COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

Case No: 29/LM/May02

In the large merger between:

Nampak Limited

and

Malbak Limited

Reasons for decision

Approve with conditions

1. On the 18th of June we handed down an order approving this merger subject to certain conditions. The reasons for our decision follow. A copy of the order is attached.

Recommendation by Competition Commission

2. The Commission's investigation concluded that the merger would result in a substantial lessening of competition in the supply of flexible roofing insulation, one of the areas of product overlap between the merging parties. It therefore recommended to the Tribunal that the merger be approved on condition that the merged entity sells the bubblepack insulation machine currently manufacturing the roofing insulation products distributed under the brand names Alucushion, Alububble and Bubblefoil. Prior to the merger Malbak produced these products.

3. As will be elaborated below, there are several other areas of product overlap. However, the Commission has found that the merger will not compromise competition in these other areas of overlap.

Background information

The transaction

4. The transaction involves the acquisition by Nampak Ltd of the entire issued share capital of Malbak Ltd by way of a scheme of arrangement.[1]

The parties

5. Nampak Limited is listed on the JSE Securities Exchange South Africa in the Packaging and Printing sector. The company's shares are widely held with some 6174 shareholders, the largest of which are Old Mutual with approximately 17%, RMB 13% and the Public Investment Commissioner 10.4% of the total issued shares. Nampak is the largest packaging company in Africa producing packaging products made from metal, paper, plastic and glass.

6. Malbak Limited is listed on the JSE. Its controlling company is Remgro Limited, which holds 44% of the issued ordinary share capital and 48% of the voting shares. Malbak, also in the packaging industry, has substantial offshore interests which account for 63% of its total sales[2].

Rationale for the transaction

7. The merging parties have identified two related, but distinguishable, rationales for the transaction.

8. Firstly, in the context of a static, even declining, domestic market for packaging services, the parties claim that the merger will substantially enhance their capacity to penetrate export markets. This, they aver, will largely occur in consequence of the efficiency boost that will be provided by the increase in capacity utilisation resulting from the rationalisation of the merging parties' production activities.[3]

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[1] Malbak's rigid plastics interests have, subject to competition authority approval, been sold to a third party. The tribunal has prohibited a third transaction, namely Kohler's sale of its cores and tubes division to Mondi Limited.

[2] This excludes sales of rigid plastics. Its rigid plastics business has been sold to a third party.

[3]According to the parties production downtime, a frequent occurrence in an industry characterized by such great product diversity, is extremely costly accounting for approximately 20% of running time. A changeover on a gravure machine can take anything from 30 minutes to four hours depending on the complexity of the job. If the merged entities were to aggregate customers' orders and run the same order on one machine instead of two or three, then benefits would be significant in freeing up capacity and in allowing for more efficient management of working capital, because stock of raw materials, particularly imported materials and finished goods, would not need to be duplicated. See page 500 of the record.

9. Secondly, the parties aver that the transaction will enable the merged entity to compete effectively for the business of multinational customers. This will be elaborated at some length in our discussion of the relevant market and our evaluation of the transaction's impact on competition. Suffice for the moment to say that the parties claim that in order to compete for the business of the large multinationals, packaging providers have to possess production units of considerable scale as well as a spread of production units at key locations capable of serving large regions. These requirements are heightened by an increasing tendency amongst the multinationals to consolidate their global production facilities, thereby designating a smaller number of larger and strategically located production facilities with responsibility for serving larger regional or continental markets. This means that in order to bid for the business of one of the multinationals a packaging supplier will have to possess capacity beyond that required to service its domestic market as well as a spread of production facilities located at key points across the global market.[4]

<u>The Competition Evaluation</u>

10. We are enjoined to determine whether or not the transaction is likely to substantially prevent or lessen competition. We will identify the markets implicated in this horizontal transaction and we will assess the likely impact of the merger on competition in the relevant markets.

