



COMPETITION TRIBUNAL OF SOUTH AFRICA

**Case No: 53/AM/May12
(015057)**

In the matter between:

DCD-Dorbyl (Pty) Ltd **First Applicant**
Elgin Brown and Hamer Group Holdings (Pty) Ltd **Second Applicant**
and
The Competition Commission **Respondent**

In respect of the consideration of the intermediate merger between:

DCD-Dorbyl (Pty) Ltd **Acquiring firm**
and
Elgin Brown and Hamer Group Holdings (Pty) Ltd **Target firm**

Panel : Yasmin Carrim (Presiding Member)
Andreas Wessels (Tribunal Member)
Andiswa Ndoni (Tribunal Member)
Heard on : 31 July 2012
Order issued on : 31 July 2012
Reasons issued on : 29 August 2012

Reasons for Decision

Conditional approval

1. On 31 July 2012 the Competition Tribunal ("Tribunal") conditionally approved the intermediate merger between DCD-Dorbyl (Pty) Ltd and Elgin Brown and Hamer Group Holdings (Pty) Ltd (collectively referred to

hereinafter as “the merging parties”). The reasons for conditionally approving the proposed transaction follow below.

Parties to transaction

DCD

2. The primary acquiring firm is DCD-Dorbyl (Pty) Ltd (“DCD”), a company incorporated in accordance with the company laws of South Africa. DCD is a diversified mechanical engineering business that operates across four primary clusters, namely rail, mining and energy, marine and defence.
3. Of relevance to the competition assessment of this transaction is DCD’s marine cluster. This cluster provides a broad range of ship repair and conversion/modification services, with predominant focus on the provision of repair and conversion services to customers that own and/or operate so-called “oil and gas vessels”. Its core ship repair activities include steel and pipe fabrication; mechanical work; large-scale machining; engine/propulsion repair; electrical repairs; blasting and coating; and valve testing. These core activities are generally provided as part of a “turn-key” service in which it is responsible for the overall management of the repair project (which may also involve sub-contracting particular services to third-parties) or, to a lesser extent, as individual services where DCD is not responsible for project management, for example where customers undertake management of the repair project themselves.
4. DCD is predominately active in the port of Cape Town where it has extensive facilities and can provide customers with a “complete shipyard” service. Its facilities in Cape Town include exclusive use of 50% of the A-Berth lay-down area (which it uses for floating repairs on very large oil and gas vessels and structures);¹ various pipe, fabrication, fitting, electrical and machining workshops; and offices and support services space.
5. Outside of Cape Town, DCD has a presence in East London through its 50% ownership in East London Shipyards (“ELSY”), a joint venture

¹ Also see paragraphs 16, 19 and 45 to 47 below.

between DCD and Elgin Brown and Hamer (Pty) Ltd. It also operates a small workshop in the port of Saldanha.

EBH

6. The primary target firm is Elgin Brown and Hamer Group Holdings (Pty) Ltd ("EBH Group Holdings"), a private company incorporated in accordance with the company laws of South Africa. EBH Group Holdings is an investment holding company which effectively wholly-owns Elgin Brown and Hamer (Pty) Ltd ("EBH") through various intermediate investment companies.
7. The EBH group of companies provides a range of ship repair and associated services to local and foreign owners of shipping vessels. Its core activities include, among other things, steel fabrication; piping work; mechanical repairs; machining; blasting and coating; electrical repairs; hydraulics; ship inspections; underwater repair services; and the provision of project management services.
8. EBH is active in four ports in Southern Africa, namely Cape Town, Durban, East London² and Walvis Bay. With regards to Cape Town the merging parties submitted that EBH's facilities are limited to a plant and equipment and property leased from the Transnet National Ports Authority ("TNPA") and buildings owned by EBH.³

Proposed transaction and rationale

9. In terms of the proposed transaction, DCD will acquire a 100% shareholding interest in EBH Group Holdings. Upon implementation of the transaction DCD will therefore have sole control over EBH Group Holdings.
10. From DCD's perspective the rationale for the proposed merger is that it would like to diversify its current business into container and cargo vessel repair, particularly in the port of Durban where DCD is not currently active.

² Through its 50% ownership and management oversight of ELSY.

