COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

Case No: 30/LM/Jun03

In the large merger between:

Ethos Private Equity Fund IV

and

The Tsebo Outsourcing Group (Pty) Ltd

Decision and Reasons [Non-Confidential]

INTRODUCTION

1. Ethos Private Equity Fund IV ("Ethos") is a private equity firm which invests in companies, in exchange for which it acquires equity therein, entitling it to a participatory management role. The Tsebo Outsourcing Group ("Tsebo") is one such firm, involved in hospitality and facilities management through its subsidiaries. Ethos is increasing its shareholding in Tsebo from [< 50%] to [> 50%][1].

JURISDICTION

2. Earlier this year the shareholders of Tsebo resolved to enter into a transaction in terms of which Ethos would increase its shareholding in Tsebo by purchasing a further [less than 5%] of the equity of Tsebo, bringing its shareholding from [< 50%] to [> 50%].

3. Although Ethos had received legal advice that it was not required to notify the transaction as a merger it decided to seek an advisory opinion on the issue from the Commission on the 26 March 2003.

4. In its letter Ethos set out its reasons for arguing why the transaction did not constitute a merger. We will consider these in detail later.

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[1] The actual shareholdings have been claimed as confidential information. However Ethos' shareholding has moved from an amount slightly below 50% to an amount slightly above it.

5. The Commission did not accept this argument and in an advisory opinion dated 23 April 2003, informed the parties that it considered the transaction notifiable. The parties then notified the transaction on the 11 June 2003, but emphasized that they were making the filing under protest in order to comply with the Commission's advisory opinion. On receipt of the notification the Commission accepted that it had jurisdiction.

6. On 15 August 2003 Ethos appealed the Commission's decision to accept jurisdiction, a procedure available to it in terms of Rule 33 (3) of the Competition Commission's rules, read with Rule 31(1)(c) of the Tribunal rules. Although the appeal was brought late the Commission has no objection and we condone the late filing. [2]

7. On 20 August 2003 a second hearing was held. The hearing dealt with arguments on the legal point as well as on the merits of the merger itself. On the same day, the Competition Tribunal notified the parties that whatever was decided on the jurisdiction point, the merger would be cleared and so to avoid delaying the parties' business operations, they were told that they could implement the transaction.

Legal requirements for establishing jurisdiction

8. A transaction is only notifiable if it constitutes a merger. The definition of a merger is to be found in section 12(1) of the Act, which states as follows:

> *"(a) For the purposes of this Act, a merger occurs when one or more firms directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another firm.*
>
> *(b) A merger contemplated in paragraph (a) may be achieved in any manner, including through –*
>
> *(i) purchase or lease of the shares, an interest or assets of the other firm in question; or*
>
> *(ii) amalgamation or other combination with the other firm in question."*

[2] A first hearing had been held on 13 August 2003 where the parties raised the jurisdiction question as a point in limine. The Tribunal advised the parties that the approach they had adopted in raising the jurisdiction question as an in limine point was not appropriate. The question of change of control in any transaction is a complex one and there was insufficient factual evidence placed before the Tribunal for it to evaluate whether in fact control had changed by virtue of this transaction and therefore whether it did or did not have jurisdiction in pursuance of the triggering of the notification requirements under the Act. The parties were given the option to either proceed with a conventional merger hearing into the merits, alternatively to pursue the legal argument on the control issue in a separate application. The parties elected to file the appropriate separate application within a few days.

9. Section 12(2) then sets out when a person controls a firm:

> *"A person controls a firm if that person—*
>
> *(a) beneficially owns more than one half of the issued share capital of the firm;*
>
> *(b) 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;*
>
> *(c) is able to appoint or to veto the appointment of a majority of the directors of the firm;*
>
> *(d) is a holding company, and the firm is a subsidiary of that company as contemplated in section 1(3)(a) of the Companies Act, 1973 (Act No. 61 of 1973);*
>
> *(e) in the case of a firm that is a trust, has the ability to control the majority of the votes of the trustees, to appoint the majority of the trustees or to appoint or change the majority of the beneficiaries of the trust;*
>
> *(f) in the case of a close corporation, owns the majority of members' interest or controls directly or has the right to control the majority of members' votes in the close corporation; or*
>
> *(g) has the ability to materially influence the policy of the firm in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to in paragraphs (a) to (f).*