The relevant markets

11. We have already indicated that we are here examining a horizontal transaction between firms involved in the packaging sector – Nampak, the acquiring firm, currently enjoys a 33% share of the total South African packaging industry market, while Malbak, the target firm, controls 5.6%. The merged entity will thus control 38.6% of the total South African packaging industry, a very significant share indeed. However, packaging is a very diverse activity with Nampak involved across a considerably wider spectrum of packaging activities than Malbak. There are, in fact, only three areas of overlap – in the folding cartons segment, in flexible plastic packaging and in the manufacture of paper labels.

The Market for Paper Labels

12. The parties submit that the ***market for paper labels*** is not part of the packaging market. There are two categories of paper labels namely

[4] As was stated by the merging parties on page 14 of the transcript: " … a number of the large multinational companies that are the significant customers of the merging parties are deciding where there should be recognized sites for their activities in respect of packaging."

self-adhesive labels and wet glued labels. The production process for wet glued labels and self-adhesive labels differs significantly. Self-adhesive labels can substitute for wet-glued labels in certain applications but the converse does not apply, that is wet-glued labels are not substitutable for self-adhesive labels on account of hygiene, cost and other technical factors. The wet glued label market is threatened by substitution of self-adhesive labels. The merging parties only overlap in the wet glued label market where their combined market share is 7 %. The largest players in this market are CTP (20% market share), Cape Printing and Litho (13%) and J. Ryan (13%).

13. The merger in this product market does not raise any competition concerns and will, accordingly, not be discussed further.

14. Our evaluation is accordingly confined to the other two areas of overlap, namely in ***folding cartons and flexible plastic packaging***.

The Folding Carton market

15. The parties aver that there are, within the ***folding carton*** market, two distinct sub-markets, namely the sub-market for cigarette cartons and that for general cartons. The Commission accepts this segmentation as do most of industry players consulted during the course of its investigation.

The Cigarette Carton market

16. The merging parties and most of the customers and competitors in the market agree that the cigarette carton market is recognized as a distinct sub-market because it requires long runs and high quality printing work, which entails specific expertise in bronzing and embossing. This is predominantly done on gravure printers in South Africa. Although it is possible to use litho printing in the cigarette cartons market it is less cost effective for long runs than gravure printing. [5]

17. The main competitors in the cigarette folding carton market are Nampak, Malbak and CTP Gravure. Note that the Nampak controlled company active in the folding cartons market is Printpak which is a joint venture between Nampak, which controls 70% of the shares of the company and Malbak which controls 30% of the shares. Nampak controls the board of Printpak and, although a shareholders' agreement does somewhat limit Nampak's freedom of action, it has not been contended that this is anything other than a Nampak controlled company and, accordingly, is a competitor of Malbak in the folding cartons market despite the latter's minority shareholding in Printpak. For ease of exposition we will henceforth refer to Printpak as Nampak.

[5] See page 490 of the record.

18. The following table shows each player's market share before the merger, as well as the level of concentration (HHI) pre- and post the merger:

Competitors in the Cigarette Carton market	Market Share (%)
Nampak	81
CTP Gravure	13
Malbak	6
TOTAL	100
Pre merger HHI	**6766**
Post merger HHI	**7738**
Change in HHI	**972**

19. The parties' combined market share post the merger is 87%. It is a highly concentrated market.

20. However, this market is dominated by a very large and powerful multinational customer, British American Tobacco ("BAT"). BAT has a market share of 93% in South Africa. Nampak has a long term supply agreement with BAT, which can, in terms of the supply agreement, source from other third party packaging suppliers if Nampak's prices are not competitive. Moreover, BAT actually negotiates the prices of the raw material inputs used in the packaging products directly with Nampak's suppliers, which means that, in effect, Nampak is a toll manufacturer.

21. The competitive dynamic in this market appears to be dictated by its monopsonistic character. This is unaffected by the merger in which the overwhelmingly dominant supplier of packaging services is acquiring the third largest supplier of packaging services. It is, in short, a market in which the parties' claim that the countervailing power of their customers will prevent an exercise of market power is persuasive. This sub-market will not be discussed further.