³ See page 64 of the merger record.

DCD further submitted that the proposed transaction will strengthen the DCD and EBH offering to the international shipping market since EBH will offer DCD access to the Durban and Walvis Bay ports and more comprehensive service offerings.

11. The rationale of the target firm's shareholders is that the shares in EBH Group Holdings are being sold in order to allow for retiring shareholders to exit the business and convert their equity into cash.

Background

Ship repair services

12. The proposed transaction results in a horizontal overlap since both DCD and EBH are involved in the provision of ship repair services. Ship repairs involve the provision of a range of different services and repairs to a particular vessel may entail one or multiple different types of work, including core disciplines such as fabrication, electrical work, machining and mechanical work, marine blasting and painting and pipe work, as well as a range of more specialised disciplines.
13. The options open to customers in terms of the ports in which ship repairs may be undertaken and the firms that will compete to undertake these repairs, will differ not only to the type of vessel, but also to the type of repair required and consequently the expertise and infrastructure required to undertake that repair.
14. The key facilities typically required to perform ship repair projects include:
 - (i) facilities for holding the vessel while it is worked on, such as a dry dock or synchrolift in the case of below the water line repairs or a suitable berth at a repair quay in the case of afloat repairs;
 - (ii) workshops for undertaking the functional aspects of ship repair (for example fabrication, electrical, machine and pipe shops) and which could be located at the quayside or away from the harbour; and
 - (iii) infrastructure and equipment for moving components to and from the vessel (for example cranes) and lay-down

areas where components can be worked on and accommodated before they are fitted to the vessel.

15. In South Africa the infrastructure used for ship repair, including land, is owned by the state through the TNPA. Some market participants, such as the merging parties, have their own floating or mobile docks for ship repair for their own exclusive use. In terms of the current framework, there is a de-centralised booking system in terms of which market participants can make bookings for usage of TNPA-owned and -operated ship repair facilities, subject to payment of a prescribed fee. Market participants in the ship repair market(s) also lease TNPA-owned land.

16. As is evident from the above description of the merging parties' activities, the port of Cape Town is the only port where both DCD and EBH are active. The port of Cape Town has three dry dock facilities, namely (i) the Sturrock dry dock (a large-sized graving dock); (ii) the Robinson dry dock (an intermediate-sized graving dock); and (iii) the smaller Synchrolift. The TNPA owns all of these docks and leases them short term on a "common-user" basis. In addition, the port has a repair quay which is 456 metres long and includes 34 berths, including the A-berth, which is used primarily for the repair of oil and gas vessels.⁴

17. A significant proportion of South Africa's deep sea fishing is based in Cape Town, and hence a considerable amount of the ship repair work undertaken in Cape Town relates to fishing vessels. However, the most significant (in terms of revenue) ship repair work undertaken in Cape Town relates to oil and gas vessels which, as stated above, are the primary focus of DCD's business.

Commission's decision

18. This merger was filed with the Competition Commission ("Commission") on 30 January 2012 and on 26 April 2012 the Commission approved the proposed merger subject to certain conditions. The Commission

⁴ Also see paragraphs 19 and 45 to 47 below.

concluded that the proposed deal would lead to a substantial lessening of competition in the regional market for ship repair services.⁵ The concern that arose related to access to ports infrastructure such as docking facilities, berths, quays and workshop facilities particularly in the ports of Cape Town and Durban. Subsequently the Commission approved the proposed merger subject to conditions which included the divestiture of certain ship repair facilities that the merged entity would control.

Complaints received by the Commission

19. The Commission received concerns from mainly two competitors to the merging parties, namely Dormac (Pty) Ltd ("Dormac") and Belmet Marine (Pty) Ltd ("Belmet"), highlighting the inaccessibility of the A-berth in the port of Cape Town, a facility for repairing oil and gas rigs.⁶

Application for consideration

20. On 14 May 2012 the merging parties brought an application for consideration in terms of section 16(1)(a) of the Competition Act, 1998⁷ ("the Act"), against the Commission's conditional merger approval.

