Brazil, Bulgaria, China, Colombia, Mexico, Romania, Serbia & Montenegro, Turkey, and the Ukraine) which also gave a green light to the transaction.

Contributed by: Mapato Rakhudu, Policy & Research Division

Analysis of Mergers in Bidding Markets: a General Perspective

Introduction

Mergeranalysis in bidding markets can be complex as competition takes place through bidding for tenders or contracts. In evaluating recent merger cases[1] in bidding markets, it was found that the dynamics of competition in the relevant markets are similar in that they are all so-called 'bidding markets'. Additionally it was found that the nature of the product markets are large, lumpy infrastructural projects and that bidding occurred mainly in respect of public sector procurement. The markets are also characterised by information asymmetries, as no bidder knows what his competitors are bidding. To provide you with a general approach as followed by the Commission in its analysis of mergers in bidding markets, this article examines the bidding mechanisms that are in place; the source of bidding values; the assessment of market power and the evaluation of the competitive effect.

Bidding mechanisms and the source of bidding values

It is said that bidding markets comprise two dimensions:

- the type of bidding/auction mechanism and
- the source of bidding values.

The source of bidding values can either be private or common or a combination of the two. In evaluating these mergers it was found that the bidding markets predominantly involved private values since each bidder's value was unaffected by other bidders' preferences or information.

What adds to the complexity of analysing bidding markets is the bidding process or auction mechanisms that are in place. Firstly, the evaluation of these mergers only took into consideration the procurement auctions, where the service/product is purchased from the lowest bidder. Secondly, it was found that the bidding markets comprised both open and closed auctions i.e. the public tenders are open auction mechanisms and private sector tenders are closed auction mechanisms.

1 See, for example, Murray & Roberts Limited and the Cementation Company (Africa) Ltd (Case No: 02/LM/Jan04); Murray & Robert Limited and Concor Limited (Case No: 101/LM/Oct/05); Scharrig Mining Limited / Benicon Earthworks and Mining (Pty) Ltd (Case No: 2006Mar2200).

Assessment of market power

By considering the auction mechanisms that are in place, market shares at a given point in time only reflect the current bidding outcomes and not the actual competitiveness in the market. The Commission attempted to estimate the market shares despite this and based on the market share analysis, the Commission found that it was unlikely that the merging parties had market power. However, in view of the fact that the defined markets were considered as bidding markets, the Commission did not regard 'market shares analyses' as the best tool in gauging the competitiveness of the market.

Since bidding analysis is a very useful tool to indicate the degree to which two merging firms are close competitors, the Commission conducted this analysis with the available data. The bidding analysis has also shown that the combination of the merging parties was rarely the successful bidder and runner-up in the bidding process relating to the relevant markets. The analysis also revealed that post-merger there would be sufficient real alternatives to the merged entity.

Evaluation of the competitive effect

In evaluating the competitive effect of the mergers, the Commission applied mainstream market analysis, for example, the potential for horizontal merger effects and foreclosure, the possibility of post-merger collusion, predatory pricing as well as potential entry into the relevant markets.

The Commission found that competition in the relevant markets presented itself in the form of bidding for tenders. They also found that post-merger there would be a number of alternative players in all but one of the possible relevant markets. It was also concluded that vertical integration would not result in foreclosure concerns. This was due to the fact that the merging firms and their competitors in the downstream markets did not deal directly with suppliers active in the upstream markets.

With regard to the potential of new entries into the relevant markets, the Commission found that there were a number of potential entrants in the relevant markets and entry barriers are surmountable. Considering the nature of the bidding process, the Commission found that collusion would be relatively easy to detect; predatory conduct would result in high cost and the losses would be difficult to recoup.

Conclusion

In general, the Commission relied on a combination of qualitative and quantitative evidence to evaluate the competitive effects of the merger. Evidence on the merging parties' market shares, bidding data in the relevant markets and the presence of rivals were vital pieces of information in determining that the mergers would not lead to anti-competitive effects. Yet, to conclude whether these mergers would change the competitive conditions, the Commission chose not to use the bidding character of the markets as the determinant issue but to rather apply it as a complement to standard merger analyses.