The General Folding Carton Market

22. This method of packaging is predominantly utilised by suppliers of detergents, beverages, food, household products, industrial and healthcare products.

23. The largest competitors in this market are[6]:

[6] Note that, as in the cigarette carton sub-market, Nampak's participation in this market is represented by Printpak which we shall refer to as Nampak.

Competitors in the Folding carton market	Market Share (%)
Malbak	21
Nampak	20
Golden Era	9
Waltons	7
S&G	6
Highland Print	5
CTP	4
Importers	4
Other*	24
TOTAL	100
HHI pre merger	**1102.4**
HHI post merger	**1942.4**
Change in HHI	**840**

*The HHI calculation is done on the basis that none of the 15 competitors[7] in the category "other" has a market share of more than 1.6%.

24. The post merger market is highly concentrated with the merged entity enjoying a market share of 41%. With a Herfindahl-Hirschman (HHI) reading of 1942.4 points, this market falls in the highly concentrated region. Mergers producing an increase in the HHI post-merger of more than 50 points, in this case 840 points, are regarded by the US antitrust authorities as enhancing or creating market power.[8]

25. The largest customers in this market are Unifoods, Lever Ponds (both part of Unilever), Nestle, Tiger Group (includes Sea Harvest, Beacon, Fattis brands) and AVI (includes National Brands and I&J). This grouping includes several of the world's largest multinational producers of consumer non-durables (Unilever and Nestle) as well as South Africa's largest food manufacturers. Certain of these multinationals – for example, Lever Ponds - benchmark their carton prices globally and the South African producers are expected to match or better these prices. Lever Ponds also negotiates its own raw material price with Mondi, the only local supplier of recycled fibre-based folding carton board.

26. Note that there is clearly a degree of substitutability between general folding cartons on the one hand, and, on the other hand, flexible plastic packaging, with the latter encroaching on the former's share of the packaging market. Accordingly, the question arises whether or not we should treat folding cartons and flexible plastic packaging as a single relevant market. While it appears that in a number of important national

[7] The parties estimate that there are 15 carton manufacturers in the "other carton suppliers" category, page 321 of the source documents.
[8] See the 1992 Horizontal Merger Guidelines of the US Department of Justice and the US Federal Trade Commission.

markets substitution away from folding cartons to flexible plastic packaging is occurring quite rapidly, in South Africa substitution has been considerably slower. Hence 90% of detergents in South Africa are still packaged in cartons although it is noteworthy that leading Lever Ponds detergent brands such as Surf and Skip are available in flexible plastic packaging. This is the basis of the parties' observation that

> *"There is a move to flexibles and although we (that is, the South African market) may be rather more conservative, that is to say the customers of the merging parties may be somewhat more conservative in making these moves to flexibles, it's certainly a trend and one can see it beginning to happen in respect of detergents where there are moves in respect of well-known brands towards flexible products."* [9]

27. Moreover, the parties do acknowledge that there are considerations other than the cost of the basic packaging that may serve to limit substitution between packaging types. For example, a switch may require investment in different filling technology and this may impact on the speed – and hence the total cost – of filling.[10] Consumer preferences and, obviously, the function of the packaging will also influence substitutability. In any event, while the evidence regarding substitutability makes a conclusive determination difficult, given the parties position in each of these segments, we do not believe that a great deal turns around this question and, for the purposes of this evaluation we will treat folding cartons and flexible plastic packaging as separate relevant markets.

28. In summary, then, the first relevant product market that we shall consider is that for the supply of folded carton packaging.