21. The basis for the merging parties' request, in short, was that the Commission in its analysis of the proposed transaction did not appropriately consider a number of factual and economic issues in arriving at its conclusion, including the potential for significant efficiencies and public interest benefits arising from the proposed merger. The merging parties were of the view that that their proposed merger was unlikely to substantially prevent or lessen competition in any relevant market. However, they ultimately agreed a set of conditions with the Commission to address the Commission's competition concerns.⁸

⁵ See market definition in paragraph 37 below.

⁶ Also see paragraphs 45 to 47 below.

⁷ Act No. 89 of 1998, as amended.

⁸ Also see paragraph 28 below.

TNPA

22. During its investigation of this matter the Commission invited the TNPA to make submissions regarding the proposed transaction. The Commission however received the TNPA's submissions only after it had already conditionally approved the merger in terms of its prescribed time lines for the investigation of an intermediate merger. According to the Commission these TNPA submissions necessitated a review of its imposed conditions.

23. The TNPA informed the Commission that it was engaged in a bid process in respect of ship repair facilities and that it, after the Commission's enquiries, decided to cancel the current tender process relating to the proposed concessioning of ship repair facilities to the private sector. The TNPA further noted that during numerous discussions with bidders, it was adamant that its model must be on a common user basis. According to the TNPA, this principle means that equal access must be granted to users of facilities on a first come first serve basis without any discrimination on tariffs, trading conditions, operating procedures, booking procedures or any minimum requirements regarding vessel size, capacity, safety and environmental aspects.⁹

24. On 13 June 2012 the TNPA met with the Commission. The TNPA in a subsequent letter informed the Commission that it will pursue alternatives in its attempt to exercise oversight control and to introduce improved management of the booking process for ship repair facilities.¹⁰

25. The TNPA had a further meeting with the Commission on 26 June 2012. In a subsequent letter of 05 July 2012 to the Commission the TNPA in relation to the Commission's proposed conditions at the time advised that those conditions in its suggested format would not be executable since (i) land in the port cannot be alienated; and (ii) the general conditions of the TNPA's leasing process does not grant the lessor any rights to dispose of

⁹ Letter of TNPA to the Commission dated 25 April 2012.

¹⁰ Letter of TNPA to the Commission dated 15 June 2012.

any buildings on the sites, as all immovable assets revert to TNPA at the end of the lease term.

26. The TNPA further advised that the EBH repair facility in Cape Town is subject to an existing lease agreement which expires on 28 February 2013. The TNPA was of the view that since the remaining period of the lease is only eight months, the lease should be allowed to lapse through the effluxion of time, since an early termination may result in unintended consequences for the TNPA and EBH, such as compensation and PFMA considerations. The latter approach would allow the TNPA to commence with a process to appoint a lessee on the land, which process will be open and transparent.¹¹

27. The TNPA further advised the Commission that it intends initiating a process of review of the current ship repair operations and tariffs, which process will involve all affected parties.¹²

Revised conditions

28. Following the TNPA submissions, the Commission reached an agreement with the merging parties to revise the merger conditions, which conditions the Commission and the merging parties presented to the Tribunal for consideration.

Pre-hearing conference

29. A pre-hearing conference was held on 10 July 2012 where the relevant parties agreed *inter alia* to the following conduct of proceedings: (i) the Commission had to provide relevant third parties (see section below dealing with Dormac) with copies of its original imposed conditions, its proposed revised conditions, as well as a letter explaining the reasons for the revised conditions; and (ii) the Commission had to advise the respective third parties that if they wished to intervene in this matter, an intervention application had to be filed by no later than 23 July 2012,

¹¹ Letter of TNPA to the Commission dated 05 July 2012.

¹² Letter of TNPA to the Commission dated 05 July 2012.

alternatively these third parties could file further written submissions by 23 July 2012.

Dormac

30. In compliance with the Tribunal's directions, the Commission on 11 July 2012 provided Dormac with a copy of its original imposed conditions, its proposed revised conditions, as well as a letter explaining the reasons for its proposed revised conditions. On 17 July 2012 Dormac was also provided with copies of the TNPA submissions to the Commission.