Contributed by: Mapato Rakhudu,
Policy & Research Division

The Role of Trade Unions in Mergers

Whenever the Competition Commission and the Competition Tribunal (also known as the Commission and the Tribunal: hereinafter jointly referred to as the authorities) consider a merger approval application they refer to the Amended Competition Act No 89 of 1998 (hereinafter referred to as the Act). The authorities must consider whether the merger will substantially prevent or lessen competition in the relevant market by assessing various factors relevant to competition in that market as set out in the Act. These factors include such things

as…
- the strength of competition in the relevant market
- the probability that after the merger the firms in the market will behave competitively or co-operatively
- the actual and potential level of import in the market
- the ease of entry into the market (including tariff and regulatory barriers)
- the level and trends of concentration, and history of collusion in the market
- the degree of countervailing power in the market
- the dynamic characteristics of the market (including growth, innovation, and product differentiation)
- the nature and extent of vertical integration in the market
- whether the business (or part of the business) of a party to the merger (or proposed merger) has failed or is likely to fail and
- whether the merger will result in the removal of an effective competitor.

In addition to this, the authorities also assess the merger on public interest grounds. The Act states that when determining whether a merger can or cannot be justified on public interest grounds, the authorities must consider the effect that the merger will have on…
- a particular industrial sector or region
- employment
- the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive and
- the ability of national industries to compete in international markets.

When the authorities make a determination as to whether or not any merger can be justified on public interest grounds they have to take into consideration the effect the merger will have on employment. The authorities carry out their own investigations to verify the accuracy of the information provided by the merging parties in their filing.

With regard to employment issues, the authorities rely partly on their own investigations, partly on the information provided by the merging parties and partly on the feedback they get from the Trade Unions representing employees at the merging firms. It is common cause that the interests of the merging parties and those of the Trade Unions, and by extension those of the employees, mostly run parallel. The employees' primary interests are job tenure and security.The merging parties' interests are mostly profit-driven (often at the expense of the employees).

The Act provides that in the case of an intermediate or large merger, the primary acquiring firm and the primary target firm must each provide a copy of the notice of the merger (in the prescribed form and manner) to:
- any registered Trade Union that represents a substantial number of employees or
- the employees concerned or
- representatives of the employees concerned (if there are no such registered trade unions)

This is the procedure that's followed:

1. the merging parties notify the authorities and the relevant Trade Unions or employee representatives
2. the authorities then call on their Education and Advocacy Co-ordinator to contact the relevant Trade Union by means of a CC5 (1) form which acts as a formal letter. This letter / form:
    - informs them of the imminent merger
    - invites the Trade Union to participate if there are employment issues to be raised
    - enquires whether there are employment issues and / or
    - if they are comfortable with, and support the merger.

The Trade Union will then either send the authorities the completed CC5 (1) form, indicating their intention to participate or a comfort letter stating categorically that they are comfortable with and support the merger. Trade Unions are encouraged to write these letters on their official letterheads and to have them signed by designated officials.

It is to be expected that when two conflicting interests cross paths one of them has to succumb to the other. Informed by this imbalance of interests, the authorities have developed an almost foolproof strategy to ensure that the interests of the merging parties and the Trade Unions are equally heeded when a determination is made.

Whilst the Act is clear on the role of the merging parties, there has recently been a new development wherein the merging parties have submitted unsigned comfort letters (not even written on a Trade Union's letterhead) to the authorities and the relevant Trade Union. The Act states that the merging parties must each provide a copy of the merger notice to the registered Trade Union (representing a substantial number of employees); it does not say that that notice should include a comfort letter by the Trade Union consenting to the merger.

Whilst the Act does not prohibit this practice, we are concerned that this may lead to Trade Unions unwittingly consenting to mergers. We have had situations with mergers, particularly those dealing with public interest matters, where Trade Unions frantically call on the Commission stating their intention to participate, only to discover that the Commission is in possession of their purported signed comfort letter consenting to and supporting the merger.

The question is whether or not it is legal and / or ethical for merging parties to write a letter on behalf of the Trade Union consenting to the merger and sending it to the Trade Union together with the merger notice? On the other hand we understand the merging parties' eagerness to get the process concluded in the shortest possible time. The Act neither prohibits nor provides a sanction for this kind of practice. However we believe that the conduct of the merging parties in this process should be transparent.

Honesty should guide these processes at all times so that there is no room for suspicion. Competition law jurisprudence in the Republic is not as vast as it is in

other, older jurisdictions. However, this does not mean that there is no recourse for Trade Unions and the authorities and it does not give the merging parties *carte blanche* to flaunt ethics. There are two primary implications of this conduct: either the merger consideration could be prolonged (costing the merging parties either money or time, or, in case of failing firms, a lot of job losses) or the merger approval could be revoked by the Commission even though it had previously been approved. In terms of the Act, the Commission may revoke their own approval of a merger if (a) the decision was based on incorrect information supplied by a party to the merger or (b) if the approval was obtained by deceit. It does not end there however; the Act further provides that the Commission may then prohibit the merger from being implemented in future.