Factual issues relating to jurisdiction

10. In February 2000, the shareholders of Tsebo had notified the Commission that they had acquired joint control of the Fedics Group (Pty) Ltd ("Fedics") as a going concern (then known as "Newco", later to become Tsebo). At that stage, they had contended that the acquiring parties, which included Ethos and its fellow shareholders Nozala Investments and Siphumelele Investments, would acquire joint control over Tsebo as any material decision in the company required the assent of 67% of the vote of the shareholders and that this could only be achieved if Ethos and at least one of Nozala Investments or Siphumelele Investments voted in favour of the

resolution. In addition, no single shareholder had the ability to appoint or veto the appointment of the majority of the directors.

11. At the time of this first notification no single shareholder owned more than half of the issued share capital of the firm. The shareholdings in the firm were held as follows:

[diagram confidential]

12. The shareholders could also appoint directors according to the following formula:

Ethos IV	4
Nozala	2
Siphumelele	2
Management	2
Independent, non-executive	2
Total	**12**

13. In terms of the present notification before us the shareholdings will alter as follows:

[diagram confidential]

14. The shareholders' respective rights to appoint directors remain unchanged.[3] However Ethos now owns more than half of the issued share capital of the firm.

15. Ethos argues that the only consequence of the transaction is that its equity in Tsebo has been marginally increased. Its ability to control the firm remains unchanged despite the fact that it will now own more than 50% of the firm. This is because in terms of its shareholder's agreement, the acquisition of the additional shares is rendered essentially neutral - all decisions of consequence require the assent of 67% of the shareholders. Since Ethos has still not acquired sufficient equity to control the firm on its own (i.e. above two-thirds) the situation is no different to what it was prior to the present transaction. The firm was jointly controlled prior to the transaction and it will still be so subsequently. Hence Ethos argues there

[3] In terms of the shareholder's agreement, a shareholder's right to appoint additional directors is only triggered if it acquires an additional 10 per cent of the shares. See clause 5.11 of the shareholders agreement.

has been no *acquisition of control* as required by the Act, in order for the transaction to constitute a merger.

16. The Commission accepts the parties' version on the facts and agrees largely with its legal conclusion that effectively the transaction has not changed much in so far as the shareholder's agreement is concerned.[4] However the Commission's view was that when interpreting legislation, one must consider whether the legislation will be effective. The Commission therefore, advanced a policy argument that the forms of control set out in section 12(2) constitute 'bright lines' for all to know - both firms and the Commission. When firms cross a bright line they must notify, notwithstanding shareholder arrangements inter se. This gives certainty to all. The Commission argued that it relies on notification by the parties in order to investigate matters. The Commission is concerned that if in a situation such as this, a firm is not obliged to notify a merger when its shareholding exceeds fifty per cent by virtue of a private agreement between shareholders in which it has diluted its voting powers, then it will become extremely difficult for it to monitor compliance with the Act. In consequence, the Commission would have difficulty in exercising its regulatory function.

17. The Commission therefore urged us to adopt a conservative yet uniform approach that protected legal certainty and public policy, by requiring the parties to conform to the Act's requirements, rather than contorting the Act to fit in with the creative ways which parties devise to structure their transactions. [5]

ANALYSIS OF CONTROL QUESTION

18. Prior to the present transaction Tsebo was, it is common cause, the subject of joint control by Ethos and one of either Nozala Investments or Siphumelele Investments. [6]

19. Ethos has now acquired an additional [less than 5%] of Tsebo. That an existing shareholder of a firm purchases more shares in it, is in of itself of no significance. What is significant for the Commission, is that the

[4] There was some disagreement about the relationship between the shareholders agreement and section 220 of the Companies Act which provides for shareholder removal of a director, but not much turned on this as even if we accept the Commission's interpretation Ethos does not seem to have acquired control over the appointment of the Tsebo board.

[5] The Commission maintained that setting the bar at 51% would not excessively increase the number of notifications and therefore burden business interests because in the majority of such cases, there will almost always be a change of control in any event.