31. Dormac was further advised that if it wished to intervene in this matter, an intervention application had to be filed by no later than 23 July 2012, alternatively it could file a further written submission by 23 July 2012.¹³

32. On 23 July 2012 Dormac advised the Tribunal of its decision not to proceed with a formal intervention application, but that it instead would make specific and limited written submissions on the TNPA's undertaking to "*review current ship repair operations and tariffs*" and the extent to which this may alleviate Dormac's concerns.¹⁴

33. At Dormac's request, the Tribunal granted it an extension until 25 July 2012 to file its further written submission in respect of the proposed transaction.

34. On 25 July 2012 Dormac advised the Tribunal that it would not reiterate the submissions already made by it as contained in the merger record. Dormac further submitted that the Commission's proposed revised conditions were unsuitable since they were not enforceable. In Dormac's view the Commission's proposed conditions relied completely on the TNPA's timely and appropriate intervention and therefore remained unenforceable by the Commission.¹⁵

¹³ Commission's letter dated 11 July 2012 to the legal representatives of Dormac.

¹⁴ See letter dated 23 July 2012 from Norton Rose to the Tribunal.

¹⁵ See letter dated 25 July 2012 from Norton Rose to the Tribunal.

35. At the Tribunal hearing Dormac's legal representative at the start of the proceedings indicated that, she was there only on a watching brief and apart from its written submissions, Dormac would not be making any oral submissions. The Tribunal proceeded on that basis.¹⁶

36. Thus, Dormac was given various and sufficient opportunities to make representations with regards to its concerns.

Competition assessment

37. The Commission concluded that the broader market for ship repairs can be further delineated in separate relevant product markets for (i) general ship repairs, including oil and gas repairs; and (ii) oil and gas repairs. The Commission ultimately, based on the merging parties' submissions, case precedence and the views of market participants, concluded that the merging parties' activities overlap in the following relevant markets:

- (i) a *general* ship repair market (including oil and gas rigs repairs) for *international* vessels

International vessels are vessels that travel along international routes and include container vessels, dry-bulk carriers, tankers, roll-on-roll-off vehicle carriers, passenger vessels and cruise liners;

- (ii) a *general* ship repair market (including oil and gas rigs repairs) for *port bound* vessels

Port bound vessels are vessels that will not view ship repair firms located in different ports as being substitutes to one another, but will rather visit the closest available port that has the facilities, capacity and expertise to carry out the repairs required. Port bound vessels include fishing vessels used for commercial and recreational fishing; port vessels that perform various functions and predominantly operate from and/or within

¹⁶ See page 1 of the hearing transcript.

a particular port, including, for example, tugs and pilot boats, launches, dredgers, and rescue and salvage vessels; and off-shore service vessels including barges and supply vessels that are predominantly used to transport goods and people to and from oil platforms;

- (iii) a *general* ship repair market (including oil and gas rigs repairs) for *regional* vessels

Regional vessels are vessels that operate over specific geographic regions. They include general cargo vessels used to carry both bulk goods and packaged items; and special-purpose vessels such as research and exploration vessels, naval vessels, cable layers, survey vessels, weather vessels and seismographic vessels used in oil and mineral prospecting; and

- (iv) an international *oil and gas* ship repair market

Oil and gas vessels and structures are extremely large and complex. Hence the number of ports in Southern Africa in which these vessels and structures can be repaired is limited. Oil and gas vessels and structures include, for example, crane barges, pipe-laying barges, oil production rigs, drilling rigs, floating storage offshore structures and floating storage production offshore structures.

38. Below we shall discuss the unilateral competition effects that are likely to result from the proposed transaction with regards to each of the four identified markets. Our focus shall however be on the market for general ship repairs of regional vessels where the Commission identified significant competition concerns.

39. We shall however not discuss potential coordinated effects since we have found no cogent evidence that the proposed merger is likely to either enhance or lead to likely coordinated conduct. We however note that certain allegations have been made in the Commission's report with

regards to the existence of cartel activities in South African in the broader ship repairs market.

- (i) *A general ship repair market (including oil and gas rigs repairs) for international vessels*

40. The Commission concluded that it is unlikely that the proposed merger will give rise to significant unilateral competition effects with respect to this market. The reason for this is that it is safe to assume that DCD and EBH individually and collectively possess an insignificant share of this market. Furthermore, customers contacted by the Commission did not raise any concerns with regards to this market. Given the wide geographic scope of this market and the very large number of players active therein, we concur with the Commission's view that the proposed merger is unlikely to raise unilateral competition concerns in this market. We therefore do not discuss this market in any further detail below.