Flexible Plastic Packaging

29. Flexible plastic packaging is used to pack an increasing variety of products ranging from food products such as sweets and potato crisps to detergents such as Skip and Surf. It is one of the packaging sector's major growth areas. One review describes it as the fastest growth area within the packaging sector over the past decade and the sector with the most intense product development.[11]

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[9] Transcript page 22

[10] For example, the current 2 kg soap powder carton used by a multi-national costs currently some 125c and the equivalent flexible pack 59c. However, the carton fills at speeds of 200 packs per minute whilst the flexible packs fill at 60 per minute. The fill speed, investment cost and packaging cost tend in this case to make the total cost reasonably even.

[11] The parties, on page 328 of the record, quoted an extract from the latest edition of World Packaging Companies – The Packaging Magazine, Third Edition 2002: "Plastics packaging, including rigid, semi-rigid and flexible, accounts for just over one third of the total value of the world packaging industry, narrowly behind paper and board packaging in value terms. It has been the fastest growth area over the

30. According to the parties there are 11 separate product markets within the broad flexible packaging category. These include separate, non-substitutable products such as printed film/foil/laminates, retail bags, heavy-duty plastic sacks, thermal insulation products, stretch wrap and shrink wrap.

31. Overlap between the products of the merging parties is limited to two products namely printed film/foil/laminates and thermal insulation products. Our analysis will be limited to these two products, which account for 36% of the broad flexible packaging market in South Africa.

Printed film/foil/laminates

32. These products are supplied to customers in reel form and then converted into packaging. Product examples range from potato crisp packets to soap and sweet wrappers. The largest customers include Simba, Nestle, National Brands, Tiger, Unilever and Cadbury. We will henceforth refer to this as the market for printed foil packaging.

33. The parties submit that paper bags and folding cartons are substitute products in this market. As already noted while we accept that there is a degree of substitutability between folding cartons and flexible packaging, we are persuaded that this does not serve to eliminate the distinction between the markets.

34. The competitors' market shares and concentration levels in the printed foil market are set out in the following table:

Competitor	**Market shares %**
Nampak	20.5
Malbak	10.9
Astrapak	11
Plastic wrap/CTP	5
Safe Pak	5
Consol	4.6
Cape Wrappers	4
Others*	39
TOTAL	100
Pre-merger HHI	907.22
Post-merger HHI	1178.12
Change in HHI	270.90

*These include imports by Positive Packaging (India), CLP (Israel) and Danisco (Denmark) amongst others. The HHI calculation is done on the basis that no competitor in this category has a market share of more than 4%.

past decade, and the sector with the most intense product development and the most successful substitution of other competing packaging materials."

35. Post the merger the parties will have a market share of 31.4%. Astrapak is their largest competitor in this product market with a market share of 11%. Concentration in this market as measured by the HHI falls within the moderately concentrated range, commonly considered to be between 1000 and 1800 points. However, in terms of the US Horizontal merger guidelines the change in concentration of 270.90 percentage points does potentially raise competition concerns.

36. Note that there is a certain amount of import activity in this market. South African manufacturers such as Coke, Fattis & Monis, Unilever and Danone Parmalat have imported their packaging material from a range of other countries such as Israel, Denmark Austria, France and Switzerland.

The unprinted film/foil market

37. The second relevant product sub-market is that for the supply of unprinted foil packaging. This is another diverse product range covering a wide variety of industries and uses. This category of packaging ranges over products including cigarette pack foil, peel off ends for cans, paper/polyethylene coatings and laminates used mainly in the packaging for the paper and tea industry and as film used for packing breakfast cereal. These are all separate packaging markets.

38. Whilst the combined market share of the parties is 31.1%, the only area in which the parties compete is in the area of thermal insulation products. The Thermal insulation market represents 7% of the unprinted film/foil market.

39. In the Thermal Insulation product market Nampak manufactures Sisalation, a branded product with double or one-sided foil used in the building and construction sector as roofing insulation. Malbak manufactures a product marketed as Alucushion, Alububble or Bubblefoil by different customers. Both parties' products essentially comprise air bubbles trapped between double foil or between a combination of foil and plastic.