[6] This is because with its [< 50%] shareholding Ethos required a further approximately [figure confidential] of the votes to attain the 67% majority required by the shareholders agreement; votes it could only secure from Siphumelele of Nozala. However without Ethos even if all the others voted together they could not obtain the necessary 67%.

acquisition means that Ethos crosses the 50% plus threshold referred to in section 12(2)(a).

20. Ethos is essentially arguing that there can only be one form of control at any time. That is, we either have joint control or sole control. A company cannot be regarded as 'solely' controlling another if effectively it still requires the assent of its other shareholders for any meaningful decision. Ethos argues that if it is required to notify the Commission of the transaction simply because it has crossed the 50% boundary, notwithstanding that its control has not increased concomitantly with its equity, it would have the effect of making the same merger notifiable twice. Recall that in 2000 the merger was notified and approved as one of joint control.

21. There are two problems with this approach of Ethos In the first place it assumes that control is what has been termed by the Competition Appeal Court a 'unitary concept'. [7] In other words, there can only be one controller in a company at any given time. On Ethos's approach, what one is required to do in merger control is to identify who that controller is – whether sole or joint - and then determine whether a given acquisition will alter that scenario. Yet this is not how the Act reads, nor how it has been interpreted by the Competition Appeal Court in the Distillers case, where the Court suggests that the Act provides for the possibility of a plurality of controllers.

22. In Distillers the Court rejected an argument that there was only one type of control and that is ultimate control. The court held that such an interpretation is not mandated by the express words of section 12(1).

23. The court went on to state that:

"The wording of section 12(2), clearly contemplates a situation where more than one party simultaneously exercises control over a company. This situation can be illustrated with the following example:

A beneficially owns more than half of the issued share capital of the firm. He concludes an agreement with B in order that the latter may run the business. B agrees provided that he obtains control over the appointments to the board of directors as well as of senior staff and marketing policy. In such a situation A would control the firm as defined in terms of section 12(2) (a) and B would exercise control as defined in term of section 12(2)(g). In short, while A would have ultimate control, B would

[7] See Distillers Corporation (SA) Ltd / SFW Group Ltd and Bulmer (SA) (Pty) Ltd / Seagram Africa (Pty) Ltd 08/CAC/May01

have control of a sufficient kind to bring him within the ambit of control as defined in section 12.'[8]

24. If more than one firm can simultaneously control another firm, it follows that more than one may acquire control and hence the concomitant obligation to notify.

25. We have also in the past decided, consistent with the practice in other jurisdictions, that a change from joint control to sole control triggers a notification[9].

26. In Iscor we explained the justification for this by quoting this extract from ICI/Tioxide a case where the European Commission had to evaluate the distinction between joint and sole control:

> *"...because decisive influence exercised solely is substantially different to decisive influence exercised jointly, since the latter has to take into account the potentially different interests of the other party or parties concerned.. By changing the quality of decisive influence exercised by ICI on Tioxide, the transaction will bring about a durable change of the structure of the concerned parties."*[12]

27. If we combine the approaches taken in the decisions of Distillers and ICI/Tioxide we come to the following conclusions.

28. Firstly, that a sole controller is a different controller to a joint controller. In other words joint controllers are considered a different species of controller to one of their constituent elements controlling on its own. We are, for this purpose, blind to the identity of the individual members of the joint control pool and we see a change between two notionally different controllers.

29. Secondly, that if more than one controller can exist simultaneously by virtue of section 12(2), then it may be possible to say that a firm can at the same time be subject to joint control and sole control. That is because the Competition Appeal Court has recognised that section 12(2) instances different forms of control and that for this reason different firms may exercise control over a target firm by virtue of these different instances at the same time.