- (ii) *A general ship repair market (including oil and gas rigs repairs) for port bound vessels*

41. The merging parties submitted that their activities for the most part do not overlap at the level of individual ports, with the exception of Cape Town.

42. The Commission concluded that the proposed transaction is unlikely to raise significant competition concerns in this market. The Commission contacted a number of customers in this market, including Pescanova, De Beers, Blue Continental, I&J, Viking Fishing and Sea Harvest and none of these customers raised any competition concerns resulting from the proposed deal in relation to this market. The Commission also noted that the TNPA will continue to have control of the key infrastructure such as the dry dock facilities and quays and that market share information shows that Dormac and Hesper are alternative ship repair service providers in Cape Town. With regards to the port of East London, the Commission submitted that the proposed merger will not change the market structure in the

market for general repairs for port bound vessels since the merging parties currently operate the above-mentioned ELSY joint venture.¹⁷

43. There is no evidence of a substantial prevention or lessening of competition in this market as a result of the proposed transaction and we therefore do not deal with this market in any further detail below.

(iii) *An international oil and gas ship repair market*

44. The merging parties submitted that since EBH has exited the provision of oil and gas related repair services in Walvis Bay it has not been active in repairing oil and gas vessels and structures, and as such there is no current overlap between the merging parties' activities in respect of this type of work.¹⁸

45. As stated in paragraph 19 above, certain competitors raised concerns relating to the inaccessibility of the A-berth in the port of Cape Town. This berth relates mainly to oil and gas ship repairs since the TNPA has earmarked the A-berth, a quay that is located at the entrance of the Cape Town harbour, for oil and gas rigs repairs. Although the A-berth is specifically designated for the repair of rigs it can however also be used for the repair of other vessels, particularly for floating repairs. However, despite these concerns raised by competitors, the Commission concluded that no merger-specific competition concerns arise in this market as a result of the proposed deal, as explained below.

46. The Tribunal in the merger involving *DCD/Globe*¹⁹ imposed a condition on the merging parties in that transaction aimed at ensuring that 50% of the A-berth will remain accessible to other players than DCD and Globe on a common user basis. The essential feature of the condition was that the then merging parties agreed that if they wished to lease the A-berth lay-down area, that such lease would not be for more than 50% of the property. Further to discussions with various parties, the initial condition

¹⁷ See paragraph 5 above.

¹⁸ See page 99 of the merger record.

¹⁹ See Tribunal decision in the merger involving *DCD-Dorbyl (Pty) Ltd* and *Globe Engineering Works (Pty) Ltd*, case no. 108/LM/Oct08.

was furthermore amended to include two other aspects. One, the requirement that the remaining area (portion of the lay-down area), must be reasonably accessible to the quay. Two, the then merging parties drew a diagram showing the proposed split into leased premises and the remainder, and undertook that they would propose to the TNPA that the premises to be leased by them, be situated as indicated on the shaded part of the diagram.

47. The Commission concluded that the current transaction does not alter the competitive landscape in this market, mainly because EBH does not have control of the A-berth and/ or does not have any long-term leases with regards to the A-berth. The Commission therefore found that the concerns raised by third parties in relation to the A-berth must be addressed through the Commission's merger conditions monitoring processes as their concerns lack merger-specificity in the context of the instant transaction. We concur with the Commission's assessment.

(iv) General repairs (including oil and gas repairs) for regional vessels

48. Since DCD and EBH are both active in different ports in Southern Africa the proposed merger gives rise to overlap of their activities at a regional level. In the description of the merging parties' activities, we have listed the ports in which each of the merging parties is active (see paragraphs 4, 5 and 8 above).²⁰ As stated, their activities however only overlap in the port of Cape Town, where the merged entity will control significant leases post-merger.²¹ As further stated, ELSY is active in the port of East London.²² The merged entity will furthermore, through EBH, have control of certain floating docking facilities in Walvis Bay and Durban.

49. With regards to this regional market the Commission concluded that the merged entity will largely control key infrastructure like docking facilities and workshop facilities post transaction. The Commission found that the

²⁰ We note that the merging parties by and large are not active in the ports of Richards Bay, Port Elizabeth, Simon's Town and Mossel Bay.