40. The Commission's investigation reveals that Nampak has a market share of between 34.9% - 42.5% and Malbak between 37.6%-40.8%. Their main competitor, Owens Corning, has between 19.9% and 27% of the market. This is a highly concentrated market before and after the merger.

41. Customers are small and do not have countervailing power. In light of the fact that the merger will substantially lessen competition in this product market the Commission and the parties agreed that Malbak would divest the Alucushion thermal insulation business to a third party not related to any of the merging parties. We accept that the

transaction will result in a clear lessening of competition and we are persuaded that the remedy agreed between the parties and the Commission will address this problem.

42. The parties were ordered and agreed to sell the Bubblepack insulation machine currently manufacturing the products Alucushion, Alububble, and Bubblefoil or as distributed under other brandnames. The seller is also required to provide, at the option of the purchaser, technical assistance, maintenance support and/or anything necessary to facilitate the commissioning of the Bubblepack machine by the purchaser.

43. By ordering the parties to sell this machine we are ensuring that an effective competitor remains in the market since barriers to entry are high. Aluchushion owns the trademark and, according to the Commission, it is not possible to import the same machine since it was custom made and specifications are proprietary to Alucushion.

44. There will be no further consideration of this market.

Multi-national Customers and Product Markets

45. There is an important feature of both the folding cartons and flexible plastic packaging markets that demands detailed consideration – it concerns the segmentation of packaging customers into, on the one hand, the giant multinational producers of consumer non-durables and, on the other hand, the national producers of these commodities. At first blush this issue seemed pertinent to the determination of the relevant geographic markets. However, on fuller consideration, it appears rather to be a refinement of the relevant product market. In any event, we are of the view that it impacts significantly on the determination of the impact of this transaction on competition in the markets for the supply of folding cartons packaging and printed foil packaging, the two markets relevant to this transaction.

46. We have been presented with persuasive evidence suggesting that there are two distinct classes of customers for packaging services. These are, firstly, national producers of consumer non-durables, some of whom may be large and important packaging customers and who may export significant volumes of their output, but whose production facilities and markets are overwhelmingly located in their national economies, in this case in South Africa. These are procurers of packaging in what we will term the 'national corporation packaging market' or, simply, the 'national market'. The requirements of this category of customers are met by a range of packaging producers some of whom predominantly service the national market, others of whom service both this national packaging market as well as a second market, that market that we term the 'multinational corporation packaging market' or, simply, the 'multinational market'.

47. This second market – the 'multinational market' - is a market in which the customers are multinational corporations. These are companies with production facilities located in many countries spanning several continents. Their reach is legion with great companies like Unilever and Nestle operating literally hundreds of production facilities spread across every continent and a great many countries. However, although the multinationals with their powerful brands generally loom large in any market in which they participate, local brands are often very powerful and command large market shares, and, as such, are important sources of custom for a variety of input producers including packaging. Hence from the perspective of their suppliers, including their packaging suppliers, the large multinationals have, hitherto, not necessarily been conceptually distinguishable from any other large national firm – like any other national firm, they have tended to purchase their inputs in the countries in which they produce.

48. However, on the basis of evidence presented by the parties to this transaction, evidence which squares with submissions made to the Tribunal in the merger between Unilever and Best Foods, we are persuaded that there are major shifts in the approaches of multinational producers, certainly those involved in the production of consumer non-durables.[12] The evidence demonstrates that these multinationals are increasingly rationalising their production activities in selected countries. They are, in other words, rapidly moving away from a model that had them locating factories in all their important national markets to one that has them establishing concomitantly large production units in a small number of selected countries with each production unit servicing a large region spanning several national markets. A precursor to this step, at least, where their packaging inputs are concerned, is a move towards single-source supply relationships, towards centralising a source of a particular packaging input. Indeed it seems that even multinationals who, for one reason or another, are constrained to maintain production facilities in close proximity to the consumers of their products are moving toward single-source procurement of their packaging inputs – KFC, the US fast-food chain, is a case in point.