30. This is the situation that we have in the present case. We have two controllers - a joint controller that includes Ethos and a sole controller that is Ethos alone. When Ethos crossed the threshold and acquired 50% plus of the equity it is deemed in terms of 12(2)(a), to control the firm on its

[8] See page 25 of the decision.
[9] See Iscor Limited and Saldanha Steel (Pty) Ltd 67/LM/Dec01

own, because it beneficially owns more than one half of the issued share capital. It ability to control Tsebo on its own in terms of 12(2(a) is not negated by the fact that simultaneously there was another entity in control at the same time, namely the joint shareholders who could command the 67% vote and who are deemed to control the firm by virtue of other sub-sections of 12(2). [10]

31. It matters not for this purpose, that Ethos has effectively eroded the voting benefits normally associated with 50% plus beneficial ownership. If that were so, every acquirer of 50% which sought to evade notification could argue that there has been no change of control because of some contrived set of circumstances in which it contracted away its voting rights to a collective that had previously existed.

32. Merger policy is not confined to an assessment of control via the legal form. The Act recognises that control is not confined to exercise through the same legal form and that a firm can be controlled by another's economic or commercial leverage over it. Because of this, the legislature recognised the possibility of the separation of the economic and 'political ' benefits of ownership and so provided for each in section 12(2) through subsection 12(2)(a) and (d) (ownership) and 12(2)(b) and (c) (voting rights). But it also had to go beyond recognising even these two traditional company law forms of control and provide for control over other entities 12(2)(e) trusts and 12(2)(f) close corporations. It went further still, recognising that even these instances may be deficient in capturing all notions of control and so provided a catch -all in 12(2)(g). Notwithstanding sub-section (g), the Court has held that the list is non-exhaustive recognising that control is too elastic a notion to confine to a closed list. In so doing it held that the legislature had instanced separate notions of control. As the Court observed in Distillers, there is nothing in the language of section 12(2) to suggest that its specified instances operate exclusively at any one time. Indeed given the range of possibilities section 12(2) canvasses, it is likely that more than one controller subsists at any given time in any complex commercial structure.

33. Of course even if this is the correct interpretation of the language, we must still enquire into whether there is any absurdity in the notion that a firm may have more than one controller at any one time. Commercial reality suggests not. Control in companies that are not wholly owned is rarely a case of an absolute dictatorship. Competition law needs to recognise that companies can be run on either republican or monarchical lines. In a monarchy the identity of the ruler is simple. In a republic where power is mediated through sets of possibly complex relationships, the location of sovereignty is more elusive. Yet pre-merger notification systems by necessity are obsessed with the notion of control. They must find putative

[10] It would seem that 12(2) (b), (c), and (g) would all fit the bill.

emperors in republics even if they are not garbed in purple robes. For this reason, some artificiality in rules that say when acquisitions of control occur is unavoidable. Happily those instances are rare – they will usually occur in cases such as the present one where a majority owner contracts out of its right to be a majority voter.

34. Section 12(2)(a), the one that implicates Ethos in the present notification, may look harsh when applied to the present facts. But if the supermajority had been set higher - say 75 %, and if Ethos had moved from a lower threshold - say from 2O% to 74%, can we say that the change in ownership was without significance? For that scenario, the triggering of an obligation to notify when the bright line of a majority beneficial ownership is crossed makes sense. The fact that there may be cases such as the present one, where the journey across the bright line is so brief, does not negate the rationality of the policy.

35. As the Commission has argued, other jurisdictions adopt bright lines not because they are perfect in each case, but because by and large they are consistent with commercial reality and, most importantly, they help create certainty for both regulator and regulated.

36. Does this mean that Ethos might have to notify again if it crosses some other threshold in section 12(2) that it presently does not enjoy now? For instance, if it was able to control or veto the appointment of the majority of the directors of the firm, a power that, as we have seen, it does not presently enjoy.

37. The answer to that question is no. A change of control is a once-off affair. Even if a firm has notified sole control at a time when that control is attenuated in some respects by other shareholders and it later acquires an unfettered right, provided that sole control has been notified and that this formed the basis of the decision, no subsequent notification is required.

38. It could be said that this approach is quixotic and leads to the notification of changes of control that are illusory. That in reality business at Tsebo continues in the same way at 50% plus as it did at 50% minus.

39. That may be so, but that is the product of the private arrangements of these shareholders who have chosen to regulate their relationships in a particular way, not a deficiency in the Commission's approach to the Act.

40. The alternative, on the parties' version, would require the Commission to enquire into each and every change in shareholder relations, some of which may be, if one's experience of shareholders agreements we see on a daily basis are anything to go by, extremely opaque.