²¹ Also see paragraph 16 above.

²² See paragraph 5 above.

merged entity will have a dominant position in this market post-merger; followed by Dormac (active in the ports of Cape Town, Durban and Walvis Bay); Hesper (active in the port of Cape Town); and South African Shipyards (active in the port of Durban). Other players active in the regional market include Belmet (active in the ports of Cape Town and Walvis Bay), Channel Ship Repairs (active in the port of Durban), Macc Engineering (active in the port of Durban) and Kraatz Marine (active in the port of Walvis Bay).

50. The Commission further found that being able to offer a privately owned or controlled docking facility is a significant advantage when competing for tender work. That is, when competitors submit bids for consideration by customers, it is important to demonstrate that the party tendering for a repair project has secured a docking facility, whether owned or booked with the TNPA. According to the Commission this means that players in the market compete through capacity, i.e. docking facilities and workshop facilities. The Commission further concluded that the proposed transaction will lead to the removal of EBH as an effective competitor in this market.
51. The Commission also found that barriers to entry and expansion in this market are high, especially for players who wish to enter as and/or become multi-disciplinary contractors. With regards to entry barriers, the merging parties submitted that the ship repair market is highly cyclical and that firms need high working capital requirements to run these businesses effectively.²³
52. However, the Commission was of the view that its competition concerns relating to this market could be remedied by a set of proposed revised conditions that would reduce the merged entity's concentration of control of ship repair facilities/infrastructure in Cape Town. The Commission and merging parties proposed a set of conditions that in essence prevents the merged entity, for a significant period of time, to tender to operate the

²³ Merger record page 42.

current EBH ship repair facility located in the northern side of the Graving Dock in Cape Town.²⁴

53. The Tribunal however at the hearing of this matter raised certain concerns with regards to the Commission and merging parties' proposed set of conditions, as explained below.

54. The first concern raised by the Tribunal related to a proposed condition dealing with the merged entity's occupation of the above-mentioned current EBH ship repair facility in Cape Town after the expiry of the lease agreement between EBH and the TNPA. This condition appeared to be in conflict with the primary condition, i.e. the condition relating to the future non-control by the merged entity of the current EBH ship repair facility in Cape Town.²⁵ The merging parties however agreed to the deletion of this proposed condition. This addressed the Tribunal's concern.

55. The Tribunal further raised the concern that the above-mentioned primary condition relating to the future control of the current EBH ship repair facility in Cape Town could have unintended and negative competition and/or public interest consequences depending on the third party who ultimately would win the tender for operating this facility and consequently acquire the market share related to ship repairs at the facility. To address this concern the Tribunal recommended that the Commission should engage with the TNPA in an advocacy role to highlight the competition- and/or public interest-related issues which may arise in relation to ship repair facilities in general, and more specifically in relation to tenders involving access by small and medium sized enterprises to ship repair facilities. The Commission and merging parties had no objection to such a condition.

56. With the above-mentioned enhancement of the Commission and merging parties' proposed set of conditions to address the merger-specific competition concerns, we approved the proposed merger subject to the following conditions:

²⁴ See paragraph 56.1 below.

²⁵ See paragraph 56.1 below.

- 56.1. The merging parties undertake not to acquire or establish control, directly or indirectly, over the EBH ship repair facility within a period of ten (10) years after the expiry of the Lease Agreement on 28 February 2013. The EBH ship repair facility refers to the ship repair facility located in the northern side of the Graving Dock in Cape Town which EBH currently operates. The Lease Agreement refers to the current lease agreement between EBH and the TNPA, in terms of which EBH is leasing the respective EBH ship repair facility property from the TNPA.
- 56.2. The merging parties undertake to notify the Commission of any acquisition or establishment of control over the EBH ship repair facility after the expiry of the ten (10) year period referred to in the paragraph above.
- 56.3. The merging parties must cooperate in the investigation process which may be instituted by the TNPA to review current ship repair conditions and tariffs.
- 56.4. The Commission shall engage with the TNPA in an advocacy role to highlight the competition- and/or public interest-related issues which may arise in relation to ship repair facilities in general, and more specifically in relation to tenders involving access by small and medium sized enterprises to ship repair facilities.
57. Given that the ship repair activities of the merging parties only overlap in the port of Cape Town and given the presence of a number of other players in the region, including Dormac and Hesper, we are satisfied that the enhanced conditions adequately address and are proportionate to the competition concerns identified in the market for general ship repairs for regional vessels. We furthermore note that the Commission will be able to enforce these conditions as well as act in terms of its advocacy function to ensure competitive outcomes.