49. The parties aver that this development, the consolidation and centralisation of the multinationals' production facilities, impacts significantly on their relationship with their suppliers, including the suppliers of packaging services. Clearly the volume of packaging required by each of these consolidated plants is considerably greater than that required by each of the smaller national plants. These multinational manufacturers accordingly require the services of packaging producers who, like themselves, have, scattered around the world, production facilities capable of meeting the massive volume

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requirements of the newly consolidated manufacturing plants of their key customers.[13]

50. According to Nampak, which currently manufactures 100% of the aerosol cans in South Africa, one of its major customers[14] intends concentrating its aerosol filling factories for Africa, the Middle East, Australia and Asia into one site in one country. One packaging supplier (of aerosol cans) will be selected to supply this one site. A would-be supplier would not be able to compete for the business of this corporation without the scale and the concomitant technology to match the output of this world scale plant – there is, in this production model, simply no room for the packaging producer geared to produce for the domestic market in which it is located plus a fractional export component.[15] Colgate is looking at a similarly structured facility for filling its toothpaste in Africa.[16]

51. We have chosen to introduce this issue into our discussion of the product market because, although the physical product required in packaging a product produced by, for example, Unifoods may, for all intents and purposes, be identical to the packaging product required by the local breakfast cereal manufacturer, Pioneer Foods, a local packaging provider who may amply cater for the requirements of the national producer or for the national market share of the multinational, is incapable of meeting the scale of Unifood's continental or global requirement. Hence if the packaging producer active in the multinational packing market exercises market power, the large multinational corporations will not easily be able to substitute by handing over its business to a packaging producer whose activities are concentrated on the national packaging market – the latter simply will not have the scale capable of servicing a multinational customer. In other words, where the supply of the packaging requirements of the large, consolidated multinational plants is concerned, the large packaging providers and their small and medium scale counterparts are not in competition with each other, they are, increasingly, not in the same relevant market.

[13] The merged company will have over 20 manufacturing plants in 11 countries in Africa outside of South Africa and 25 manufacturing plants in the United Kingdom and 12 plants in the rest of Europe. See page 496 of the record.
[14] Confidentiality claimed on customer's identity.
[15] The introduction of new modes of bidding for entry into the multinational market is indicative of its qualitative differences with the national market. One example mentioned by the parties is the reverse auction process, which Nestle used to select its single-source packaging supplier. The bid is open to worldwide suppliers. Participating would-be suppliers are nominated by the buyer, all parties operate electronically from the confines of their own offices, none of the sellers knows who they are bidding against, the bid is generally for a region and the potential for bogus bids exists. The process initially lasts 40 minutes and the buyer has extensive information available to it, whilst the only data the seller has is its ranking, i.e. the bidder with the 3rd lowest price just has a 3 on its screen. If, in the last minute, one of the bidders puts in a new low bid, the process is extended and this can continue.
[16] See page 79 of the transcript.

52. The bifurcation developing in the packaging market explains why some of the most vociferous opposition to the transaction has been articulated by the largest customers of the merging firms, precisely those who are said to have the countervailing power that would prevent the merged entity from exercising market power in the first place. Precisely because the firms in this latter category are such large producers and that their packaging requirements are so concomitantly vast, their choice of packaging provider is limited to the select few capable of meeting their requirement, in the South African case Nampak and Malbak. It matters not to the customers in the multinational packaging market that barriers to entry in folding cartons or flexible packaging are low or that there are robust medium sized enterprises active in the industry – these are not capable of meeting the scale requirements of the multinational class of customers. The packaging firms in the national market were capable of meeting the multinationals' requirements when the latter were producing for, by and large, the domestic market.

53. The merging parties have attempted to rely on both arguments – on the one hand, they have insisted that the merger is a precondition for allowing them to meet the requirements of their multinational customers insofar as it up-scales their capacity in South Africa (thus enabling the merged entity to bid for the consolidated regional or continental requirements of their multinational customers) and gives them a spread of production facilities in Africa and Europe. On the other hand, they have defended the merger by pointing to low entry barriers and the group of robust medium sized enterprises who will continue to compete with the merged entity.