41. In the present case, the shareholders agreement provides for a two-thirds majority vote on a specified number of issues. On the parties' approach, if the shareholders were to amend that arrangement tomorrow and remove some items from the list, it would on each occasion trigger a difficulty of whether sole control was achieved, a question that might be as difficult to answer for the parties as it is for the Commission. It is for this reason that the Act has adopted the blunt approach of recognising instances of control; not just in a legalistic sense, but also as a concept that acknowledges economic and commercial reality as well.

42. For this reason, section 12(2) instances certain "bright lines" of when control will be assumed. When firms cross that line, as Ethos has, they must notify, albeit that they have not traveled very far in crossing it.

43. This does not mean that section12 (2) sets out only bright lines. The parties correctly observe that section 12(2)(g) is anything but 'bright'.

44. But that sub-section, as we stated earlier, serves as a default provision. It is only likely to concern a potential controller if it does not fall into any of 12(2) 's prior categories. So who would fall into such a situation? Typically this would be the shareholder of a widely held public company, where no shareholder had an interest in the company above 50%, and that shareholder might, because not all shareholders in public companies vote their shares, command the majority of votes at a general meeting of the company, notwithstanding that its share of the company's total voting rights is well below half. [11]

45. Granted a section 12(2)(g) enquiry may be a complex one, when that becomes the only basis for deciding where there has been a change of control, but that does not mean that in every other case where the legislature has determined bright lines, we should ignore that indication and revert to elaborate legal and factual enquiries into the shareholders' private arrangements before concluding that there has been a change in control.

46. Ethos's purchase of additional shares in Tsebo means that it now beneficially owns more than half of the issued share capital of Tsebo. Ethos is therefore considered to have sole control of Tsebo by virtue of section 12(2)(a) of the Act. As the previous notification of control in respect of Tsebo related to joint control by Ethos and others, the question of its sole control of Tsebo has not previously been considered. The fact

[11] See for instance the recent case of Anglo American Holdings Limited and Kumba Resources Limited 46/LM/Jun02, where the shareholder notified a merger at a level considerably below 50% on the grounds that its holding and minority representation at board level would give it material influence. See also the decision by the European Commission in the case on Anglo Americans' attempt to merge with Lonrho (Case IV /M .754) where the Commission regarded Anglo's stake of 24.47%% as one giving them the possibility to exercise decisive influence.

that Tsebo also continues to be subject to the joint control of its shareholders in terms of section 12(2) does not detract from its obligation to notify. The Tribunal accordingly has jurisdiction to consider the transaction as a merger in terms of the Act.

47. There is one further issue that we should comment on lest this decision be interpreted as heralding in an era of bureaucratic unreality. What if the current Ethos/Tsebo merger had not previously been notified, but was notified now with the present constellation of shareholders and shareholders agreement? How would the merger assessment be done if the company has at the same time two possible controllers? The answer it seems is determined by the manner in which the transaction is notified. There seems to be no reason why, as part of the same notification, that the competition consequences of two simultaneously existing controllers cannot be explored. Thus to pursue the present example, the parties would indicate that for the purpose of section 12(2)(a) of the Act, Ethos is to be regarded as a single controller of Tsebo, but that de facto, the firm is jointly controlled by Ethos and at least one other shareholder and that it is also to be regarded as jointly controlled by them for the other purposes of section 12(2).

FINDING ON JURISDICTION

We therefore find that this transaction is notifiable and hence we have jurisdiction to consider this merger. We go on to consider whether this merger will substantially lessen or prevent competition in any market.

ANALYSIS OF MERITS

The Parties

48. The acquiring firm is the Ethos Private Equity Fund IV ("Ethos IV"), a subsidiary of Ethos Private Equity Limited, ultimately controlled by Ethos Holdings Limited.[12]

49. In essence, Ethos IV is a private equity fund manager that provides investment capital to companies requiring it. It is a fund incorporating both local and international investors. Institutional investors invest capital into the respective partnerships in order to participate in private equity investments through Ethos. Ethos invests primarily in companies where it can be involved in management. It participates through acquiring a seat on the company's board. Ethos IV has investments in various portfolio companies, of which the target firm is one.