Public interest

58. The merging parties submitted that the proposed transaction will not result in any retrenchments.²⁶ The proposed deal raises no other public interest concerns.

CONCLUSION

59. We approve the proposed merger subject to the conditions as highlighted above. The full set of imposed conditions is attached hereto as “**Annexure A**”.



ANDREAS WESSELS

29 August 2012
DATE

Yasmin Carrim and Andiswa Ndoni concurring

Tribunal researcher: Nicola Ilgner
For the merging parties: Werksmans Attorneys
For the Commission: Thabo Khumalo and Bukhosibakhe Majenge
For Dormac: Norton Rose

²⁶ See merger record pages 31 and 49.

ANNEXURE A

Intermediate merger involving DCD-Dorbyl (Pty) Ltd and Elgin Brown and Hamer Group Holdings (Pty) Ltd

Tribunal case no: 53/AM/May12 (015057)

CONDITIONS

1. DEFINITIONS

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

- 1.1. "the Commission" means the Competition Commission of South Africa;
- 1.2. "Conditions" means these conditions;
- 1.3. "DCD-Dorbyl" means DCD-Dorbyl (Pty) Ltd;
- 1.4. "EBH" means Elgin Brown and Hamer Group Holdings (Pty) Ltd;
- 1.5. "EBH ship repair facility" means the ship repair facility located in the northern side of the Graving Dock in Cape Town which EBH currently operates;
- 1.6. "Lease Agreement" means the current lease agreement between EBH and the TNPA, in terms of which EBH is leasing the respective EBH ship repair facility property from the TNPA.
- 1.7. "Merger" means the acquisition of control over EBH by DCD-Dorbyl;
- 1.8. "Merging Parties" means DCD-Dorbyl and EBH;
- 1.9. "the TNPA" means the Transnet National Ports Authority;

2. RECORDAL

- 2.1. On 14 May 2012 the merging parties brought an application for consideration in terms of section 16(1)(a) of the Competition Act 89 of 1998, as amended ("the Act"), against a conditional merger approval issued by the Commission on 26 April 2012.
- 2.2. Subsequent to the issue of the merger clearance certificate, the TNPA, which owns the land and infrastructure used for ship repair in South Africa, made a submission to the Commission which necessitated a review of the merger conditions issued by the Commission.
- 2.3. The principal objective of the merger conditions was to address competition concerns arising from the merger relating to access to ship repair facilities.
- 2.4. The TNPA may embark on a process to review current ship repair operations and tariffs in the light of the concerns identified by the Commission.
- 2.5. EBH currently operates a ship repair facility located in the northern side of the Graving Dock in Cape Town which is subject to a lease agreement between EBH and the TNPA expiring on 28 February 2013.
- 2.6. Upon expiration of the Lease Agreement, all buildings, permanent fixtures and improvements of immovable nature will revert to the TNPA in accordance with the Lease Agreement. All movable property will be removed by the merging parties from the site.

3. CONDITIONS TO THE APPROVAL OF THE MERGER

- 3.1. The merging parties undertake not to acquire or establish control, directly or indirectly, over the EBH ship repair facility within a period of ten (10) years after the expiry of the Lease Agreement on 28 February 2013.
- 3.2. The merging parties undertake to notify the Commission of any acquisition or establishment of control over the EBH ship repair facility after the expiry of the ten (10) year period referred to in paragraph 3.1 above.
- 3.3. The merging parties must cooperate in the investigation process which may be instituted by the TNPA to review current ship repair conditions and tariffs.
- 3.4. The Commission shall engage with the TNPA in an advocacy role to highlight the competition- and/or public interest-related issues which may arise in relation to ship repair facilities in general, and more specifically in relation to tenders involving access by small and medium sized enterprises to ship repair facilities.