The Act also allows the Tribunal to revoke its approval of a large merger previously referred to it by the Commission at the application of the latter authority. Even the highest competition authority in the Republic, the Competition Appeal Court, may confirm the decision taken by the Tribunal to revoke a merger.

Conclusion

More and more practitioners and merging parties are understandably eager to get their transactions concluded in time. In light of this we would like to urge all parties to act in a manner that reflects maturity and compassion and embodies the spirit of the Act. This spirit requires us to build an efficient and competitive economic environment, balancing the interests of workers, owners and consumers and focussing on development that will benefit all South Africans. We are painfully aware that we will always have divergent interests; however our actions must always balance our interests with the best interests of the Republic of South Africa so that we can one day look to the past with gratitude; to the present with confidence and to the future with hope. It can be done - play your part.

Contributed by: Ikaneng Modise, Compliance Division

Cases

Touchline Media (Pty) Limited (Touchline) / Gallo Images (Pty) Limited (Gallo)

Touchline is a wholly owned subsidiary of Media 24 Ltd (Media 24) and Media 24's operations are in turn controlled by Naspers Ltd (Naspers).In this case, the primary acquiring firm is Touchline and the primary target firm with its four shareholders, is Gallo.

In terms of the structure of the transaction; in relation to the first of the interrelated agreements and pursuant to the draft Sale of Business Agreement to be entered into between Touchline and Gallo, Touchline is to sell its image distribution business to Gallo. The image distribution business comprises of inter alia fixed assets, contracts, intellectual property rights, goodwill, the rights to conduct the Getty Images Inc. business and other tangible and intangible assets. Despite the effective change of control, the combined revenue

and asset valuations of Gallo and Touchline for the acquisition of the image distribution business do not meet the thresholds. The consideration payable for this transaction amounts to R 5 991 832, 00.

In the second of the interrelated agreements, Peter Anthony Gallo and Bruce Andrew Stewart (the trustees for the time being of the Washington Trust and referred to collectively as the 'sale shareholders') will dispose of their

respective shareholdings in Gallo to the benefit of Touchline. The effect of this disposal is to confer a 50% shareholding interest in Gallo to Touchline. The cumulative effect of this agreement is Touchline's assumption of joint control over Gallo's operations. The consideration payable for this transaction amounts to R 15 583 199, 00.

The proposed transaction results in both a horizontal overlap and vertical integration. The horizontal overlap occurs in respect of the distribution and marketing of creative and editorial imagery. The vertical integration between the merging firms occurs in that Naspers (the ultimate holding company of Touchline) is a major player in the publishing industry.

The Commission contacted various customers and competitors of the merging firms in respect of the merger. Various concerns were raised relating to input and customer foreclosure. The Commission found that the merging firms would have a combined post-merger market share of 21% in the editorial imagery market and 20% in the creative imagery market. These market shares are unlikely to raise any competitive concerns as there are many other competitors active in these markets. With regard to the vertical integration, the Commission found that the proposed transaction is unlikely to raise any foreclosure issues.

The transaction does not raise any significant public interest concerns. The Commission approved the proposed transaction unconditionally.

Metso Corporation Oy (Metso) / Aker Kvaerner's Pulping & Power (AKPP)

Metso a Finnish public company, with seven satellite companies in South Africa, is the primary acquiring firm. Metso is currently engaged in the development and manufacture of machinery and process engineering. They operate through four business groups, namely: Metso Paper, Metso Minerals, Metso Automation and Metso Ventures. With the merger concluded, Metso will acquire full ownership of AKPP.

AKPP is active in the supply of machinery and systems for use in the chemical pulp industries. They also provide designs, engineering, fabrications and project management services for the fibreline, recovery boilers, and power boilers. AKPP also supplies pollution control systems, and specialised processing technology, ancillary to chemical recovery and power generation.

The acquisition involves (a) chemical pulping equipment manufactured by both Metso and AKPP and (b) power boiler equipment manufactured solely by AKPP. The parties maintain that in essence the proposed merger involves the merging of complementary products. It will enable Metso to expand its product range to include continuous digesters, a whole range of chemical recovery equipment and power boilers. Post-merger Metso will be in a position to respond to their customers' increasing demand for the supply of complete pulp mill equipment, as well as increased after sales responsibility.

In a globally defined geographic market there is a product overlap between the activities of the merging parties in the manufacture of brown washing equipment, oxygen delignification equipment, and bleaching equipment.