[12] No investment decisions are made at the Ethos Holdings level and the Ethos Private Equity funds are run independently of this.

50. Ethos Private Equity operates several other funds. One of its other funds has an interest in a firm known as Muscatel Investments (Pty) Ltd, also known as Pleasure Foods (Pty) Ltd). Accordingly, the only other Ethos subsidiary relevant to this transaction is Pleasure Foods, which controls Wimpy, Whistle Stop and Market Café. Pleasure Foods has 538 outlets countrywide. Other brands include Juicy Lucy and the Milky Lane.

51. The target firm is Tsebo Outsourcing Group (Pty) Ltd ("Tsebo"). Its shareholding pre-merger is set out above in the discussion on jurisdiction.

52. Tsebo's subsidiaries include:

- ?? Fedics (Pty) Ltd
- ?? BJ s Franchising (Pty) Ltd
- ?? Drake and Scull Facilities Management (SA) (Pty) Ltd
- ?? Air Caterers Johannesburg (Pty) Ltd

53. Tsebo has two operating divisions:

i. Firstly, **Facilities Management Services Division**[13], through this division Tsebo and its international partner manages outsourcing of non-core activities such as building maintenance, cleaning, mail services, etc.

ii. Secondly, **Food Services** (branded as Fedics), providing an outsourced catering service to corporations, educational and healthcare institutions. Its only subsidiary relevant to this transaction is BJ's which is a chain of quick service restaurants located along the major highways of RSA.

Rationale for the Transaction

54. Ethos is acquiring additional shares in Tsebo in terms of a restructuring.

The Relevant Product Market

55. The overlap occurs insofar as BJ's (Tsebo) and Wimpy, Whistle Stop and Market Café (Pleasure Foods) are all fast food outlets that are also linked to major fuel stations.[14] The national market shares for <u>all</u> the fast food outlets of the merging parties irrespective of location are low. The parties' combined post merger market share nationally is [less than 10%]. Even at this level the parties maintained that their market share is overstated

[13] Through Drake & Scull, its joint venture with an international company.
[14] Wimpy, Whistle Stop and BJ's do however also provide services as stand-alone entities, that is, entities that are not linked to fuel stations but exist on their own as retail fast food stores.

because independent operators in the market have been excluded. Competitors in the broader market for fast foods (not necessarily highway outlets only) include Nando's, KFC, McDonald's, Spur, Steers, Maxi, to name just a few.

Market Shares in the National Quick Service Food Market

Competitor	Market Share
KFC	[ ]%
McDonalds	[ ]%
Spur	[ ]%
Steers	[ ]%
Nando's	[ ]%
Chicken Licken	[ ]%
Maxi	[ ]%
Buster	[ ]%
Wimpy	[ ]%
Whistle Stop	[ ]%
BJ's	[ ]%

Source: Parties' Competitiveness Report

56. However, it is possible to have as a sub-market a fast food market based on the kind of food served at the various outlets. The Commission did not go into whether consumers regard as substitutable take-out or home delivery stores. Nor whether chained or non-chained stores are regarded as substitutable. They also followed the European Commission approach of confining quick service format outlets to one product market, regardless of the type of meals that are served. The Commission therefore defined the market as the fast food chain store market.

57. We do not rule out the possibility that, in a uniquely South African market, one could delineate each food chain brand into separate product market niches according to the type of food that they sell; the stay or go nature thereof or even on the basis of price. However, for the purposes of this merger and the minimal impact on competition in the market, we do not find such stratification necessary. The other delineation is that fast food outlets attached to service stations constitute a different product market but form part of a national geographic market as we approached the furniture market delineation in cases such as JD/ Ellerines and JD/ Profurn.[15] This market on the other hand may not be a separate relevant

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[15] JD Group Limited and Ellerine Holdings Limited –78/LM/Jul01; JD Group Limited and Profurn Limited - 60/LM/Aug02

product market but may be delineated geographically as we discuss below.

Geographic Market

58. The parties and the Commission took the view that because the various fast food outlets are organized into chains with prices set nationally, the relevant geographic market is national.