54. However, the medium sized firms operating in the national market will not compete with the merged entity in respect of its activities in the multinational market – they do not possess the scale at their individual plants nor do they possess the spread of production facilities that allow them to compete. In the multinational market a potential exercise of market power by the merged entity will only be constrained by the presence of packaging firms of a similar scale. While these may not exist in South Africa they certainly exist globally – the parties informed us that the merged entity will be the 31st largest packaging firm in the world and, while this aggregated figure may not reflect their position in the two sub-markets relevant to this transaction, it does reflect significant international competition. Should the merged entity attempt to exercise market power against one of its multinational customers the latter will either locate their centralised production facilities elsewhere, or, more likely, will attract entry by one of the global packaging giants into the production site chosen by the multinational. Hence, by way of example, we do not accept the party's argument that, in the event it attempts to exercise market power against a customer like Simba it will face competition from other local packaging suppliers. However, we are persuaded that the merged entity will not attempt to exercise market power against Simba – the latter's concerns notwithstanding -

because the scale of Simba's South African requirement and its position within the multinational Pepsi group will attract competition from other global packaging giants.

55. Note however that the merging parties – and, naturally, the post-merged entity – do not only compete in the multinational packaging market. They also compete in the national packaging market, that market in which national users of packaging services are active. Indeed the merged entity will dominate this market and it is not surprising that several significant domestic manufacturers, users of packaging services, also expressed concern with the merger – Robertsons and I&J are examples. Here the merging parties are not availed by pointing to competition from the other global packaging giants – a global packaging giant would not, unless already based in this country, be a likely competitor for this business.

56. However in this latter market, the national packaging market, the competitive constraint comes from robust medium-sized domestic suppliers of packaging services already active in the total South African packaging market such as Consol, Mondipak and Astrapak[17] and from potential new entrants. Moreover, we accept that barriers to entry into the national packaging market are indeed low. The Commission, at the hearing noted that in the general folding cartons market New Era and Shave and Gibson have installed new flexo printing facilities and Pioneer, a large national food producer, has entered into the market for corrugated packaging and has indicated that it intends integrating into the folding carton market.[18] BMI, an independent market research company, confirmed that a number of smaller players have gained market share over the last couple of years.[19]

57. Indeed we are persuaded that the merged entity will, in the immediate post-merger period and possibly permanently, lose market share to these competitors as the manufacturers participating in the national packaging market seek to reduce their reliance on a single packaging supplier, particularly one whose sites are firmly set on wider horizons. The parties drew on their experience to offer two examples in this regard: in the Kohler-Interpak merger 6% of the market share of 30% was lost and in the tissue merger 10% of the market was lost.[20]

58. Nor do we believe that conditions in these markets conduce to post-merger co-ordination between the merged entity and the other national packaging producers. There are a significant number of domestic player and entry is easy, both of which militate against co-ordination, as does the existence of considerable excess capacity.

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[17] See page 307 of the record.
[18] Also see record page 321 where the parties indicate technology is not changing radically and equipment is inexpensive.
[19] See page 22 of the Commission's recommendation.
[20] See page 88 of the transcript and page 307 of the record.

59. What does this say about the geographic markets? It is our view that the markets in which the multinationals are serviced are most usefully described as a global market. However, it is an unusual global market because by designating it such we do not suggest that there is or will be a large direct international trade in folded carton and printed foil packaging products. At most, the international trade in this commodity can be described as indirect, a derivative of the international trade in consumer non-durables, a market that will strengthen in consequence of the locational and sourcing strategies of the multinationals that dominate international trade and investment in this market. The packaging companies that supply these multinationals will continue to serve the national producers of consumer non-durables in their home markets. However, the Nestle's and Unilever's of this world will increasingly turn away from input suppliers whose capacities do not extend much beyond their ability to service production for their home market. If the South African packaging giants cannot measure up to their requirements then they will turn to alternative global packaging suppliers who will service the multinational's global market, including that share traded in the South African market, and whose home countries will become the preferred location for the multinational's global or regional production facilities.