The transaction also gives rise to vertical integration as Metso is involved in the manufacture of automation systems, which are in turn supplied to the manufacturers of power boilers. From the ensuing vertical integration, the Commission's investigation showed that the proposed transaction is unlikely to raise vertical integration concerns.

The Commission's investigation also showed that in the markets for the manufacture of brown stock washing, oxygen delignification and bleaching equipment there are entry barriers in the form of:

- the need for supplier track records
- intellectual property rights regarding some equipment
- huge initial capital requirements
- a long waiting period before reaching take-off

There have practically been no *de novo* entrants over the last 50 years, and entry is only eased through the acquisition of a license for an existing product.

The Commission's investigation has also shown that the merging parties' customers in the manufacture of brown stock washing equipment, oxygen delignification and bleaching equipment will not be able to constrain the merging parties from behaving anti-competitively. The Commission is thus of the view that the proposed transaction removes an effective and dynamic player that has the capacity and capability to ensure that the affected markets (which are of an oligopolic nature) remain competitive.

The Commission concluded that the proposed transaction is likely to lead to a substantial prevention or lessening of competition in the markets for the manufacture of brown stock washing, oxygen delignification and bleaching equipment. There are no additional perceived efficiencies that could be attained in the washing, bleaching and oxygen delignification lines that could

outweigh the anti-competitive outcome that would arise from the consolidation of the merging parties' operations in the relevant affected markets.

However, there are other efficiencies that could be derived through the consolidation of the chemical recovery and power boilers business of AKPP and of the fibreline and wood-handling business of Metso – seen as complementary activities. Where there is an anti-competitive outcome due to the proposed transaction the markets constitute a part of the entire transaction.

To address the anti-competitive consequences resulting from the instant transaction, the Commission thus approved the transaction subject to the following conditions:

1. The divestiture, within 6 months, of the following existing AKPP assets relating to the supply of:
   i. brown stock washing
   ii. oxygen delignification
   iii. bleaching equipment and processes
   iv. together with auxiliary products such as pumps and mixers.

The above should be disposed of as a going concern and will be referred to as 'the divested business'. For clarification purposes the divested business includes, but is not limited to, the following items and assets:

- All tools, moulds and key machines used in the manufacture of wash presses and other auxiliary equipment used in brown stock washing equipment, oxygen delignification equipment and bleaching equipment
- All patents related to the manufacture of wash presses, mixers, pumps and auxiliary equipment
- All patents related to brown stock washing equipment, oxygen delignification equipment and bleaching equipment. (For clarification, the reference to all patents includes all mechanical or process patents relating to the AKPP divested business)
- All trademarks related to the wash presses and auxiliary equipment, including mixers and pumps
- All know-how related to brown stock washing, oxygen delignification and bleaching equipment, including, but not limited to, all designs, drawings, technical specifications and formulae, relating to the divested business.

2. The merging parties must (at the time of the implementation of the divestiture and subject to the applicable labour laws) give the purchaser of the divested business the right to employ all the AKPP employees it wishes to employ.

3. The merging parties must (at the time of the divestiture) provide the purchaser with commercial data (necessary to facilitate the efficient manufacture of brown stock washing, oxygen delignification and bleaching equipment) relating to the divested business. The commercial data concerned includes, but is not limited to, pricing information, actual prices received, subcontractors' details and contacts and existing tender log books, product specifications, process guarantees and other key commercial conditions of past and current projects and tenders.

4. The merging parties shall:
   i. (in accordance with good commercial practice) preserve and maintain the economic and competitive value of the divested business as well as manage the divested business in the best interests of such business until the date of disposal
   ii. refrain from carrying out any act that may reasonably be expected to have a significantly adverse impact on the economic value, the management or the competitiveness of the divested business
   iii. refrain from carrying out any act that may be of such a nature as to, in an adverse way, alter the economic value of the divested business or which could alter the commercial strategy in respect of such business in a significantly adverse way; and
   iv. provide sufficient resources for the maintenance of the divested business

5. Subject to the prior written approval of the Commission, the merging parties shall at own cost (within one month of implementation of the current transaction) appoint an independent trustee. The trustee shall
   i. monitor the satisfactory discharge by the merging parties of their obligations in terms of the conditions,
   ii. mediate any disagreements relating to the obligations imposed, and
   iii. (on a quarterly basis after the implementation of the merger) report in writing to the Commission on the merging parties' compliance with the obligations in terms of the conditions and the progress of the implementation of the divestiture.

6. The merging parties shall, within one week of receiving a ruling from any competition authority in relation to the current transaction, inform the Commission of such a ruling and provide the Commission with a copy of such a ruling.