59. However, as we stated earlier when discussing the relevant product market, there is a possibility that the market could be more narrowly defined to include only those fast food outlets attached to the highway service stations on national routes between city destinations. The Tribunal therefore requested the Commission and the parties to consider an alternate, possibly separate, relevant market, which incorporates only the service station outlets of the Whistle Stop, Wimpy and BJ chains located on national highways. Our concern was that when one undertakes long haul trips, there is not a great deal of choice between the different fast food outlets at the highway service stations, elsewhere referred to as comprising "transient routes".[16]

60. However, the possibility of such an alternate market existing would require considerably more information. We make no finding on the precise extent of the product or geographic market since, as the further analysis will show, there is no prospect of a substantial lessening or prevention of competition on any market definition.

Impact on competition

61. The parties' response was that from a demand perspective, there is a vast array of potential substitutes that would compete with such highway outlets. Amongst such competitors are competing garage food outlets such as convenience stores (located en-route as well as the fuel station's own branded convenience stores located on their forecourt); independent roadside cafés and restaurants; retail outlets such as Woolworths; stay-over options such as B&B's and hotels. The parties therefore sought to persuade us that the highway outlet market should also include such "en-route" outlets as well as those food outlets proximate to the merging parties' outlets.

62. However, as we discuss below, since the barriers to entry in this market are low, we need not address this question directly. Our analysis below

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[16] The possibility of an alternate market definition is lent credence by a recent remark by the Steers' COO for franchising in referring to the Steers take-over of Pleasure Foods. He reported that the Wimpy and Whistle Stop brands "ply market niches (breakfasts/brunch and "transient routes"). " Hedderwick and the Hungry Inch ". Finance Week Article 3 September 2003

with respect to competitors in the market is also subject to this qualification.

63. The parties further provided a breakdown of the number of outlets of the merging parties that are located at petrol stations alongside national highway routes. Of the three fast food brands, only the Whistle Stop Café had the majority of its outlets located alongside national highways. The reason for this is that the Whistle Stop brand was established in conjunction with the Shell fuel company. The parties assured us that there is no agreement that would prohibit other franchise operations from establishing themselves at Shell garages. The other two, BJ's and Wimpy, primarily have outlets located on non-highway routes. Revenue derived from their highway outlets are as follows:

Wimpy	17%
Whistle Stop Café	90%
BJ's	40%

The best information the parties could provide on market shares in respect of outlets attached to retail petroleum stations was as follows:

Firm	Outlets on highways (no.)	Other outlets (no.)	Total outlets
BJ's	36% (10)	64% (18)	28
Whistle Stop	92% (33)	8% (3)	36
Wimpy	8% (31)	92% (335)	366
Total			430

Source: Additional Submission by Merging Parties

Barriers to Entry

64. Although the market information is inadequate to properly evaluate the extent of concentration in the retail outlet market, the parties did provide persuasive evidence concerning the ease of entry. On the supply side, given the many other brands of fast food outlets in the market in general, there are a number of potential entrants into the transient route market described above. The number of differently branded competitors that appear on the forecourts of the different petrol stations is an indication of this. Besides the outlets of the merging parties, Shell, Engen and Caltex have relationships with other outlets such as KFC, Vet Koek, Nandos and Steers, to name a few. There are furthermore no restrictions on entry, such as exclusive supply arrangements between any fast food franchise outlet and a particular petroleum company. The evidence indicated that the petroleum companies seek to encourage the presence of a number of fast food brands on their forecourts since there is a demand for this variety

of choice from consumers. It is therefore quite plausible that such variety of competing fast food brands at any one petrol station may serve as a preferred destination stop for consumers on long-haul journeys, making such petrol stations more competitive. Therefore, insofar as it is in their interests to have competitive outlets, the choices of the petroleum companies determines the structure of the market.

We conclude that this merger will not lead to a substantial lessening of competition. There are no public interest concerns that would alter this conclusion. The merger is therefore approved unconditionally.

______________ 3 October 2003

N. Manoim Date

Concurring: D.Lewis, T. Orleyn

For the merging parties:	Adv. A. Gotz, instructed by Webber Wentzel Bowens Attorneys
For the Commission:	K. Ramathula, M. Worsely, Competition Commission