60. However, the geographic market in which domestic (as opposed to multinational) consumers of packaging products are served is national. In other words, where these customers are concerned, an exercise of market power by the merged entity could only be constrained by the existence of other packaging suppliers already active in the domestic market or by the possibility of new entry of other domestic packaging suppliers. Consumers of packaging in this market would be hard pressed to import their packaging requirements, not only because of the weak Rand but also because of logistical problems such as not being close to the manufacturer of one's packaging material, an input that requires close personal contact.[21]

Conclusion

61. We have determined that there is a horizontal overlap in three packaging sub-markets, that is, markets in which both parties are active. These are sub-markets of the folding cartons and flexible plastic packaging market. In one of these – the thermal insulation market – we have, following the Commission's recommendation, determined that competition will be substantially lessened. We have accordingly attached a condition to our approval that is designed to maintain competition in this market.

62. The other two markets in which each of the merging parties has a significant presence are those for the supply of general folding cartons

[21] See Pioneer's submission to the Commission, page 653 of the record.

and printed foil, sub-markets of the folding cartons and flexible plastic packaging markets respectively. Concentration levels, already high in each of these sub-markets, are significantly exacerbated by the transaction. The parties, citing the presence of large multinational corporations as purchasers in these markets, rested their plea for approval of the transaction on the countervailing power enjoyed by their customers. They also averred that there was robust competition from a number of well-established smaller players in the South Africa market and that entry was easy. They also insisted that the merger would allow for deeper penetration of export markets, effectively a plea for justification of the merger on public interest grounds as provided for in Section 12A(3)(d) of the Act.

63. Our decision is rooted in evidence, which strongly indicates significant developments in the manner in which multinational corporations organise their global production. These are manifest in an increasing centralisation at selected locations of production units capable of serving a regional, continental or, even, global customer base. In a parallel development, multinational companies producing consumer non-durables, even those multinationals unable to centralise their production, are moving rapidly toward single-source purchasing of major inputs, including packaging.

64. It is our view that these developments underpin a significant bifurcation in the relevant markets that we have identified. Indeed, it is our view that we are in the midst of a development in the direction of separate relevant markets for, on the one hand, the sale of packaging services to multinational customers and, on the other hand, their sale to customers who produce predominantly for their domestic markets. The former will be served uniquely by global packaging giants, firms with production facilities whose scale and global spread enables them to meet the requirements of their multinational customers. The latter will be served by these multinational producers in the national markets in which they are located but they will also be served by local packaging firms whose scale does not allow them to compete for the work of the multinationals but who are perfectly capable of competing for the custom of the national producers.

65. While we cannot yet confidently find that these developments have already given rise to separate relevant markets, we are certain that they impact significantly on the competitive structure of the packaging industry. The merging parties are, it appears, positioning themselves for competing for the custom of the multinationals. In so doing, they will compete with other global packaging giants in a competitive international market. The merged entity will also compete in the national packaging market, the market in which South African non-durable good producers procure packaging services. Although the merged entity will occupy a powerful position in this latter market, here they face robust competition from local producers and the prospect of relatively low entry barriers. Because we have not found a substantial

lessening of competition in this latter market and, hence, have no reason to prohibit the transaction, it is not necessary to make a finding on the particular public interest plea, that is, the argument that the merger be allowed to proceed because it would promote the merged entities ability to export. We simply note that both parties are already successful exporters.

66. We accordingly approve the merger between Nampak Ltd and Malbak Ltd but impose a condition designed to maintain competition in the market for thermal insulation products. The order, parts of which contain confidential information, is attached.

15 July 2002

D. Lewis **Date**

Concurring: N. Manoim, M. Holden