The Commission is of the view that the proposed remedies, including proposals by GL&V (the potential purchaser), could address the possible anti-competitive effects of the instant transaction in the markets affected by the merger.

Mittal Steel Company N.V. (Mittal Steel) / Arcelor SA (Arcelor)

The transaction involves two parties, namely Mittal Steel and Arcelor. Mittal Steel intends to acquire the majority of the outstanding share capital, voting rights in, and convertible bonds of Arcelor. The transaction will be implemented by way of a public bid to Arcelor shareholders.

The primary overlap in the parties' South African activities relates to the supply of certain finished and semi-finished carbon steel products to customers in a number of SA industries.

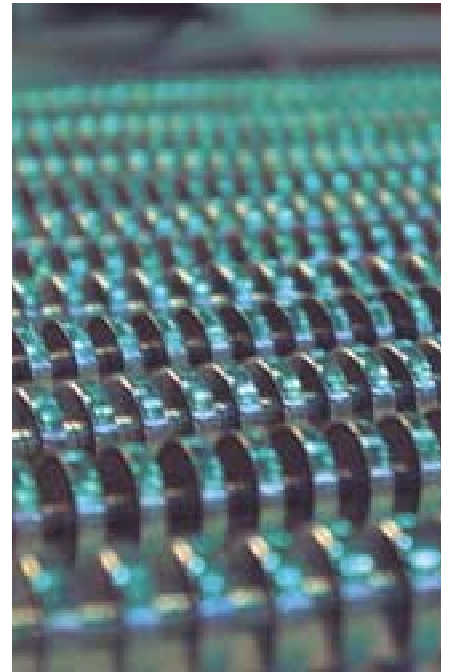
Internationally, Mittal Steel and Arcelor are both involved in the manufacturing and distribution of steel products in different segments of the industry. Locally, Arcelor only distributes imported products and is not involved in any manufacturing activities. Post-merger the accretion in the share of sales in all of these segments will be negligible.

Horizontally, the Commission concluded that the proposed transaction is unlikely to substantially prevent or lessen competition in the overlapping markets.

Vertically, the efficiency arguments raised in favour of the merger outweigh any anti-competitive effects. Furthermore, locally, neither party is involved in the stockholding or service centre activities in South Africa.

No job losses are expected and there are no other significant public interest issues arising from the proposed transaction.

The Commission accordingly recommended that the merger be approved without conditions.



Distribution and Warehousing Network (Pty) Ltd (Dawn) / Isca (Pty) Ltd (Isca) & Dora Investment cc (Dora)

Dawn is the primary acquiring firm and Isca and Dora are the target firms. In terms of the structure of the transaction, Dawn will acquire Isca's business and assets and Dora's properties namely Erven 519, 520, 577 and 578 (collectively referred to as the Isca Factory Properties).

Dawn is a specialist trading and distribution group that services the merchant retail sector of the building and construction industry. Dawn's subsidiaries sell and distribute plumbing, sanitary and hardware products. Recently Dawn acquired the Amanzi, Libra and Vaal businesses.

- Amanzi manufactures and supplies acrylic baths.
- Libra is involved in the manufacture, sales and distribution of acrylic baths and is also a distributor of ceramic sanitaryware.
- Vaal is involved in manufacturing and distribution of ceramic sanitaryware.

The transaction has both a horizontal and a vertical dimension. In the horizontal dimension the activities of the parties overlap in the manufacture and supply of brass taps and mixers. This is also the upstream market in the vertical dimension, with the distribution of sanitary-ware, plumbing and hardware products being the downstream market. Combined the parties would have an estimated 53% post-merger market share for the manufacturing and supply of taps and mixers in SA. Dawn is the current market leader in the distribution of sanitary-ware and plumbing products with a market share of approximately 56%.

Dawn holds high market shares in the market for both the manufacturing and supply of taps, mixers, accessories and spares as well as the distribution market. However, the Commission is of the view that it is unlikely that this merger will substantially prevent or lessen competition in the markets in which the parties compete. Customers have alternative sources for the products supplied by the merged entity as there are a large number of imports in the market for the manufacture and supply of taps and mixers. In the market for the manufacturing and supply of acrylic baths in SA, the Commission found that most firms are vertically integrated and as result they are able to distribute their own products. The investigation further revealed that those firms that are not vertically integrated are able to approach manufacturers directly. The Commission thus concluded that the transaction was unlikely to substantially prevent or lessen competition. The Commission also found that the proposed transaction did not raise significant public interest concerns.

Towards a free and fair economy for all

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